PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONOURABLE CHARLES N. BROWER,
MR. TOBY T. LANDAU QC
held at Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario
on Sunday, October 26, 2014 at 9:13 a.m.

VOLUME 1

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Also Present:
Alicia Cate
Jennifer Kacaba
Saroja Kuruganty
Lucas McCall
Alex Miller
Harkamal Multani
Darian Parsons
Adriana Perezgil
Melissa Perrault
Chris Reynolds
Cole Robertson
Sejal Shah
Michael Solursh
Mirrun Zaveri

Teresa Forbes, CRR, RMR, CSR, Court Reporter
Lisa Barrett, CRR, RMR, CSR, Court Reporter

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Toronto, Ontario

--- Upon commencing on Sunday, October 26, 2014
at 9:13 a.m.

THE CHAIR: Fine. It looks like we are ready to start. I am pleased to open this hearing and welcome you all here. And when I say this, I am also welcoming those who are viewing the hearing at a nearby venue.

Let's start with the introductions of those who are in attendance. You don't need me to introduce the Tribunal, as we have already met on various occasions; on my right, Judge Brower, on my left Mr. Landau. We also have the Tribunal's secretary on my far right, Mr. Donde.

We have the court reporter. You have given us lists of people in attendance over the time of the hearing. It would be good if you could briefly, for the record, list who is present now at the start of the hearing.

Can I first turn to you, Mr. Appleton, to state who is here on behalf of the claimants?

MR. APPLETON: Yes. Can you hear me? Can you hear me on this microphone?

THE CHAIR: I hear you without the

microphone.

MR. APPLETON: I think for today we will keep the microphone on because of the throat.

Thank you. Actually, before we begin, we would just like to also greet all of those people who are now watching this hearing live in terms of the closed circuit hearing room. We think it is important that this is a transparent process and we want to thank the Tribunal, Arbitration Place and the Permanent Court of Arbitration for the efforts that they took to be able to facilitate a transparent and open process today.

With respect to our delegation, we have a delegation list which we circulated and we will make sure there is another copy for the court reporter today.

I am the lead counsel from the law firm of Appleton & Associates, international lawyers. During this hearing, you will also hear from Kyle Dickson-Smith from our firm, who is beside me here on right, and you will hear from Mr. Ed Mullins from the firm of Astigarraga Davis Mullins & Grossman, who is here on my left.

We also should acknowledge the presence of a party representative here today. We have Cole Robertson from Mesa Power Group. Mr. Robertson, wave your hand. He's with us today. Thank you. I think we can turn it over to Canada.

THE CHAIR: Thank you. Can I turn over to Canada? Should I give the floor to you, Mr. Spelliscy? Yes.

MR. SPELLISCY: Sure. I will come up to the microphone so the folks in the room can hear me. My name is Shane Spelliscy, and I am lead counsel for the Government of Canada on this case. With me today I have the Director and General Counsel of the Trade Law Bureau, Ms. Sylvie Tabet. You also have other counsel that you will hear from this week, including Heather Squires, Raahool Watchmaker.

Behind us we have our team of paralegals, Melissa Perrault and Darian Parsons, as well as the graphics persons for us, Christopher Reynolds, and we have more counsel sitting behind them. From your left to right: Rodney Neufeld, Laurence Marquis, Susanna Cam.

Then we have client representatives here, as well, who I should

acknowledge, and my understanding is here from the Ontario Ministry of Energy is Jennifer Kacaba and Mirrun Zaveri. I think they are in the back there. We have Michael Solursh and Saroja Kuruganty from the Ministry of Economic Development, Employment and Infrastructure and the Ministry of Research and Innovation.

We have Lucas McCall, who is a trade policy officer of the Department of Foreign Affairs in the back, and we have Sejal Shah, who is counsel at the Ontario Power Authority.

My understanding is that we also have representatives from the United States and Mexico who have actually joined us, I think. Yes, you can see.

THE CHAIR: Yes. I have not yet come to you, ladies. I understand we have Ms. Adriana Perezgil for Mexico and Ms. Alicia Cate for the United States; is that right? Thank you.

MR. SPELLISCY: Great. I think that is everything. The Government of Canada of course welcomes the Tribunal to Toronto and is grateful you can sit with us this week.

Before we do get started, I do have a procedural issue I would like to discuss,

but I can do that at whatever time the Tribunal feels is appropriate.

PROCEDURAL MATTERS:

THE CHAIR: I would like to go through some procedural points before we start, and then of course if there are procedural issues that the parties wish to raise, we will hear them before we go to the oral argument.

I understand that there are no fact witnesses in attendance now. You remember that we have this rule that they would not attend before their examination except, of course, for Mr. Robertson, who is here also, not only as fact witness, but also as party representative.

We will hear today the opening arguments and we will then start afterwards with the witness examination, first with Mr. Pickens, and, if we get to it, to the start of the examination of Mr. Robertson.

The opening, as you know, should take no more than two hours, and you can set time aside for rebuttal and sur-rebuttal, and of course the time will count towards your total hearing allocation.

The total allocation, as you know,

is 17 hours per party. The Tribunal's secretary will keep the time and advise you every evening after the hearing by e-mail of the time that you have used and what is remaining.

We will of course deduct the time for Tribunal questions and other procedural issues.

We should also recall how we will handle confidential, restricted access information. The Tribunal will rely, as we have agreed, on the parties, on counsel, to mention when something is about to be addressed that may fall within a topic that includes either confidential information or restricted information. That will be heard in camera And the transcript will be marked as such.

And, in addition, if it is restricted information, Restricted Access Information, then persons not entitled to hear it would have to leave this room.

There was a question whether the non-disputing parties would wish to make oral presentations, or not, in addition to your written submissions. Do you know already? This would obviously, if at all, be after the presentations of the oral arguments of the parties today.

Can I ask Mrs. Cate?

MS. CATE: On behalf of the United States, I would like to reserve our right to make an oral submission.

It will be the same position as the US.

MS. PEREZGIL: We will be the same position as the US.

THE CHAIR: Which means you will reserve your right, but you are not intending at this moment to make presentations.

So I understand there is a divergence among the parties about this. Since the issue may not arise at all, I suggest that we do not resolve it as long as it does not arise, all right?

There was an issue, as well, about the timing of the respondent's oral argument, before or after lunch. The Tribunal will suggest now that we wait to see how the hearing evolves, and then take it from there once we have reached the end of the claimant's oral argument.

That is all that I should say in terms of organization of this hearing so far. Is there anything that the parties would like to raise before we start with the oral argument?

Mr. Appleton? Mr. Mullins?

MR. MULLINS: No, ma'am.

THE CHAIR: No, fine. There is one thing on behalf of Canada, I understand.

MR. SPELLISCY: Thank you, Madame President. Yes, hopefully this is just a very brief and quick clarification, and that is that as the Tribunal is aware, on October 17th there was a submission that the Tribunal ruled would potentially prejudice Canada's due process rights if it was admitted.

The claimant, as the Tribunal has known, has elected to withdraw that submission from the record, which is acceptable to Canada. I do want to just clarify two things because, given the unusual circumstances, the claimant's withdrawal letter said it withdraws the document that it filed.

And I am sure that the use of the term the singular document was not intentional there, but I do want to clarify that, in fact, the letter constitutes a withdrawal of the record of the entire submission, which is not just the modifications that were made to the expert report, but also the exhibits.

I also wanted to clarify the effect that the withdrawal will have on this hearing. As the Tribunal noted, allowing the claimant to modify its expert evidence a week in advance of the hearing could potentially prejudice Canada's due process right. Obviously the same due process violation would arise if the same modification was made at this hearing.

So what I want to do is just clarify there should be no doubt that what could not be done a week before cannot also be done from the stand.

I think that this should have been relatively obvious. I don't expect dispute on this, but I also think it is good to have a ruling from the Tribunal in this regard, that the claimant, the witnesses, the counsel, may not refer to the submission or the contents thereof during the course of these arguments for exactly the same reasons the Tribunal ruled on its October 20th ruling on this.

And I think we may not get there, but if the situation does occur where there is reference to these documents, then I think we're going to be in a position where we're going to be

requesting immediate bifurcation of the hearing. I don't want to get there, but that is why I want to have this rule clear up at the front, that reference to the content, the subject of these documents, unless these documents are already in the record -- and I recall the claimant pointed out one exhibit that was already in the record. That is fine, obviously, for something already in the record.

We're not going to object to that, but to the extent these modifications have been withdrawn, we want to make sure the effect is that the submission has been withdrawn and it is not going to be just remade here orally.

THE CHAIR: Thank you. I think the points are clear.

What I would suggest is because there is no rush on this issue and it's an issue for Friday, it's good that you raise it now. What I would suggest is at some point I give the floor -- not now -- to the claimants for you to answer this, probably sometime this afternoon, and then the Tribunal will consider it. And I suppose that by tomorrow, we could have a rule by the Tribunal.

Yes. Mr. Landau tells me that it is also an issue for the opening submission. Is there an intent on the part of the claimants to use this October 17th submission in the opening? If so, we would have to deal with it now.

MR. APPLETON: Can you hear me?

THE CHAIR: Yes.

MR. APPLETON: Yes. I am rather taken aback by the fact that given that this is not a new issue for my friend, that he did not avail himself of the opportunity to follow the procedural direction of the Tribunal to raise such issues by Friday or whatever that deadline was.

This is not a new issue, and it would have been easier and much more efficient for everyone had we not conducted a trial by ambush and having these issues raised without notice.

Having said that, I am happy to confirm that there will be no discussion whatsoever about any matter that is contained in that October 17th document, but there will be some significant need to have discussion with this Tribunal about that October 17th document, procedurally, and the impacts, because we do not -- it should go very clearly on the record now we do not agree with the

characterizations that have been made by Canada at all, and we want to make that formally noted on the record immediately. But we will of course come back to this when we have the opportunity later on today.

THE CHAIR: So your immediate answer to my immediate question is that you will not refer to the submission in your opening, and the rest of course we will deal with at some later point that will be a good time to do this in the course of this day?

MR. APPLETON: That is correct.

THE CHAIR: Did I understand you correctly?

MR. APPLETON: That is absolutely correct. Thank you, Madame President.

THE CHAIR: Fine. Any other procedural issues that we should resolve before we start with the opening arguments? The claimant has already said "no". I understand that this was all for the respondent.

Good. Then this allows me to give Mr. Appleton the floor for your opening, please, Mr. Appleton.

MR. APPLETON: Thank you. I just

need a minute.

THE CHAIR: Do you have a PowerPoint presentation? Here it is.

MR. APPLETON: Yes.

THE CHAIR: Thank you.

MR. APPLETON: We should probably put that up on the screen now. Put the first slide on.

--- Off record at 9:27 a.m.

--- Upon resuming at 9:29 a.m.

OPENING SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Are we live to everyone in the hearing room now? Yes. Thank you very much.

Madame President, members of the Tribunal, the rule of law is what this case is all about. This is a story about an administrative process done at the direction of the Government of Ontario which on its face appeared, at least in the beginning, to be open, fair, and transparent. But as we will soon see, something very different was afoot.

Once we scratch the surface, we find that the ostensibly good public purpose of Ontario's encouragement of renewable energy was

actually subverted for an inappropriate purposes.

The integrity of Ontario's electricity system depends on the good faith of the officials administering it and on its protection from political and other inappropriate interference. That protection did not occur here.

Instead, politics and special influence prevailed over the fair and transparent administration of public policy and good governance.

This abusive behaviour harmed Mesa who, in good faith, relied on the mistaken belief that Ontario would follow Canadian laws and the FIT program rules in its administration of the Ontario FIT program, and this abuse harmed Ontario's ratepayers, who had to bear all of the costs for these mistakes.

Mesa was given every reason to believe that its sole means of access to the transmission grid for renewable power generators was through the Feed-In Tariff, the FIT program. Mesa did not know about special, more favourable treatment which was offered to certain Korean renewable power investors and their investments, but not to their competitors. Those competitors

were the FIT proponents like Mesa Power.

The NAFTA contains a powerful set of obligations designed to protect the equality of competitive opportunities of all investors covered by that treaty, and we will spend some time looking at these NAFTA obligations, such as Most Favoured Nation and national treatments, which ensure that treatment equal to the most favourable treatment in Ontario is provided to investors like Mesa.

This morning we will begin by taking the Tribunal through certain non-contentious facts and the governing legal principles in this dispute. We do not propose in this opening statement to address all the legal questions before you in detail, as this has been covered in the briefs and we know the Tribunal has read the briefs.

Instead, we will highlight some factual issues to assist the Tribunal during the witness examination phase of this hearing, and then we will review the governing legal principles to assist the consideration of the evidence during this hearing, and we intend to return to both law and evidence in the closing statement after the conclusion of the witness examinations.

We will start with a review of certain non-contentious facts. First, we will look at Ontario's Feed-in Tariff for renewable energy, the FIT program.

In May 2009, Ontario passed the Green Energy and Green Economy Act. This Act authorized the Ontario Minister of Energy to create a renewable Feed-in Tariff program. On September 24, 2009, the Ontario Minister of Energy who, at the time, was serving as the Deputy Premier of Ontario, issued a mandatory order to the Ontario Power Authority to create a Feed-In Tariff program for renewable energy.

By statute, the Ontario Power Authority had to follow the government's directions. The FIT, as this program is well known -- and that's the thing, FIT -- had written rules to govern applications from various proponents who sought access to transmission into the public Ontario electricity grid for the purpose of obtaining renewable power purchase agreements.

To obtain transmission access and thus to be able to obtain a contract, all applicants were required to meet onerous Ontario local content requirements.

For wind projects operational in the year 2011 or later, at least 50 percent of the local content had to be sourced from Ontario. And, in fact, because of certain caps within the subcategories of the FIT program, Ontario local content requirements, proponents had to acquire well more than 50 percent Ontario local content to meet the program's mandatory minimum local content requirements. So a very high level.

Now, a successful applicant under the FIT program would receive a 20-year contract backed by Ontario's ratepayers at a fixed price of 13.5 cents per kilowatt-hour. Make no doubt about this, this was a highly attractive rate.

Unsurprisingly, as a result of these highly attractive terms, there were many, many applications for Ontario FIT contracts.

On the monitor before you, you will see slide 1. You will see a map of Ontario's transmission regions. FIT contracts were awarded based on transmission regions. Ontario accepted applications for the FIT starting in the fall of 2009.

Now, slide 2 on the monitors sets out a time line about the FIT program. You will

see that Ontario started to accept applications for the FIT in the fall of 2009. We're going to try to adjust the screen for those in the viewing room.

But as you can see here at least on the slides, you will see that we start in the fall of 2009. The first FIT contracts were awarded on April 8th, 2010 for all regions other than the Bruce. You will see the significance of this Bruce region in a moment. That's that region out in western Ontario on the side of Lake Huron. That is the Bruce.

On February 24, 2011, another 40 FIT contracts were awarded, but none in the Bruce.

On June 3rd, 2011, the Minister of Energy issued a mandatory direction which ordered the Ontario Power Authority to issue a second round of contracts in the west of London region and a first round of contracts, finally, for the Bruce region.

This direction allowed projects in the west of London region and the Bruce region to change their interconnect points between regions into the transmission grid.

Despite the fact that the program had been set up years prior, only one business

day's advance notice was given of this change, and only five days were provided to effect the change.

On July 4, 2011, 25 FIT contracts were finally awarded in the Bruce and west of London transmission areas, and the FIT program operated until June 2013, when Ontario announced it was terminated.

So that's the public program. That's the FIT. Now I am going to turn to the GEIA.

The FIT program was the public face of Ontario's renewable energy program, but as it turns out, there was another route to obtain the very same renewable power purchase agreements, and these were through secret terms mostly unknown to the public ratepayers that were paying for it.

On January 21, 2010, a signing ceremony took place between the Premier of Ontario -- that's him standing in the back row by the flags -- the Ontario Minister of Energy -- that's him right at the centre of the room -- and senior executives from a Korean consortium comprised of Samsung and Korea Electric, known as KEPCO. That is everybody else around the table.

The new deal, titled the Green Energy Investment Agreement, GEIA, was clouded in secrecy. Very little of substance was released to the public about the signing. A press backgrounder with very limited disclosure about the terms of the deal was produced. The actual terms of the GEIA were kept secret and remained secret until after this arbitration was filed.

Also kept secret from the public was the fact that the GEIA was not the first agreement between Ontario and the Korean consortium. On December 12, 2008, more than one year earlier, Ontario and Samsung became party to a secret memorandum of understanding. This secret MOU, which is contained in Exhibit C-536 so you can note it -- we will be no doubt looking at that through the course of this hearing -- made Ontario and Samsung exclusive partners on renewable energy production and would have wide-ranging impact on the FIT program.

Ontario, not the Korean consortium, demanded that this deal be kept secret. The chief of staff to the energy Minister wrote to Samsung to ensure that it kept the information about this MOU secret, so the public would not be

aware about the exclusive relationship between Ontario and the Korean consortium. And according to Ontario's Auditor General, even the Ontario Power Authority, the entity that would eventually administer the renewable energy program, was unaware of even the existence of this MOU until the summer of 2009, more than six months after it was entered into.

Thus, in 2010, when the GEIA was announced, the public and FIT applicants were misled. Indeed, while a government press release stated that the GEIA -- sorry, that under the GEIA the Korean consortium would receive assured access to electricity transmission in Ontario in exchange for jobs and manufacturing plants, the public was not aware of the actual terms of the GEIA, which said something very different, or the public was not aware of the existence of the earlier secret MOU. And this information did not become public until after this arbitration commenced.

The Ontario public was also unaware that the Korean consortium actually was not contractually obligated to produce any jobs or to make any manufacturing commitments -- sorry, any manufacturing investments in Ontario under the

GEIA.

Now, in slide -- sorry, on September 30th, 2009 before the GEIA was signed, the Ontario Power Authority was ordered by the energy Minister to give priority access to applications for FIT contracts made by persons who had signed a province-wide framework agreement with Ontario.

Now, at the time of the announcement, there was no one who had publicly acknowledged as having signed a province-wide framework agreement with Ontario.

The OPA identified from surveys that it expected to receive many more FIT applications than could be accommodated by Ontario's transmission capacity. Yet from this limited pool, the GEIA nonetheless gave the Korean consortium 2,500 megawatts of priority transmission access, 2,000 megawatts for wind, another 500 megawatts for solar.

In addition, the Korean consortium could receive an extra payment, an economic development adder, if it could demonstrate that others, not it, created manufacturing jobs in Ontario as a result of the renewable energy

projects owned by the Korean consortium.

The Korean consortium did not have to invest in these facilities. It simply had to identify the manufacturers of its purchases in Ontario within a certain time frame. And if it did this, if it did this identification, it would receive an additional top-up payment beyond the 13.5 cents per kilowatt-hour contract price given under the FIT program.

Moreover, in any case, the first 500 megawatts of priority transmission access simply was provided as a gift to the Korean consortium, as it actually was not required to do anything special to receive the priority transmission access for this 500 megawatts.

The Korean consortium was also able to increase the size of its projects on its own initiative by up to 10 percent within the overall 2,500 megawatt transmission allowance.

As a result of the GEIA, the Korean consortium obtained priority access to the electricity grid, special access to governmental officials to address regulatory issues in connection with their projects, and a fast-track to over $18 billion in revenues from renewable energy

projects in Ontario -- and this was all sole-sourced -- all without competition from its numerous worldwide competitors, such as the FIT applicants such as Mesa Power.

I would like to turn to Mesa Power now. Mesa Power is a Dallas technologies-based LLC incorporated in the State of Delaware. Mesa was founded and is owned by T. Boone Pickens, a legendary energy sector investor, well known for his efforts to focus on energy security and to wean North America off its dependency on foreign oil.

You will hear from Mr. Pickens later on today and during this hearing from a senior Mesa executive, Cole Robertson.

Mesa Power came to Ontario to invest in the FIT program in 2009 in good faith and with high expectations. Mesa filed applications for four wind projects located in western Ontario in the Bruce transmission region on the side of Lake Huron.

These projects are illustrated here on slide 7. Two of these projects, Twenty Two Degree, also known sometimes as TTD, and Arran are coloured in blue here on the map.

These projects issued applications

on November 24, 2009 during the launch phase of the FIT. The other applications, North Bruce and Summerhill, were filed on May 24, 2010 and they are identified here in gold. You will see these later projects are adjacent to each of the initial projects.

Mesa filed over 3,000 pages of material to support these applications. In total, Mesa applied for 565 megawatts of transmission capacity and power generation contracts for these four projects.

Mesa would have invested more than $1.2 billion in the construction of its four wind projects, and Mesa made actual investments in Ontario in these Ontario projects of over $160 million, which has now been lost. $160 million has been spent on these four project investments here under the FIT program in Ontario.

Mesa believed that it would be treated in a fair and transparent manner and that the FIT rules would be applied fairly and transparently and in accordance with the rule of law and due process. Mesa did not expect that it would be misled by public officials or to be denied basic fairness by the Ontario government.

But what Mesa did not know is that a die had been cast by Ontario with its secret MOU with the Korean consortium or that Ontario would unfairly distribute the remaining transmission capacity.

Mesa's applications, by the way, started as a joint venture between Mesa Power and General Electric, a Fortune 100 company that manufactures wind turbines and is one of the largest companies in the world. The Mesa-General Electric joint venture was known as the American Wind Alliance.

Mesa submitted projects originally developed by an Ontario company called Leader Wind, at the time the most experienced wind developer in the Province of Ontario, as it had just developed the largest wind project here in Ontario.

On July 7, 2010 while the FIT applications were pending, Mesa and General Electric unwound their partnership with each company taking back projects contributed by them to the partnership, and with Mesa paying some additional funds to General Electric and keeping the American Wind Alliance for itself.

Now, this is really not

significant, as Mesa retained its interest in the Ontario wind projects at issue in this arbitration.

Now, I would like to talk a little bit about the Ontario electricity system. The OPA issued 20-year-long power purchase agreements to FIT proponents and the Korean consortium under the GEIA.

GEIA contracts were nearly identical to those of the FIT, and they essentially had the same regulatory and local content requirements -- in fact, not essentially -- had the same regulatory and local content requirements. Both the FIT and the GEIA contracts had a 20-year term at the same 13.5 cents per kilowatt-hour base rate, as you heard GEIA could get more because of the ability of the adders.

The OPA received ratepayer payments for these FIT and GEIA power contracts and forwarded these amounts to the electricity generators. Electricity under a FIT contract never was delivered to the power -- by the power generator to the OPA.

Let me rephrase that. Electricity supplied under a FIT contract was never delivered by that power generator to the Ontario Power

Authority, nor does the title to that power under a FIT contract ever pass to the Ontario Power Authority. As displayed here on the slide you will see, FIT power was instantaneously sold directly to the ratepayers through the IESO-controlled power grid.

So the power cannot -- since power can't be stored, the ratepayers' funds eventually make their way to the IESO, who then eventually forward these funds to the Ontario Power Authority.

The FIT rate is paid for by the ratepayers. The OPA then pays FIT generators from ratepayer funds which have already been collected.

The OPA has no interest in obtaining the possession of such electricity, given that it does not consume the electricity for its own use, nor does it manage or control the production or transmission of electricity in Ontario.

Now, there's been a great deal of discussion during this arbitration about the relationship of the OPA and the Government of Ontario. Let's be absolutely clear. Canada is responsible for the activity at issue in this arbitration that was done by the Ontario Power

Authority.

Let me show you how. Under section 25.35 of the Electricity Act, the Ontario Minister of Energy used his statutory power to direct the Ontario Power Authority to follow directions from the Ontario government. Set out here in slide 10, you will see the section of the Ontario Electricity Act. It says:

> "The Minister may direct the OPA to develop a feed-in tariff program..."

In addition, the Minister has another power to direct the OPA in section 25.32 of the Act, which contains a very general power of the Minister to delegate governmental authority to the OPA and to direct them to do that. Let's look at that. That is here in slide 11. It is section 25.32, which says:

> "The Minister may direct the OPA to assume... responsibility for exercising all powers and performing all duties of the Crown..."

And in Canada, when you see the term "Crown", as you would see I assume in the United

Kingdom, it means the powers of the government.

When such instructions are given, the OPA must comply with the direction. A large number of mandatory instructions were given to the OPA by the Ministry of Energy for matters at issue in this arbitration, including the creation and operation of the FIT program and the last-minute changes made to it.

The investor has set out a detailed listing of these mandatory instructions at paragraphs 145 to 148 of its memorial.

Now, Canada likes to characterize the OPA as a third party to this arbitration like someone you just met at a cocktail party and it doesn't know very well. This is very, very far from the truth. The record is clear that the OPA works hand in glove with the Government of Ontario. And as a matter of international law, it actually operates as a part of the state for the purposes of state responsibility, because of these orders made under statutory authority which invoke the clear operation of Article 8 of the ILC articles of state responsibility.

Now, over this next week the facts will become even clearer. Mesa should have been

awarded these contracts if the rules were applied fairly and in good faith by Ontario. We will revisit the facts after we have had the benefit of the completion of the expert and the witness testimony, but now I would like to turn to the law.

Canada has engaged in internationally wrongful acts against Mesa with respect to four NAFTA obligations, and these obligations include: Most Favoured Nation treatment, national treatment, the imposition of prohibited performance requirements, and the international law standard of treatment.

And we're going to look at each of these four NAFTA obligations. We will start with Most Favoured Nation treatment. This is generally known as MFN treatment, and you will hear people interchangeably referring to it as MFN or Most Favoured Nation treatment.

MFN is a rule and a principle of the NAFTA set out in article 102 in its interpretive sections, and Most Favoured Nation treatment is an obligation in five different NAFTA chapters; yet, MFN treatment is undefined in the NAFTA.

Indeed, terms like MFN treatment,

other terms like national treatment or fair and equitable treatment, are not specifically defined in the NAFTA; yet, they have been used in an undefined fashion by more than 1,000 bilateral investment treaties and in countless other international economic instruments like treaties of friendship, commerce and navigation, the GATT, the WTO.

So the NAFTA drafters, like the drafters of these other agreements, knew that -- they chose to rely on the living meaning of these well-known but undefined international law terms. That's a meaning that comes from international tribunal decisions and from customary international law.

The meaning of the Most Favoured Nation treatment must accordingly be based on the ordinary meaning of this term, understood in its context and in light of the NAFTA's object and purpose, and this is the way the Vienna Convention on the law of treaties mandates that we would proceed.

Now, the purpose of MFN treatment is straightforward. MFN generalizes automatically the advantages granted by one state to any other

included in the MFN arrangements.

If we can go back, Professor Schwarzenberger back in 1945 gave a very useful definition. He said: An MFN obligation in the treaty means that anybody's advantage accrues to everybody's profits.

It is a very straightforward term. Paragraph 1 of NAFTA Article 1103, which enshrines this MFN treatment for the purpose of investment as set out here in slide 13, it states:

> "Each party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

Paragraph 2 of Article 1103, which is set out on slide 14, extends this very same obligation to the investments of those investors

that were covered in paragraph 1.

Article 1103, therefore, has two simple criteria of interest to us in this arbitration. The first: Are there investors or investments from a non-party or from any other party in like circumstances; and is there treatment less favourable provided to the claimant rather than to those investors or investments who are in like circumstances?

Now, under MFN treatment, Canada needs to show that it is in like -- sorry, and this is the test that Mesa has to show to prove its claim that it is in like circumstances and that it has received less favourable treatment from Canada. That's the test that it needs to address.

Now, under MFN treatment, Canada needs to show that it is in like circumstances to an investor from a non-party or from any other NAFTA party other than Canada.

Under NAFTA Article 1102, national treatment, which we will discuss a little later this morning, the comparator is a local Canadian investor or investment, rather than a non-party or any other NAFTA investor.

That's the primary difference in

the structure of the wording of national treatment and MFN treatment.

So let's look to the first test, "like circumstances." A determination that the investment or the investors are in like circumstances is the first requirement for establishing the existence of a breach of MFN treatment under NAFTA Article 1103.

Here, this requires the consideration of whether Mesa's investments seeking renewable energy power purchase agreements under the FIT program were in like circumstances to those investments seeking renewable energy power purchase agreements owned by investors from non-NAFTA party states or from any other NAFTA party state.

The like circumstances test does not require the investments to be in identical circumstances. This test requires the Tribunal to consider a comparison between the circumstances of foreign and domestic investments, which only need to be "like".

There can be many differences in circumstances, but once the threshold of likeness is met, a comparison of treatment follows.

So what is clear is that likeness

needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations and administrative considerations, likeness requires the Tribunal to consider all of those who are competing for similar regulatory or administrative permissions.

Now, in this NAFTA claim, all of those who, like Mesa Power, sought regulatory permissions for renewable energy contracts are in like circumstances. This is the class of investments whose treatment needs to be considered.

Of course, determining likeness is not a mechanical exercise. The WTO frequently is asked to consider this very question, and has recognized that judgment needs to be applied and that the interpretation and application of the test of likeness must further the objectives of equality of competitive opportunities.

That is the interest at stake here. Likeness is a functional test. The mere fact that a measure at issue may treat investors under a different regulatory regime does not, in itself, determine likeness.

Likeness requires a substantive assessment of the competitive landscape. This

requires an analysis of whether there are economic actors competing for a limited amount of Ontario's electrical transmission access and for renewable power purchase agreements, and it is within the overall context of the competitive environment that the regulatory means used to deliver the treatment could be considered to determine its relevance and its weight.

Now, in this NAFTA claim, all of those who sought 20-year renewable power purchase agreements, like Mesa Power, are in like circumstances because they were actively seeking to obtain the same type of results from the same decision makers at the same time.

Expert economist Seabron Adamson will testify before you later this week. His report details the electricity market in Ontario and the operations of the FIT and the GEIA.

And in his report, Mr. Adamson notes that the GEIA requires a GEIA proponent to have nearly identical contracts that are based on the FIT contract terms, and he observes that they were the same parties to the contract under the GEIA and the FIT.

I just check those off,

check-check.

And he observed that there was the same duration of contract under the GEIA and the FIT, and you check that off, too.

And there were the same payment terms and base price under the GEIA and the FIT. Check that, as well.

And there were the same local content requirements under the GEIA and the FIT. Check that again.

And there were the same environmental requirements under the GEIA and the FIT, double-check.

Proponents to the FIT and the GEIA both competed for the same supply of renewable energy power purchase agreements and competed for the same supply of electricity transmission access in Ontario.

A review of the terms of the FIT and the GEIA demonstrate that they are essentially like. Now, evidence in the record also shows likeness. In his sworn declaration before a New York district court, Zohrab Mawani, a former Samsung employee who is was directly engaged in the GEIA projects, confirmed that the proponents for

renewable power purchase agreements under both the FIT and the GEIA were all competing for a limited amount of renewable energy PPAs, because of a limited but large amount of available transmission access.

Here on slide 16, we have repeated Mr. Mawani's sworn testimony, he says:

> "There is a finite amount of transmission capacity in the Province of Ontario and companies that seek PPAs in Ontario are in competition to obtain access to this limited transmission capacity."

Samsung Korea competed against these other companies for transmission access in order to sell power under PPAs.

Similarly, in his deposition, Mr. Edwards, Pattern's senior developer, was questioned as follows. The question:

> "And just so we're clear, Pattern is a competitor of Mesa for -- for Power Purchase Agreements, right, in Ontario?"

And the answer was, "Yes."

Notably, Pattern, Mr. Edward's company, is a joint venture partner with Samsung, a member of the Korean consortium.

Expert Seabron Adamson carefully compared the terms of the FIT and the GEIA and concurs with Mr. Edward's assessment. Here on slide 18, Mr. Adamson sets out his conclusion from that expert report. He says:

> "There is no practical difference between FIT program participants and GEIA participants (the Korean consortium and its development partner, Pattern Energy) in terms of the fundamental circumstances of their competition for wind PPAs in Ontario."

The very terms of the GEIA make clear that the GEIA does not require job creation, nor does it require manufacturing by the Korean consortium. The GEIA had the same local content requirements as the FIT. So a GEIA project had to use the very same significant amount of local

content for its projects to qualify as did a FIT project.

What the GEIA requires is only that a member of the Korean consortium identify where manufacturing jobs from their energy projects arise. The Korean consortium was not required to actually create manufacturing plants, only to point to where jobs were created in connection to the purchases related to the construction of its own wind farms. The Korean consortium only had to point. It was not required to do anything more.

So the local requirement in the GEIA project would count twice, once for the minimum content under the FIT, and once again for the GEIA. The GEIA required nothing more.

Slide 19 sets out Mr. Adamson's report, which says:

> "The economic exchange required in the GEIA is very one-sided. In return for the Economic Development Adder (estimated at the time by the Minister of Energy to have a value of $437 million) the Korean consortium was

required to sign contracts with equipment suppliers it would have had to have signed anyway to meet the Ontario minimum domestic content rules to obtain PPAs."

On slide 20, Mr. Adamson continues by stating:

"The GEIA's manufacturing commitment - the requirement to designate manufacturing partners through agreements to supply essential components - appears in practice to be little or no different than the need for every FIT developer to have local component suppliers under the FIT rules."

Mr. Adamson concludes that the manufacturing commitments of the GEIA were not really additional to those commitments otherwise imposed by the FIT on slide 21. It says:

"The manufacturing commitments of the Korean

consortium amount to little or nothing more than the domestic content requirements imposed on FIT participants such as Mesa."

Cole Robertson stated in his reply witness statement that Mesa was prepared to meet the very same obligations as those imposed under the GEIA, such as meeting the GEIA's so-called manufacturing commitments.

So quite simply, there could not be any objective regulatory distinction between renewable energy producers seeking to obtain transmission access and PPAs under the FIT or under the GEIA.

FIT proponents were in like circumstances with GEIA proponents, the only difference being that GEIA proponents were treated more favourably.

The fundamental element of competition for the same limited amount of access to government-controlled transmission grids and for the same type of renewable power purchase agreements fundamentally demonstrate that Mesa was in like circumstances with GEIA proponents like

Samsung and its joint venture local partners, such as Pattern, from any other NAFTA parties or from a non-NAFTA party.

So in this arbitration, the Tribunal will see that treatment has been provided to others in like circumstances with Mesa from non-NAFTA party states, such as Korea, as well as from other NAFTA party states, such as the United States where Pattern is based.

And even Ontario treated FIT proponents interchangeably with GEIA proponents. Ontario announced in December 2010 that it would reserve 1,200 megawatts of transmission capacity in the Bruce region for FIT proponents.

In September 2010, Ontario announced that 500 megawatts in the Bruce region was allocated to the Korean consortium for the GEIA projects. So even Ontario has treated the GEIA and the FIT interchangeably with respect to these allocations.

In its press statements, Ontario noted that the Korean consortium would receive the same rate as FIT proponents and would receive FIT contracts.

Now, in such circumstances where

there is more favourable treatment accorded to another investor from a non-NAFTA party, such as Korea, who is in like circumstances, there is a clear MFN treatment violation. And it is evident that the members of the Korean consortium under the GEIA are in like circumstances to Mesa under the FIT in seeking access to Ontario's transmission grid and seeking renewable power purchase agreements.

Indeed, it is the height of hubris for Canada to provide unequal benefits to one competitor, and then claim that those very same benefits make the more favourably treated competitor different from others and, thus, immune to international treaty scrutiny.

The better treatment cannot define the likeness. The measure cannot define the likeness. The title that we give to something doesn't define the likeness. It is a functional assessment that must be done by this Tribunal.

Don't be fooled by Canada here. The benefits of the MOU and the GEIA were exclusive to the members of the Korean consortium. The terms of the MOU between the Government of Ontario and the Korean consortium have been in force since

2008. They established an exclusive partnership between Ontario and the Korean consortium.

Given the lack of transparency in this process, no other investor, other than those involved in the GEIA, could have been aware of the extensive benefits available to the Korean consortium in Ontario. The secrecy of the GEIA and the terms of the MOU thus effectively made its terms exclusive.

For these reasons, it is clear that Mesa was in like circumstances with the members of the Korean consortium and with their joint venture partners, and, thus, it should be entitled to receive treatment as favourable as that accorded to the Korean consortium.

And I point out Mesa was not offered nor accorded treatment as favourable as that offered to the Korean consortium.

I would like to turn to treatment. The second element of MFN is to establish that more favourable treatment is being provided to an investor or an investment of an investor from a non-NAFTA party state or from another NAFTA party state.

Canada is required to provide

treatment as favourable as that given to other investors or investments from a non-NAFTA party or any other NAFTA party who are in like circumstances to Mesa.

So the same better treatment provided by Canada to foreign investors and investments of those investors from, let's say, Europe or Asia must be provided to Mesa under the MFN treatment obligation.

Here there is better treatment provided to others. There is overwhelming evidence that the treatment of Koreans and investments of Koreans under the GEIA is more favourable than the treatment given by Ontario under the FIT to Mesa.

Canada has not offered any evidence to contest the investor's evidence of more favourable treatment being provided to members of the Korean consortium under the GEIA rather than those like Mesa under the FIT. They can't.

MFN treatment applies in the case where a state provides more favourable treatment to investors of a third state than is provided under its treaty with an investor. Whenever a state makes the decision to provide broader trade liberalized treatment to investors from a third

state, this better treatment automatically must be provided to a foreign investor in like circumstances.

The investor has filed expert evidence and evidence arising from market participants which all confirm the more favourable treatment that was provided to investors from non-NAFTA parties, like the Korean consortium, than to Mesa.

Canada did not file any evidence to contest that more favourable treatment was provided. In fact, Canada did not file any defence to this evidence which demonstrated more favourable treatment.

Zohrab Mawani from Samsung, or formerly from Samsung, confirms on slide 23:

> "Samsung Korea's guaranteed access to transmission capacity under the GEIA allowed Samsung Korea to be in a better competitive position than those companies without guaranteed transmission access like Mesa Power Group."

He continues on slide 24 by stating under oath that:

> "The GEIA included a number of beneficial provisions that provided treatment superior than that offered to other competitors for PPAs under the feed-in tariff program."

And that:

> "Samsung had the opportunity to meet with OPA representatives to negotiate certain contract terms that were more advantageous than those available in the standard FIT contract."

Colin Edwards testified in his deposition that Pattern switched from being a FIT proponent to a GEIA proponent. Pattern was in both. When asked if Pattern had discussions with Ontario about the GEIA being a better deal than FIT, Colin Edwards states here on slide 25:

> "The fact that we signed a joint venture agreement and elected to participate with

Samsung is evidence that we thought this was a better opportunity."

After examining the evidence of better treatment under the terms of the GEIA over the terms of the FIT, expert economist Seabron Adamson concludes, as set out here on slide 26, that:

"It is undisputed that the GEIA provided a superior treatment to the Korean consortium than was provided to FIT wind developers."

Indeed, the existence of better treatment that was provided simply cannot be debated. It is a fact.

I would like to talk about diversity of nationality, which is an element that is involved in Article 1103. Article 1103, just like NAFTA Article 1102, national treatment, requires that there be a demonstration of diversity of nationality between the nationality of the investor and the nationality of the host state. No further diversity of nationality is required.

Nowhere does the text of Article

1103 refer to a requirement to establish intentional nationality-based discrimination. All that the text in Article 1102 or 1103 require is that there be an investor, or an investment, from one NAFTA party that is treated less favourably than an investor or an investment from another state.

So while there is a requirement to identify nationality for the purposes of comparison, there is no requirement to establish any intent of any kind.

Now, finally, we would like to turn to some miscellaneous issues raised by Canada which we believe to be irrelevant to the Tribunal's determination of the MFN issue.

First, we would like to point out that there are sectoral exclusions to the MFN obligation in NAFTA Chapter Eleven, and these are explicitly set out in Annex 4 of the NAFTA.

Here outlined in slide 27, you will see that there are the sectors that were excluded by Canada, and these sectors were excluded by each state. So each state had the right to identify what it wanted to exclude. Canada excluded the sectors of aviation, fisheries,

Maritime matters, and telecommunication transport networks and telecommunication transport services.

These were the only sectors excluded from MFN. Canada took no sectoral exclusion for the production of energy to MFN treatment. It had the right to. It had the full ability to exercise the right to exclude sectors when it filed its annex, but it did not.

Thus, the provisions in the investment agreements are covered by the scope of MFN treatment obligations unless an exception or a reservation applies. The terms of the NAFTA clearly say what is excluded and what is covered. No such sectoral exception applies here to the MFN obligation under NAFTA Article 1103.

In conclusion about MFN, Mesa as a FIT proponent is in like circumstances with the non-NAFTA party Korean consortium and with Pattern Energy, an investor from another NAFTA party who received more favourable treatment under the GEIA.

As a result, Mesa was entitled to receive the same treatment, which it did not receive.

I would like to turn to national treatment. As with MFN, likeness under the NAFTA

national treatment provision in Article 1102 needs to be determined in the circumstances.

In this regard, likeness requires the Tribunal to consider all companies who are competing for similar regulatory and administrative permissions. This is the class of investments whose treatment needs to be considered.

Those who are like Mesa for the purpose of national treatment are those Canadian companies who received better treatment from Canada in obtaining renewable power purchase agreements.

And these companies are: The Canadian subsidiaries of the Korean consortium; and Pattern Renewable Holdings Canada, ULC, a Canadian subsidiary of Pattern; and Boulevard Power, the Canadian subsidiary of NextEra.

They qualify for national treatment consideration because they are Canadian investments and meet the definition in the NAFTA as such. And like Mesa, these companies sought regulatory permission from governments and are in like circumstances.

Now, we have already considered in detail why the Korean consortium is in like circumstances with Mesa. For the same reason, the

Canadian subsidiaries of the Korean consortium are also in like circumstances with Mesa, and, thus, NAFTA Article 1102, the national treatment obligation, has been breached by Canada's better treatment to these investments.

Now, the evidence is clear, with respect to the members of the Korean consortium, that there was better treatment. Canada did not file any evidence to demonstrate the Canadian subsidiaries of the Korean consortium also did not receive more favourable treatment.

And as we have demonstrated in our pleadings and as you will see over the next week, better treatment was provided to the Canadian companies, such as Boulevard Power and Pattern Renewable Holdings Canada.

Now, finally, with Article -- as it was with the MFN obligation in Article 1103, there is no requirement to establish intent with respect to national treatment in Article 1102. The text of Article 1102 makes clear that there is a requirement to demonstrate a divergence of nationality between the more favourably treated investment and the claimant.

That divergence of nationality or

diversity of nationality, to use a US term, is all that needs to be established, nothing more.

Now, I would like to turn to performance requirements under article 1106. Now, slide 29 here will set out the text of Chapter Eleven's article 1106(1) performance requirement obligations.

This obligation sets out a list of industrial policies which the NAFTA parties agreed to prohibit. This was a very important NAFTA obligation, the performance requirements provision, and the reason that these obligations were banned in the NAFTA was on account of the inherently discriminatory and market disruptive effects caused by local content rules.

Indeed, the extent of this NAFTA obligation is broader than just requiring the NAFTA parties to engage in these policies against one another, because these industrial policies are considered so disruptive to fair process and free trade that the NAFTA parties agreed to no longer engage in these policies against any investor or any investment from any state party or of a non-party in its territory.

These industrial policies were

outlawed completely in the NAFTA. Despite the clarity of this outright ban, this Tribunal will see that Ontario shamelessly broke these promises not to engage in performance requirements like local content requirements.

In the FIT, Ontario engaged in policies that provided a preference to goods and services from Ontario as a requirement of obtaining access to the electricity grid and obtaining a FIT contract.

Ontario also imposed minimum domestic content levels as a requirement for transmission access and a power purchase contract. Thus, there are two express violations, as you can see here under paragraph (b) and (c) of Article 1106(1).

And the investor provided witness evidence directly from Mesa Power and from its expert independent valuator, Robert Low, to establish that Mesa suffered damage arising from the imposition of the prohibited local content requirements.

And even more telling, Canada has filed, by its own choice, no substantive defence of any kind to the Article 1106 case brought by the

investor. It is as if it doesn't exist. It is like a part of our pleading is gone. It has vanished.

Canada has no defence to liability for Article 1106 violation. Quite frankly, how could it? It's clear on its face and the NAFTA is clear on its face. It is an outright prohibition.

Now I would like to turn to Article 1105, the international law standard of treatment. NAFTA Article 1105 requires Canada to accord the international law standard of treatment to investments of investors from the NAFTA parties.

The text of this obligation is set out here in slide 30. Paragraph 1 of Article 1105 provides that the international law standard of treatment includes the provision of fair and equitable treatment, as well as full protection and security. These international law obligations are well established and well known.

Good faith is an integral part of the fair and equitable treatment standard. You can't have fair and equitable treatment without good faith. Many NAFTA and non-NAFTA awards recognize the duty to act in good faith as a distinct independent obligation within the

international law standard.

An example would be a lack of candour concerning the basis for policy decisions. This fundamental obligation of good faith needs to be considered in the context of the highly developed legal and regulatory framework in North America where citizens have a basic expectation of due process, natural justice, transparency and the applicability of the rule of law.

Now, similarly, the obligation to provide full protection and security is a specific element of the international law standard, and in its modern expression, this obligation requires governments to provide a stable, legal and business environment to foreign investors.

Full protection and security in itself includes protection of the rule of law and of fundamental fairness.

And with respect to the protection against arbitrariness, the state breaches its customary international law obligation when it acts arbitrarily, for instance, on prejudice or preference rather than on reason or fact.

Arbitrariness also occurs when discretionary decisions by governments are based on

the irrelevant considerations and when relevant considerations are ignored.

Now the long-standing international customary law protection against the abuse of rights applies in the context of abuses of administrative authority. Here on slide 31 we set out three basic forms of abuse of rights: First, where a state hinders an investor in the enjoyment of rights; two, where there is a fictitious exercise of a right; or, three, where there is abuse of discretion in the exercise of governmental power.

A government cannot exercise its power to abuse a foreign investor by capriciously exercising discretionary rights. Similarly, ignoring relevant decision-making criteria and focussing on irrelevant criteria, such as political considerations, would also constitute an abuse of process.

Now, the duty of transparency is clearly contained within the fair and equitable treatment concept in the NAFTA. It compels openness and clarity of a host's legal regime and procedures, and the need for transparency is a necessary aspect to enable good faith, the rule of

law and due process rights.

So each of the aspects of the international law standard are relevant to this arbitration, and the NAFTA was drafted to enshrine a holistic view of the law that would embrace international public law and international economic law, as well.

In our closing, we will return in some detail to the proper application of the international law standard and the requirements of proper reliance on the rules of international law, including but not limited to the Vienna Convention on the Law of Treaties and the international law which has been adopted by the parties as permitted under Vienna Convention Article 31(3)(c).

But now we would like to turn to Canada's general jurisdictional and exception defences to explain why they do not apply.

Canada contends that Mesa did not bring its claim in a timely fashion, and this failure goes to Canada's consent to arbitrate. In particular, Canada contends that Mesa's claim was brought within a six-month waiting period before the filing of the notice of arbitration.

As a result, Canada contends, the

notice of arbitration is untimely, and then Canada makes another leap of logic and concludes that this means that Canada's consent to this arbitration contained in NAFTA Article 1120 is of no force or effect, meaning that this Tribunal has no jurisdiction to rule on this matter.

This is entirely ridiculous. In coming to this assertion, Canada ignores the investor's pleadings and the evidence provided by the investor, and simply declares that there could not possibly be any breach of the NAFTA until July 4, 2011, when Ontario announced the winners of the FIT contract for the Bruce region.

This is simply nothing short of an exercise in creative writing by Canada. Canada's entire challenge here is without merit.

First, let's look to Canada's consent to the arbitration in the NAFTA -- it's in the NAFTA article 1122. It is displayed here on the monitors before you. First, it says:

> "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. The

consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the following..."

And they give us the requirements, (a), (b) and (c): Chapter II of the ICSID Convention and the Additional Facility Rules, Article II of the New York Convention, and Article 1 of the Inter-American Convention.

We will show you why there is no impediment to the Tribunal's jurisdiction arising from any lack of consent.

Slide 33 sets out the text of Article 1120. This requires that "six months have elapsed since the events giving rise to a claim." The events giving rise to a claim. So the only preliminary factual question is whether the events giving rise to a claim in this case arose at least six months prior to the filing of the notice of arbitration. And we have set out these events on the time line here on slide 34, which is shown on the monitors.

Now, just to situate you on the slide, the green flag is identified October 4th,

2011. This is when the notice of arbitration was filed. So the six-month waiting periods is set out by the red ribbon.

The events giving rise to the Article 1106 local content claim began almost 15 months before the NAFTA arbitration filing, on July 7, 2010, the first of the red flags.

For the Article 1106 local content claim, while the investor knew that there was a violation of NAFTA when it filed its obligations, but the first date that the investor knew of the loss was on July 7, 2010 when the investor received an e-mail from General Electric confirming that the 1.6 megawatt turbine was the only turbine that would generate sufficient Ontario local content for use by Mesa for deployment in 2011.

A second event giving rise to the Articles 1103, 1102 and 1105 claim arose more than 12 months in advance of the NAFTA notice on September 17, 2010, marked here with a second red flag. And that is when Mesa learned that more than one-third of the transmission that had been reserved to FIT applicants in the Bruce region was now being given in priority to the members of the Korean consortium under the GEIA.

So it is abundantly clear that the investor's claim met the procedural requirements of the NAFTA, well more than the minimum six-month period before the notice of arbitration was filed.

There is simply no support for Canada's contentions, and Canada is well aware that its argument here is simply an exercise in fantasy. These objections must be dismissed. And to this end, the investor has set out detailed submissions on how its claim meets NAFTA's procedural requirements at paragraphs 839-889 of its memorial and paragraphs 817-859 of the reply.

We spent a lot of time identifying why this cannot be correct. We also point out that there is no requirement that all of the events in the claim arise six months before the notice of arbitration.

What is required is that the events for a claim first arise at least six months before the filing of the notice of arbitration. And in this regard, the Ethyl tribunal, and you can see at slide 35, at the very beginning of the NAFTA dispute process the Ethyl tribunal wrote:

> "Resolution of disputes would not be best served by a rule

absolutely mandating a six-month respite following the final effectiveness of a measure until the investor may proceed to arbitration."

The Ethyl tribunal rejected the application of rigid approaches and preferred practical and efficient approaches.

And of course, there are other breaches which arose after these initial breaches, including the Ministry of Energy and the OPA's improper conduct regarding last-minute changes to the FIT rules in June of 2011 and the improper award of contracts in June 2011, but these are simply additional actions which violate the NAFTA. These are not the events that first gave rise to the claim.

And the NAFTA does not require that every breach arise more than six months before the claim is submitted to arbitration. It only requires that claims first arise in that period of time. And the reason is simple: Because otherwise a respondent would be able to ensure that the Tribunal would never have jurisdiction to rule on its behaviour if it continued to engage in wrongful

behaviour, and simply by continuing to harm a victim, to torture a victim, could never remove the authority of an international tribunal to be able to rule on that treatment.

But that is what Canada is asking you to do, and that would make international law highly ineffective. That cannot be right and it cannot be countenanced.

Now, clearly this NAFTA claim arose before April 4, 2011. And so for each of the NAFTA Chapter Eleven breaches of international treatment under Article 2, for MFN under Article 1103, for the international law standard of treatment under Article 1105, and for the local content issues under 1106, the breaches of the NAFTA and the harm to the investor first arose before April 4, 2011, six months before the filing of the October 4, 2011 notice of arbitration.

And the fact that Canada continued to engage in internationally wrongful behaviour in violation of the NAFTA does not, in any way, impair the jurisdiction of this Tribunal to rule on this claim that is before it.

Now, the investor has set out its arguments about this in its response to the 1128

submissions. In particular, it relies on paragraphs 118 to 127 therein.

And in that submission, it is clear that other NAFTA tribunals, including the ADF tribunal, specifically rejected the contention that a procedural defect could have the effect of negating a NAFTA party's consent to arbitration, the other argument that Canada makes here, that somehow the six-month rule removes its consents.

Now, the ADF tribunal carefully reviewed NAFTA Article 1122, that long article I took us through, and found the consent in Article 1122 that meets the requirements of the New York Convention, The Inter-American Convention and the ICSID Additional Facility Rules.

And the ADF tribunal found that the confirmation of the existence of consent between the NAFTA parties -- that is, the state parties -- set out in Article 1122 was clear. The ADF tribunal, like this current arbitration Tribunal, was constituted under the UNCITRAL arbitration rules.

And so they found that the state-to-state consent was clear and that all that was required was the filing of the consent to

arbitration by the investor to perfect that consent, and those procedures are the procedures laid out in Article 1122.

And the ADF tribunal found this by reviewing the consents and they dismissed the contention that a procedural irregularity would result in an impediment to a consent to arbitration. The ADF tribunal concluded the effect of these provisions made the consent of the parties to the arbitration clear and effective and that there is no additional effect to the procedures contained in Article 1120, which Canada relies on here today.

So if the consent to arbitrate provided in the text of NAFTA is sufficient to satisfy the requirements to establish the jurisdiction of these other rules according to ADF, surely it must be sufficient to satisfy the requirements to establish the consent necessary for this NAFTA Tribunal.

We believe the ADF tribunal's approach is correct. We also believe it is identical to the situation in this current arbitration. Insisting that an investor must file a new arbitration claim with respect to any

potential procedural error is inefficient and inimical to the overall objectives of the NAFTA, and to somehow suggest that would mean that there is no consent to arbitrate and that the responding party doesn't have to respond, doesn't have to follow the rules of the NAFTA, doesn't have to consent and follow the process, would completely defeat the purpose of dispute resolution under the NAFTA. It cannot be permitted to occur again.

Now, I would like to talk about the actions of the Ontario Power Authority. The actions by the Ontario Power Authority at issue in this claim, as we had mentioned earlier, are attributable to Ontario as a result of the operation of Ontario law.

And we have seen the Electricity Act, which permitted the Minister of Energy to direct the Ontario Power Authority to carry out acts. The investor set out the formal directions issued by the Ontario Minister of Energy as we have seen earlier at paragraphs 145 to 148 of the memorial.

Canada has not denied that these instructions were made. I don't know how they could, but they haven't, nor have they denied the

statutory effectiveness upon the Ontario Power Authority under this Ontario law, the Electricity Act, of these directions.

ILC Article 8 makes Canada responsible for situations where the OPA was acting under the instructions, direction or control of the state. Ontario made specific directions and, thus, these orders made Ontario and Canada directly responsible for the OPA's actions.

Now, I would like to ask the Tribunal. I could take a brief pause here before we finish, if you would like, or I can continue. I don't know what the court reporter would like or what the Tribunal would like.

THE CHAIR: How much more time do you think you would need for this part of your argument? Are you going to use the entire two hours or do you plan on reserving time for rebuttal?

MR. APPLETON: I would think -- well, I will have to see. I am a little slower because of my voice issue.

THE CHAIR: Your voice works --

MR. APPLETON: So far --

THE CHAIR: -- pretty well.

MR. APPLETON: Yes, I am happy this morning. I wasn't so happy yesterday, let's put it that way. We will see how it goes the rest of the day.

I would think that we have at least another 15 to 20 minutes to do, perhaps slightly more than that, so it is really a question of what your preference is. I am happy to continue.

MR. APPLETON: I think we --

THE CHAIR: What I would suggest is that we have a rather short break.

MR. APPLETON: We will stay here, yes.

THE CHAIR: Short breaks are difficult to enforce, as experience shows, but I would say just could we have ten minutes and not more than ten minutes?

MR. APPLETON: Excellent.

THE CHAIR: And we will resume in ten minutes.

MR. APPLETON: I will go nowhere else, I promise.

THE CHAIR: Thank you.

--- Recess at 10:47 a.m.

--- Upon resuming at 11:03 a.m.

THE CHAIR: Are we ready to resume? Can I ask someone to close the door in the back? Thank you. Mr. Appleton, you can continue.

MR. APPLETON: If we do that, I have to see if I am live.

MR. BROWER: Yes, you appear to be live.

MR. APPLETON: Thank you, Mr. Brower. And you can hear me? Thank you very much. Very, very good.

So I left off as we were about to turn to Canada's Article 1108 defences. So Canada has attempted to rely on two defences, both contained in Article 1108 of the NAFTA, one with respect to subsidy and the other about procurement. Both of these defences fail.

I will turn first to subsidy. Canada raised a most unusual defence in paragraph 65 of its rejoinder memorial. Canada first alleged that in the event the FIT program did not constitute procurement, then the FIT program constituted a government subsidy.

Then on September 15, 2014, Canada clarified its position. It stated that the FIT was

not a subsidy and that it would not produce any evidence that the FIT was a subsidy.

So, first, Canada says that it has a government subsidy defence to Mesa's claims and defends the existence of that claim over our objection, and then ten days later Canada has a change of face and says that it will not provide any evidence to support its government subsidy defence, because Canada says there is no evidence to support its defence that the FIT is a subsidy, because there is no subsidy.

Well, this begs the obvious question. If there is no government subsidy, how can there be any government subsidy defence?

Canada has not even established a prima facie case for there to be a government subsidy. The burden of proof is on Canada to establish the facts for this defence, even though Canada freely admits that there is no evidence of subsidy. And Canada has not met this burden and has refused to meet this burden. There is absolutely no bona fide defence of government subsidy here.

At the heart of this issue is a factual statement that the Ontario Power

Authority's forwarding of ratepayer funds to pay for the FIT demonstrates that the FIT program is really a form of governmental assistance.

Many government programs constitute governmental assistance, including every government health care or public education program, but none of these, to our knowledge, constitutes a subsidy. Canada isn't saying that these basic public education or health programs are subsidies, and the reason is because the term "subsidy" is not coextensive with the term "governmental assistance", a logical flaw in Canada's argument.

A subsidy under international law, under Canadian domestic law, under US domestic law, requires proof of benefit in addition to governmental assistance.

Mesa never alleged that the FIT program constituted both governmental assistance and a benefit. Mesa merely stated what the WTO found, which was the FIT program was a form of governmental assistance.

There is no legal basis to support Canada's government subsidy defence. There is no factual basis either.

If we turn to slide 37 on the

monitors here before you, we see Exhibit C-0173, and this is a briefing note to the Ontario Minister of Energy about the FIT program.

And we see the Ministry officials here advising the energy Minister in the fall of 2010 that the FIT program did not represent a subsidy, because it was funded by ratepayer funds, rather than by government funds.

I will read it: Does not represent a subsidy because FIT prices are paid for by the province's electricity customers.

Thus, the FIT program was designed not to constitute a governmental subsidy, because the payment for the renewable energy did not come from the government at all, but directly from the ratepayers who consume the power. Accordingly, the government subsidy defence must be dismissed in its entirety.

I would like to turn to procurement. Now, Canada relies on Article 1108(7) and 1108(8), which both have procurement exceptions to avoid three of its NAFTA obligations. But upon examination, it is clear that these exceptions simply do not apply.

Canada's Article 1108(7)(a)

exception only applies to Chapter Eleven's national treatment -- that is Article 1102 -- and Most Favoured Nation treatment, Article 1103, obligations, and it acts to prevent these obligations from applying where there is procurement by a party or a state enterprise.

By comparison, the Article 1108(8)(a) exception exempts the Article 1106 minimum local content prohibition.

So at the outset, it is important to note that the procurement exception in 1108(7)(a), so 1108(7), no longer has legal effect for Canada, because Canada has spent this power. Canada offered more favourable treatment to non-NAFTA party investors under two other treaties; namely, the Canada-Czech Investment Treaty and the Canada-Slovak Investment Treaty. Both of these treaties were signed after the NAFTA came into force.

Now, we have provided an analysis of the underlying obligations in these third party treaties and in the NAFTA in our reply memorial at paragraphs 185 to 188, and in our Article 1128 response at paragraphs 63 to 70. So we're not going to review that here. We want to highlight

where that is.

The treatment provided by Canada under these two other treaties is substantively broader and, thus, more trade liberalizing than the treatment provided by Canada to investors and investments in like circumstances under the NAFTA.

MFN and national treatment obligations under both treaties are not reduced by a procurement carve-out. Accordingly, such treatment must be considered to be more favourable treatment than that provided by a more restricted MFN and national treatment obligation than otherwise would exist under the NAFTA.

Thus, the broader and more trade liberalizing behaviour must be extended by Canada to its other NAFTA treaty partners because of the NAFTA's MFN obligation in Article 1103. As a result, Article 1108(7)(a) no longer has effect for Canada, because Canada provided better treatment to others.

Now, the more favourable treatment provided by Canada to investors from the Czech Republic or the Slovak Republic does not have any effect on Canada's reliance on the exception with respect to performance requirements in Article

1108(8)(a).

So the Tribunal must look to the meaning of that exception with respect to Article 1108(8)(a) and, therefore, the effect on performance requirements under 1106.

Now, the applicable rules of treaty interpretation in international law are codified in Articles 31 and 32 of the Vienna Convention Law of Treaties.

Article 31(1) of the Vienna Convention instructs this Tribunal to interpret the treaty in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, the entire treaty provides context to the meaning of the terms used in that treaty.

When looking at the term "procurement", it is notable that the NAFTA contains Chapter Ten, which is dedicated to the topic of government procurement. Chapter Ten must provide the context to the undefined term "procurement" in Chapter Eleven.

And Chapter Ten contains a definition of procurement. It is here on slide 38.

This is in Article 1001(5), and its definition of procurement states the following:

> "Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:
>
> "(a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments."

The provision of goods and services to persons are exempt from the definition of procurement. Governmental assistance is also exempt from the definition of procurement. These are what we have here with the FIT program.

Now, NAFTA tribunals have relied

on NAFTA Chapter Ten to give meaning to the undefined term "procurement" in Article 1108.

It's been considered by two tribunals, and both of these tribunals relied upon the definition in NAFTA Chapter Ten to give meaning to the term "procurement" in Article 1108.

Now, the NAFTA tribunal in ADF reviewed Article 1108 and concluded that the tribunal, in considering the meaning of Article 1108's procurement, should look at the definition for the term in the procurement chapter, Chapter Ten.

The UPS tribunal relied on the ADF award, and the UPS tribunal concluded that the definition of procurement in Article 1001(5) provided context for the interpretation of procurement in Article 1108.

The ADF tribunal looked to the ordinary meaning of the term "procurement", and that is set out here in slide 39. The ADF tribunal found, in its ordinary or dictionary connotation, procurement refers to the act of obtaining as by effort, labour or purchase.

Thus, government procurement refers to the obtaining by purchase by a

governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery.

Now, what is interesting here is that Canada itself argued this definition of procurement in NAFTA Article 1001(5) was the right definition in the UPS case. The position taken by Canada just a few years ago on the meaning of procurement agrees entirely by the meaning advanced by Mesa in this arbitration.

Let's go look at what Canada had to say, as set out here in slide 40 on the monitors before you. We see Canada stated in its counter-memorial in the UPS case that:

> "The absence of a definition of 'procurement' is itself a suggestion that the parties intended the term to be given its ordinary meaning throughout the NAFTA, subject to the exclusions in Article 1001(5)."

This was the approach taken in the only Chapter Eleven arbitration to consider the exception in Article 1108(7). So it begs the

question: What has changed in the fundamental basis of interpretation in NAFTA between the UPS argument made by Canada and the argument here where they say exactly the opposite?

Canada's argument runs afoul of the decisions of other NAFTA tribunals and the simple, basic obligations and terms and instructions that we have in the Vienna Convention.

And, finally, I point out that the tribunal, a recent tribunal in Mobil Oil v. Canada, so a NAFTA tribunal, also came to the conclusion that it was appropriate to look at NAFTA Chapter Ten to give meaning to undefined terms in Chapter Eleven.

In Mobil Oil, the tribunal needed to give meaning to the term "research and development expenditure" that was in Article 1106. There was no definition, but "research and development" was contained in Chapter Ten in the context of procurement.

The Mobil Oil tribunal concluded, based on the Vienna Convention, that it should look at the treaty as a whole, a very reasonable approach. And this is exactly the approach that

Canada argued should be followed in UPS and the approach taken by the tribunal in ADF, and this is the correct approach to be taken in this claim.

The Tribunal should apply the definition in Article 1001(5) to the meaning of the term "procurement", and when we apply that definition, it is absolutely clear that the FIT program is not government procurement.

And, finally, the transaction that takes place under a FIT contract does not constitute procurement under any ordinary definition of the term. Instead, the FIT is a payment conduit which is akin to a financial transaction.

Ontario does not purchase the electricity for its own use, and, indeed, it doesn't even take title to it. And as set out here on slide 41, we have an extract from Mr. Adamson's expert report and he confirms:

> "The OPA never receives or takes title to the electricity generated, which is sold directly into the IESO grid and is paid for by the IESO under its normal

> settlements process... the OPA is simply a payment conduit, receiving ratepayer funds and passing them on to the FIT suppliers through the PPA contract payments."

The power goes directly to the ratepayers and never to the OPA. And as a result, the transaction under a FIT never meets the general definition of the word "procurement" suggested by the ADF tribunal, since the renewable energy under the contract is never obtained in any way by the OPA. Instead, the power under the FIT PPA goes to ratepayers through the IESO grid.

Ontario designed the program. They could have designed it some other way. As we see, they designed the program specifically this way so the ratepayers would pay. They did this to make sure there would be no subsidy, but it also ensured it could never be a governmental procurement, because the government doesn't pay. It just doesn't pay.

And of course NAFTA Article 1001(5) excludes the provision of goods and services to persons from the definition of

procurement.

So, thus, the goods and services are not used by the government itself, but used by all the ratepayers, and these cannot be covered by the term "procurement" here. As seen here on slide 42, electricity which is produced under a FIT contract is "provided to those persons" and not to the Government of Ontario.

The power under a FIT contract is never obtained by the Ontario Power Authority, and it does not get the title to this power. It doesn't use this power. The power goes to the IESO grid and on directly, instantaneously to the customers.

This power is not used by the Ontario government. It is always resold to others at market rates using the commercial grid. In this way, Ontario is always engaged in commercial activity with respect to the electrical power market.

This transaction cannot meet the definition of procurement in Article 1001(5), because it is a sale to others where the good or service is provided to others.

Furthermore, Ontario made it

abundantly clear public money is never spent on the purchase of power under the FIT program. The funds for the purchase all come from the ratepayers, third parties to the FIT.

The cost for the FIT purchase is all paid by the ratepayers, a matter specifically identified by Ontario's Auditor General.

The Vienna Convention requires this Tribunal to consider the ordinary meaning of procurement in light of its context, object and purpose, and, accordingly, the activities arising from the FIT contract cannot constitute procurement by any of the ordinary meanings of the term and in the context of its meaning in the NAFTA.

Canada, as the party relying on the exception, bears the burden to establish its own defence and to demonstrate that the exception applies, and Canada has not met this burden.

You don't meet this burden simply by calling something something. You have to prove that it is actually that project -- it has to actually have that meaning. We can't just put a sign on something and make it something else.

And as a result, Article 1108(8)(a), and to the extent applicable, Article

1108(7)(a), does not apply as an exception in the issues in this arbitration.

Canada can't make its case. It is not procurement. It doesn't meet the definition of procurement. And with respect to Article 1108(7), Canada can't even rely on this anymore, because that obligation is gone once it gave the better treatment under the Czech and the Slovak treaties.

So it is clear for the following reasons that Canada has not established the procurement exception. Ontario does not engage in the procurement. The activities involve a sale of goods to persons and are, thus, outside the definition of procurement in Article 1001(5); because the activities involve financial assistance and, thus, are outside of the definition of procurement in Article 1001(5); because the activities do not meet the ordinary meaning of procurement because the OPA does not take title to the power, it does not take delivery of the power and because the power is paid for by the individual ratepayers and not by Ontario.

Indeed, there is no evidence that Canada designed the FIT program to be -- sorry, excuse me.

There is evidence, as we saw, that Canada designed the FIT program to be paid by the ratepayers in this way to avoid characterization of the FIT as a government subsidy, and for this very same reason the FIT cannot be considered governmental procurement.

Canada could have procured. It could have done this. It could have engaged in the process. It chose to do a different process, and it is not entitled to have the benefit of the exception for a process that it specifically did in a different way that wouldn't meet those obligations.

And because Canada is not entitled to rely on Article 1108(7)(a) because of the Canada-Czech and the Canada-Slovak treaty, we're really only focussing on Article 1108(8), and here it simply does not meet the definition of procurement any way you slice it. This argument just doesn't fly. Canada's defence needs to be dismissed.

So in conclusion, the investor will review the evidence and the law in our closing arguments. We will return in some detail to the proper application of the NAFTA and international

law, and the requirement of the proper reliance on the rules of international law, including the Vienna Convention on the Law of Treaties, and we will in the closing discuss damages.

Now, in conclusion, the Tribunal should consider the following: (a) that there is compelling evidence already in the record that demonstrates the proponents for renewable energy power purchase agreements under the FIT are in like circumstances to proponents for renewable energy power purchase agreements under the GEIA.

There was no real difference in likeness between the proponents, despite the fact that there was a substantial difference in the favourability of treatment between those being accorded the more favourable treatment under the GEIA than those under the FIT.

Two, that the national treatment claim is similar to the MFN claim with respect to the better treatment obtained by the Canadian investments of the Korean consortium.

Three, that the local content requirement explicitly violated the terms of NAFTA Article 1106(1) and that there is evidence of harm caused to Mesa in the record. Remember, this is

the claim where Canada hasn't even filed a defence.

And, four, that there are violations of the international law standard of treatment, especially fair and equitable treatment, present in this case.

We have addressed conclusively why Canada's arguments that it has not given its consent to this arbitration are simply misleading and not meritorious and why the government subsidy exception defence and the procurement defence should not be accepted by this Tribunal.

In our introduction of the international law principles that govern this arbitration, we referred to the rule of law as the bedrock of NAFTA.

Mesa always intended to treat Ontario with respect and to act in full compliance with environmental values, laws and regulations. Mesa believed Ontario offered it an honest and transparent process that would be administered by responsible government officials, that would be administered fairly and in good faith, and that would be determined in an objective and fair manner.

Mesa did not expect to be denied

basic fairness by the Government of Ontario, from which it was entitled to expect fair and transparent treatment.

Now, the NAFTA acts to protect claimants from these breaches of fairness, from the imposition of internationally wrongful local content rules, and from the lack of equal treatment.

In the coming days, we will see how Canada took these types of actions and how Mesa was harmed. But the NAFTA provides a remedy to these harms, and this remedy is in compensation, and only this Tribunal can address these wrongs committed by Canada and the Government of Ontario. And it is this compensation remedy that the investor respectfully requests from this Tribunal.

So we thank you very much, and we're ready to turn to Canada.

THE CHAIR: Thank you, Mr. Appleton.

Can you just check how much time the claimant has used for their opening?

MR. DONDE: One hour, 43 minutes.

THE CHAIR: One hour, 43 minutes. I am just saying this in case you wish to have

some --

MR. APPLETON: My timer is a little different. I have 1:41. I have been timing while we have been on.

THE CHAIR: You can fight about this if you need the time, but if you don't need it --

MR. APPLETON: That sounds good.

THE CHAIR: Good. So the Tribunal's suggestion would be that we continue directly with hearing the beginning of Canada's argument. Do you have a time estimate of how much time you think you will need overall?

It doesn't commit you, but it would give us some idea for planning purposes.

MR. SPELLISCY: Yes. Thank you, Professor Kaufmann-Kohler. I am looking at it and thinking I am going to use close to the two hours, which would put us about 1:30, prior to a lunch break.

I also note that unfortunately I have to raise a procedural due process issue first, and so what I am wondering is, if I raise that now, we could go somewhat into the opening. I find it a little bit odd to break the opening during a lunch

break. We're getting close to noon. If the Tribunal feels it could wait until 1:30 or 2:00 for lunch, I could probably do so, but you might be hungry. But I do have an issue to raise in advance of starting the opening statement.

THE CHAIR: Fine. So why don't you raise this issue now, and then we will take it from there.

OPENING SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: Thank you. This actually comes back to the issue that I raised right at the beginning of the hearing today, and I think now it is an issue that does need to be resolved.

In the claimant's opening presentation, two slides, slide 34 and at slide 36, the claimant represents that the date of harm for its 1106 breach was July 7th of 2010.

The first time that the claimant ever raised that valuation date was in its October 17th, 2014 submission, which it said it withdrew from the record. Prior to that, it claimed that its Article 1106 loss occurred on August 5th.

In its reply at paragraph 824, it said it was August the 5th. In its expert report,

its reply expert report of Mr. Low at paragraph 7.11, it said the date was August 5th. And that cited to the witness statement of Mr. Robertson in paragraph 23, which said that date was August 5th.

In its October 20th order in respect of this, the Tribunal said in its second paragraph that:

> "The Tribunal notes, in particular, that the claimant's 'correction' of the Deloitte report attaches new documents, changes the discounted rate calculations and certain valuation dates in section C."

It continued:

> "It is of the view that these modifications are not corrections as contemplated in paragraph 37."

One of those modifications was moving the valuation date for the 1106 breach from August 5th to July 7th. The Tribunal ruled with the hearing less than a week away. There is a risk the respondent's due process right be prejudiced if

these modifications are admitted into the record.

This morning I got up and explained our position that what could not be done in writing a week before because of a due process risk could not be done at this hearing. And yet that is what happened this morning.

We're not in a position to examine on this date -- our expert is not in a position to comment on the valuation of this date. This was a direct due process risk that we identified.

The Tribunal never required the claimant to withdraw this information from the record. It gave the claimant a choice, withdraw or we bifurcate quantum.

The claimant chose to withdraw. We're not saying this can't come into the record. The Tribunal has never said it, but the question is: If they are going to be making these modifications, what are Mr. Goncalves and Mr. Low doing here this week?

We won't be able to have them answer questions on this and we won't be able to ask questions on this, and this is exactly why I raised this concern this morning, because we are concerned.

Now, you will see here that this refers to an exhibit that is in the record. That is true. That is there. There is no problem you can refer to that document, but what the Tribunal ruled and what is clear is you cannot change your valuation date at this late stage, and that is the prejudicial situation you're in.

You change that valuation date, all the calculations change, all the spreadsheets change. Our expert, Mr. Goncalves, has said he does not have time in a one-week period to re-look at this, to look at how that is going to impact things.

In terms of when they say that that harm occurred, we do not have time to prepare to examine on this, and this is exactly the due process right we had, the due process concern we had in our letter where we flagged that we will be in a position where we can't effectively examine witnesses on this. And this is where we find ourselves.

So this morning, I said that if reference came up, I was going to have to stand up and I was going to have to say: All right, well, now we have to bifurcate.

So I think the issue has actually been raised and joined now, and we need a decision from the Tribunal as to how this is going to proceed. Thank you.

THE CHAIR: We may have some questions. Why don't -- I have one or two, yes, please.

MR. BROWER: The one thing you say was that in the record was simply that slides 34 and 36 present July 7, 2010 --

MR. SPELLISCY: Yes.

MR. BROWER: -- as a date, anyhow, from which damages may be -- when the claim can be considered to have arisen and damages potentially measured from then. You said otherwise it was August 5th, also of 2010?

MR. SPELLISCY: Yes.

MR. BROWER: Right, okay.

MR. SPELLISCY: In all of the materials submitted prior to October 17th, it was August 5th.

MR. BROWER: I see. Thank you.

THE CHAIR: But that applies only to the 1106 claim. It does not apply to the others where we have the September 17th, 2010 valuation

date or breach date on slide 34.

That was not changed. We will of course give the floor to the claimants afterwards, but do I understand this correctly?

MR. SPELLISCY: Yes, I think that is fine. The date we're talking about here is the 1106 part. Obviously one way that the Tribunal could go would be to hear the other aspects of the damages claim, but I think that that gets to a point of inefficiency, because if we have to have the damages experts come back anyways to discuss this new breach to this new date of valuation, the new dates of the alleged breach, and if we have to have some fact witnesses come back to be examined on the question of when that harm was actually suffered, then there doesn't seem to be much point in doing it now, because we are going to require an extra hearing day, anyway, later.

MR. LANDAU: Can I just ask? As I understand it, the issue which you raise turns upon whether or not the valuation date has changed.

And if the valuation date has changed, then, as I understand it, what you're saying is that causes due process issues, because that will impact directly on the quantum evidence.

But if -- I don't know whether this is the case, but if what is being said in these slides is that the 7th of July 2010 is a date where the events giving rise to the claim first arose, and if that is -- that's not being put forward as a valuation date, then there wouldn't be a due process issue.

MR. SPELLISCY: Well, I think that will come down to the claimant to clarify what they are trying to do.

Certainly the way that they have presented all of their arguments to date is to line those two dates up.

MR. LANDAU: I see.

MR. SPELLISCY: So in every case you have, as they say in their reply memorial in paragraph 824, they say the date of the breach, the date the claim arose, the date of the breach, is August the 5th, and then their expert then I think values from that. So my understanding is they have always lined that up.

I think if their explanation is, No, no, no, we still intend to value from August 5th, although we claim the date of the breach is July 7th, then I think it is a bit of an odd

situation. We would have to look at that.

But that is certainly never how they presented it and certainly not in their October 17th submission that they have withdrawn how they presented it. They lined those two dates up.

THE CHAIR: Any other questions from my co-arbitrators? No. Then can I give the floor to the claimant to comment?

FURTHER SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Yes. Thank you very much. Again, all of this would have been so much easier if Canada had advised us on Friday, by the deadline, of some of its concerns. We would have had clearer rules and approaches to go with here.

I believe the Tribunal, first of all, has very correctly identified the issues. We gave a slide about an issue with respect to when the breaches arise with respect to the timing of this arbitration.

But I also point out that the document that we're talking about, which Mr. Spelliscy has raised so much concern about, is a document raised by his own damage expert. BRG

123 means that it is a document raised by Mr. Goncalves, who is here in the courtroom today, and it is a document that they brought. It is Canada's document that they know about, and he is complaining about the effect of a document brought to the attention of everyone by his own damage witness in his own rejoinder damage report.

That, to me, is perplexing, that somehow now that Canada has objected to its own evidence. It is just like this issue with subsidy. Is it there or is it not there? We don't know. They won't tell us.

Here we have a situation, again, they object to us discussing their own documents. How could that possibly be? We will talk. We will talk later today in response to the issues raised this morning by Mr. Spelliscy, and I believe that when we go through that we're going to have a much better understanding of what we can or cannot do, because it seems to me perplexing.

If the suggestion of Mr. Goncalves is that he is not capable of being able to make any change based on hearing testimony or questions from the Tribunal, then he's probably the wrong expert to be before this Tribunal, because that is what

happens with valuation issues. They listen to each other, they narrow the issues, and they change calculations based on that.

But, in any event, we will get there. For this purpose of this objection, which is I think nothing but an idea to stall for time, to be able to have time to respond to our opening, which I hope this that is not what this is, the fact of the matter is this document which he raised objection to, are we now going to strike part of your rejoinder report so this document isn't here? Is that the idea?

The document BRG 123, and I have a copy of Mr. Goncalves's report in front of me, is referred to at page 16 of the report, BRG 2. If you want to go there, it is -- it may not be necessary, because we're not expecting the valuation witnesses today so you wouldn't have their materials out.

But on page 16 he refers to this e-mail, an e-mail from Mr. Michael Volpe of GE to Mark Lord from Mesa of July 7, 2010.

Now, how could that be an objection? How could that somehow have a due process? The only due process issues here are the

effects that we're having as a result of this harassment. It is entirely inappropriate and we shouldn't be wasting any more time for these scurrilous matters.

If the issue is that we are concerned, I can tell you without question that this is about the timing of the claim, which is what, in fact, my evidence was -- sorry, my statement was. The evidence is from Canada. I can't see how they could have any objection to that. We should not be wasting any more time, and with all due respect I think it is quite clear that we need to put Canada on to put their opening so that they can't get any benefit from this delay.

MR. LANDAU: Sorry, Mr. Appleton, before you -- you can speak from there?

MR. APPLETON: Yes, sure.

MR. LANDAU: I just want to be clear on what your client's position is in terms of two issues, firstly, the valuation date for Article 1106 claims.

MR. APPLETON: Yes.

MR. LANDAU: And, secondly, the timing issue with respect to the six-month waiting period, as a preliminary -- as a separate issue.

So on the first of those, do we take it that paragraph 824 of your reply and, for example, 832 remain as pleaded? 832 says harm first arose from these breaches on August 5th, 2010. 824 says:

> "The dates on which breach and damage for each NAFTA article first arose are..."

So the point of the question is: Is the 5th of August 2010 still the valuation date as asserted by your client?

MR. APPLETON: From the perspective of the point of whether or not the breach arose more than six months earlier --

MR. LANDAU: That is not the question.

MR. APPLETON: I know that.

MR. LANDAU: I asked you just the question on valuation first.

MR. APPLETON: The issue on valuation requires me to give the answer with respect to how we want to approach the valuation evidence, generally.

If you would like to talk about that now, I can start, but I thought that I would

be given an opportunity to consider that and come back in the afternoon.

I obviously have had no opportunity to consider the question this morning, because I had to proceed immediately to the opening statement. I would certainly be happy to give you some impressions if that would assist you.

MR. LANDAU: Forgive me. This is a rather specific question which should be capable of a "yes" or "no", because the issue has already been ventilated between the parties and in front of the Tribunal as to whether or not the valuation date is being changed.

MR. APPLETON: Yes.

MR. LANDAU: So the question is: Is it being changed?

MR. APPLETON: Mr. Landau, the procedural order for the examination of witnesses permits the witnesses to be able to identify differences between their position and also to address issues that arose since they filed their witness evidence.

This letter, BRG 123, being added to the evidence arose since Mr. Low filed his witness statement. He is entirely entitled, in the

context of his direct evidence, to be able to comment on matters that arose after he filed his witness evidence.

I would imagine that BRG 123 would be an issue that he would want to comment on, and as we have already seen -- I don't want to pre-judge his evidence -- we have already seen that he believes that Mr. Goncalves was correct and that, therefore, the date should shift slightly.

As Judge Brower has identified, the shift in the date is relatively minor. It is from August to July. So it is not a large change of the date.

I believe that it is important that the Tribunal have accurate information with respect to knowing when the six-month period ties in, and therefore we provided that information to the Tribunal, which is our view as to when the breach would arise, because by looking at that letter, it would appear now, years later, that they would have the requisite knowledge one month earlier. That was because of the point being raised by Canada and the letter from BRG.

So that's why, in our view, the date for the damage has two composite requirements.

One is you must be aware of a loss -- a breach of the NAFTA. The other is you must be aware of the harm.

The awareness of the harm would appear to have occurred, based on that e-mail at BRG 123, one month earlier than an almost identical e-mail which was received on August 5th, and that's why we wrote in our memorial about August 5th, and it was brought to our attention by Canada and BRG that virtually the same information was expressed in an e-mail of July 7th -- was it July 7? July 7th.

Therefore, that's why we have identified that date. So our view will be that that should be the appropriate date, once it was brought to our attention by Canada, to clarify the issues after their last pleading.

There must be some value to Canada's rejoinder pleading, and we take our call conscientiously to review it and see if we can narrow the issues, and if they put forward and it would suggest a different date, that is where we would take that view.

So our view is that the dates for the purpose of the breach should be the 7th of

July, not the 5th of August, and I believe that it is appropriate, but that will be for the Tribunal to rule.

If the Tribunal decides that this evidence from the valuation expert -- he is the one that identified it -- isn't appropriate, he will leave his whole report in with a date that follows the same information, but would be off by one month.

So that is something that we will need to discuss when we have that discussion, whether or not it is permissible for an expert to comment on evidence brought to his attention after the filing of his report.

So that is why I say that the items are linked and that is the difficulty, but I don't see how, what the purpose of the issue of the six-month period -- that that could be material, since the differences between July and August of 2010 have no impact on the points whatsoever that have been filed, none.

They are all either 18 months or 19 months before the six-month -- or before the filing of the notice of arbitration.

But I wanted to give you what I

believe is going -- where I am trying to get to, but I would like the opportunity to consider these issues, because I think they are important. And certainly by the way Canada has addressed them, they seem to be, I think, more important than they are.

THE CHAIR: Do you have any further questions?

MR. LANDAU: No. I just -- well...

THE CHAIR: We will need to briefly discuss it among arbitrators to see how we go further on this.

Would Canada wish to reply now?

MR. SPELLISCY: I do apologize, but I think I would like to raise a couple of things before the Tribunal goes into deliberations.

THE CHAIR: Yes, yes.

FURTHER SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: One is that BRG's valuation date that they put forward is not this date. It is July 4th, 2011. It is after this. So this date does not come from BRG.

We have talked, and the claimant has said this is BRG's letter. It is not BRG's

letter. It is an e-mail internal to the claimant that the claimant has had since July 5th or July 7th, 2010.

They chose not to base their damages on it. This is not something that BRG found. It came from the claimant's production. It is their document, not our document.

We're not saying that the document can't come into the record. It is already in the record. We put it in the record. But what we are saying is that you can't change the valuation date that you propose one week prior to the hearing. And that was what the Tribunal's ruling was.

And I have scanned through that answer and I actually didn't see a "yes" or "no" to Arbitrator Landau's question, but from the answer, it appeared to me that the answer was, yes, they are changing the valuation date.

I think the Tribunal in its letter was clear that doing that would result in a modification to the expert evidence that would pose a risk to Canada's due process rights.

So what should we do? We have this part of the hearing at a future date if it is necessary. That was a relatively simple choice for

the claimant to make. Instead, it filed a one-sentence letter that said: We withdraw.

It didn't raise the point about, Well, we think we can do this in response. It is clear now that what they are intending to do was to raise the exact same changes that they made that were disallowed in writing a week before and that they are intending to do it on the stand. So we have exactly the same due process concern.

This is not about what is permissible. This is not about a response. It is about the timing of when you do things, and it is about the timing in the procedure and procedural rights.

So if they want to change their valuation dates because they think that is important, fine. We will send Mr. Goncalves and Mr. Low home and we will have that part of the hearing at some later date, if it is required. We're amenable to doing that.

We think of course that changing it a week before, you could have -- let's remember that the BRG expert rejoinder report came in July, and the claimant waited until a week before the hearing to raise this.

Thank you.

THE CHAIR: Thank you.

Mr. Appleton, are there other things that you intend to tell us on this issue, on this procedural issue, other than what you have mentioned now, or have you said what you wanted to say?

It is just for us to understand the scope of what we need to decide now.

FURTHER SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Again, Madame President, as you know, I haven't had the opportunity --

THE CHAIR: That is why I am asking you, yes.

MR. APPLETON: So I am sure it is likely that I will have other points to discuss with the Tribunal about this larger issue. I would have assumed we would have done that sometime perhaps at the end of the day today so the Tribunal would have been able to determine it tomorrow.

So I would still like that opportunity, because I believe there are issues that need to be done and we need to have some ground rules to understand some things.

For example, what's to happen if a

witness raises an issue? Are we going to be excluded -- once an item is in evidence, in testimony, it will no longer be able to go there? Are we now no longer able to talk about documents that are already in the record?

What are we to do with the normal process of the rule that says -- all of these things.

THE CHAIR: I think you have answered my question in that you have not --

MR. APPLETON: Yes, I need to work through.

THE CHAIR: -- not finally answered the topic so far.

MR. APPLETON: Yes, I need to work through this.

THE CHAIR: That's clear. So let us just have a brief conversation of how we go further about this, because we also have other things to do today and we should make sure that we make progress.

We will just take a break now and the Tribunal will confer.

--- Recess at 11:54 a.m.

--- Upon resuming at 12:21

--- Reporter change, Lisa Barrett

THE CHAIR: We have considered the issues at this stage, and this is not a ruling; this is an attempt to clarify things and tell you a few things how we understand it at this stage and at the same time ask some questions.

It seems to us that we must distinguish the issue of the six-month period computation and the issue of the damage calculation. The six-month period does not affect the damage expert evidence, and, therefore, we do not consider that to be an issue now. And it seems that this is agreed from looking at the nodding on both sides.

So I will concentrate now on the damage computation. The issue arises with respect to the claim for 1106 only. We understand, and, of course, the client will correct us if our understanding is incorrect -- we understand that there is a change in the valuation date in what we can discern from the explanations, because in the reply memorial, paragraph 824, 832, for example, it is clear that the valuation date is August 5th and not July 7.

Now, we'd like to have

a confirmation of this. It is true that the procedural rules that we apply here provide for an expert witness to have the opportunity in direct to address matters that have arisen after filing the expert report or the witness statement and also to address matters that arise out of oral testimony that was given before.

That is not the question. The question is: It seems to us that changing the valuation date goes beyond this exercise that is accepted in the procedural rules of addressing evidence that was put in after the expert's report. So we have a question for the claimant about the change of the valuation date.

Assuming the claimant were to say that the valuation date for 1106 is, indeed, changed, then we have a question for Canada. There are still five full days with 24 hours each day until we hear the damage experts. Can your expert run a computation with a different valuation date? And if he cannot in this time, why not? So that is the question to Canada. It's a hypothetical question for the time being.

And then what we want to say, as a general matter, is that we would prefer at this

stage not to have to bifurcate for reasons of efficiency and costs. At the same time, it goes without saying that we will comply with due process, and whatever needs to be done for that, we will do.

So that is all that we can say right now. Maybe you think about these questions over lunch, and you come back just after the lunch break. We will break now because it doesn't make sense at this hour to start with Canada's opening, and we will start, first, listening to your answers to these two questions, and then we will continue with Canada's opening statement, and we will start at 1:30.

I hope this was clear. If it is not, then you may ask any clarification that you wish at this stage. Mr. Appleton?

MR. APPLETON: I think that was clear.

THE CHAIR: Thank you. Mr. Spelliscy? Fine, then have a good lunch.

--- Luncheon recess at 12:25 p.m.

--- Upon resuming at 1:32 p.m.

THE CHAIR: I hope you all had a good lunch, and we can resume now. We first have

the two questions that the tribunal has asked from counsel, and then we will move to Canada's opening argument.

Mr. Appleton, you have the floor for the question.

MR. APPLETON: Actually, Mr. Mullins will be speaking for me. I'm going to rest my voice for a minute.

THE CHAIR: Fine. Mr. Mullins.

MR. MULLINS: Thank you, members of the tribunal. To answer your question, we want to make the record about exactly what happened, because I think there has been some confusion. What's happened is, based on the last statement from the expert for Canada, our expert looked at his calculations. There was no change in methodology. He just looked at certain complaints and issues raised by the expert for Canada.

This is not uncommon where experts get into what they call a hot tub. I'm sure you are familiar with the program where sometimes we would have hearings where you'll have experts talk at the same time, and the tribunal will ask questions. We feel this is appropriate and consistent with the tribunal's orders and obviously

makes a lot of sense. What doesn't make sense is that someone's locked into position and then is not able to react to a legitimate complaint from the other side.

The irony here is that all the changes we're talking about go to the benefit of Canada. Frankly, we were shocked that they made any complaints about this because, by making the changes at issue, it lowered the damages in every category. For example, in the 1106, it decreased the damages by roughly $1.5 million.

For other things like the change in discount range, the change could be $20 million to the benefit of Canada, and for 1105, close to $90 to $100 million. Obviously, these are substantial damages being sought. We were shocked that Canada was complaining about the fact that this is to their benefit.

And we're fine if they want to take the higher numbers. What we don't want is the following: That our expert witness is cross-examined and says, "Isn't it a fact that that your discount rate is wrong?" And then he can't answer because of some ruling from the tribunal about some due process violation. Our experts

should be able to say, "Well, based upon the different calculation, this is how you come out," or, "Based upon a different change in the 1105, this is what the change in damages would be."

We don't think this is inconsistent with what tribunals have done in the past. We think it was consistent with the order.

We are extremely concerned that we will have our due process violation -- or rights violated if our experts cannot react to a legitimate cross-examination question that was all premised on the idea that he was simply reacting to what their expert did.

That's our concern. Again, if the answer is we're going to keep the higher numbers, that's fine, but then I'll just say we are not going to get cross-examined on it. We're trying to get the truth here, and we're perfectly happy to try to get the truth and have credibility through our experts. So we are perfectly happy to have him respond to questions and explain on certain assumptions how the damages would be affected. That's our position. So we ask that we change the valuation date. It's really a matter of reacting to what their expert did. We're not changing

methodology. We're just simply saying that certain things that they raised -- and my expert will do it much better than I'm doing it right now -- but he can explain why things change and how the effect of it, but, again, I can tell you, because we looked at this over lunch, it's all to the benefit of Canada.

THE CHAIR: I don't think this is noted, but the valuation date to me, in a damage computation, is an important date. I mean, it may play to the favour of one or the other, but it's an important date, and, therefore, I still must say I understand what you're saying about the reaction to evidence provided by the other side. There is no issue with that. What we would like to understand is: Have you changed your valuation date or not? Or maybe you tell me. I don't want to tell you now, and then we'll go ahead like this.

MR. MULLINS: I'm sorry. I kind of jumped two steps ahead. I am less concerned about the valuation date. It is a $1.5 million issue. We are perfectly happy to keep the date that our expert originally picked.

Our bigger concern is the other things that are our letter of corrections go to

much more significant issues, and we don't want any ruling today or right now to, in effect, say, "Okay. You can't make any of these evaluations, or we're going to be able to cross-examine you and say your expert didn't know what he was doing, and he can't respond because he was trying to correct it."

So I know you are focused on the valuation date, but there are much more things in that letter with much more significance. Again, millions of dollars to Canada's benefit. So I just want to make sure that our expert is being able to say, "Look, yes, if you're right, Mr. Gonzales, this is how the damage is affected, and this is how we get there." We thought we were giving them a favour by telling them upfront. We could have waited until the hearing until they got cross-examined. And now we are being accused of all kinds of, you know, scurrilous acts.

So I hope I answered your question. Again, I think the 1106 is sort of not a major issue when you are talking about a $700 million claim. It's a $1.5 million issue. It's really sort of the other issues that are much more significant, and that's all we're saying. That's why we are raising it now, because that's what we

wanted to talk about, because we knew there were potential ramifications based on what you will be ruling on, and we also think, that Mr. Gonzales has had plenty of time to calculate. We've given him this analysis. He has had it now. As you pointed out, he's got this week, and he'll have the benefit of the testimony. Both experts are going to be here. I imagine they may change their ideas on some things based on how the testimony goes. We'll be asking questions, and I assume you're going to have some questions, and they may have to change their analysis based on what you've asked them. That's why we're here.

THE CHAIR: Thank you. Mr. Spelliscy, on the question from the tribunal?

MR. SPELLISCY: I guess my answer to the question from the tribunal is going to necessarily change a little bit because of what I just heard, because it now strikes me that we are not just talking about the change in the valuation date for 1106. We are now talking about the claimant wanting to do, at this hearing, all of the corrections that it previously did and to introduce them, and that is a huge concern.

We're not now talking about simply

running a different valuation date. In fact, they said they'd be willing to give that up. We're now talking about everything else that they tried to do, all of the due process concerns that we identified. And so the question will be: Well, when is that coming? How much time will we have?

A week is not enough for us to handle that. Two weeks was not enough for us to handle that consistent with our due process rights. The tribunal recognized that on October the 20th, and I think that the idea that somehow this is a question of the claimant's due process rights is a red herring.

The reality is the tribunal said, "You are allowed to put in this evidence, but if you're going to put in the evidence, we'll have the quantum hearing later." They didn't pick that option. They said, "We will withdraw it." We didn't prepare any questions. We didn't prepare any responses. We took them at their word that they were not going to be introducing this evidence, and so we are not prepared to do it, and certainly I think, you know, in terms of what could be done on the 1106 valuation, I think now that that question isn't so much relevant anymore

because it is obvious that the claimant wants to do far more than that.

I think also on the question of the response, it is pretty clear that what this is is a sur-reply, as we said in our letter. The claimant had Mr. Goncalves' report since July. If it reviewed that report, it could have made a request sometime in the intervening four months to make those changes. We could have then had legitimate time to respond and have our expert review it. We were denied that because they sat on it. They sat on it until a week before, and they sat on it based on documents that they've had in their possession for years. And they chose to do it this way.

So I do want to somewhat try to respond to what you had actually asked, and I think in terms of thinking about, well, what can be done, I think, you know, sure, if Canada worked 24 hours a day for the next five days and ended up exhausted and tired at the end, we might be able to do this, but I don't think due process really requires that.

I'm sure that our expert could put something together, but the question is: What can really be done consistent with due process? What

can be done to help us understand what the claims are being made?

And I think to do that, I think you have to understand the extent of the changes that are being suggested here. We laid all this out in our letters. The claimant responded in a long letter of its own, and the tribunal ruled already. These are significant modifications to the expert evidence. If the claimant wants to introduce them, fine, we will have an opportunity to respond, and we'll do that separately.

What we can't do that is this week because what it would require is not just communications among Mr. Goncalves and Mr. Lo, but we are also talking about changes to how some of the cross-examinations are going to go, to the questions that will be asked.

In order to actually try to do this, what would have to happen is the native Excel spreadsheets would have to be produced; they were not. All we have is a paper version. Our experts would then have to audit them line item by line item.

When the last valuation dates were changed -- and that was in the reply submission of

the claimant, and I note that this change wasn't made, even though other valuation dates were changed there -- our experts went through and did a line-by-line audit and found mistakes and errors. They have to be allowed the same opportunity to do that, and they can't do that while they're here trying to prepare for their testimony, listening to relevant testimony that they may have to respond to.

It cannot, in our view, be done, and so I think ultimately where we are at this point right now is we are back to the exact same question that the tribunal posed to the claimant in its October 20th letter. If you would like this information in the record, then elect bifurcation. If you would like it not, then withdraw it.

The claimant picked withdraw it. I think we're back to exactly the same question that the tribunal asked the claimant: Would you like this information on the record? It seems to me the answer from them is "yes," which means that, as much as the tribunal wouldn't like that to happen, as much as we prefer to have this hearing all at once, I don't think there's a choice that's been left. It was the claimant who proposed to

proceed this way. We either proceed this way, and it has the effect, but I think now we have to take a real look and say, "Okay, at this point, you are essentially electing to bifurcate."

THE CHAIR: I think, unless my colleagues have questions, I would briefly give the floor to Mr. Appleton and again to you, and then we stop this debate and go over to the openings, and the tribunal will obviously have to consult on this issue because it is not going away. It is becoming worse. So we certainly need to do the right thing, but before we close this debate for the time being, Mr. Appleton, or Mr. Mullins, would you like to react to what you just heard?

MR. MULLINS: I'd be delighted to. I have not heard counsel deny that this isn't in Canada's favour. He didn't deny that.

I also have not heard, and I think I heard to the contrary, that they don't intend to cross-examine my experts on these issues. So the plan, I think, is that what he wants to do is cross-examine on issues that his expert came up and not allow our expert to respond. We gave them this information ahead of time, and we're being punished for it. I cannot imagine, had we not done that, we

would be in this situation, because our expert would have had to deal with it. Maybe they would have complained then too. At this point, I don't know. There has been no change in the methodology. None. I cannot imagine why Canada is raising this issue. Are they really going to cross-examine our witness and look at the figures and try to increase the damages to their client? Is that the plan? If the answer is they're willing to accept our original numbers and they're willing to concede that they're not going to cross-examine on any of the changes and they are willing to accept the numbers, then that's fine. But they can't have it both ways. If they are going to attack the credibility or analysis of our expert, he's got to be able to respond to that, especially when it's to their favour, and that's our concern.

We've been completely open. We've given them our analysis. They've had this since October 17, and they've done any analysis they need to do. So our position is we can leave the reports as it is, and they'll agree that they're not going to go into those issues, or they can take the analysis we've given them and deal with that. But they can't have it both ways. We certainly don't

think there is any reason to bifurcate. The idea that an expert can't alter his analysis during an arbitration where we're going to have witnesses, and they're both here, why are they here?

You're here. You're going to ask questions. Counsel is going to ask questions. They're going to be cross-examined. There is always going to be some give and take. And the idea that everybody is locked in, to me, is patently absurd. But we're willing to do that. But we are not going to have a situation where they cross-examine our guy and he can't answer. That is not fair and violates our rights.

THE CHAIR: Any reaction to this? It's not an obligation; it's an opportunity.

MR. SPELLISCY: I think I will try and be brief. The claimant's counsel is saying this is to Canada's benefit. I don't know that. I haven't done the evaluation. Whether the corrections in the calculations are done right, I don't know that. I haven't done that. I haven't looked at that. Neither has my expert. They're talking about, well, we reduced the damages by this much. Maybe a correct reduction based on their new valuation dates would be far greater. That's the

concern here.

Now, on the idea of cross-examination and whether we were going to question, of course we were going to question their witnesses on the theories that they presented. He presented a valuation date. We will question him on that.

The question now is he presented a theory of Article 1105 damages which is totally different than the theory they're now advancing. Of course, we would question them on that, on whether that made any sense. He presented new evidence. That's not -- documents upon which to base a theory that aren't in the record at all that have been in the claimant's possession for years. We have pointed out again and again those documents should have been in the record, but they weren't. So it comes down to it's not a question -- and the claimant's counsel keeps coming back to this. It's not a question of the claimant being allowed to respond. It's a question of the timing of that response and allowing the other side an adequate opportunity to evaluate what was done. And that's what the issue is here. We are, in essence, sitting here right now arguing about exactly what

we argued about when this was filed on the 18th and the 20th.

The claimant is just raising the exact same positions. The tribunal considered those positions and made the ruling it made. The claimant is asking us to forget that that ruling has come out that you shouldn't do that. We can't be in a position. And to say that we've had this since October 17th, but on October the 20th or October the 21st, the claimant said, "We withdraw it." Well, we're only five days after that, and to suggest that we should have been working on something that the claimant withdrew from the record, suspecting that they were going to try and do orally what they were told they couldn't do in writing, I think, is ludicrous. Thank you.

THE CHAIR: We will leave this issue for the time being. We will, of course, take it up again relatively soon because the parties need to know how the hearing will evolve, but for the time being, we will now hear Canada's opening argument.

MR. SPELLISCY: I think you probably have them behind you, sitting on the counters behind you.

I will raise one technical issue first. I'm told by some of the people on our side in the back of the room that they are actually having difficulty with the split screen, seeing some of the slides because they're small. It is not objectionable to anybody. While people won't be able to see my handsome face while I'm arguing -- I'd be fine to have my disembodied voice up there on the slide on the whole screen. People will still be able to hear.

THE CHAIR: Is this fine with the claimant? I think we did this before just to make sure that the people in the viewing room also see what happens in the hearing room, but if this is not a good solution, then we can change, at least for the time being.

MR. MULLINS: We have no objection to opening. But certainly during examination, we think we're going to have to have the split screen.

THE CHAIR: We'll go back to the split screen during the witness examination and see how it works then, absolutely.

MR. SPELLISCY: Well, good afternoon again.

THE CHAIR: So now you have the

floor.

FURTHER SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: We heard a lot this morning of allegations. We heard a lot of characterizations about the facts. What we didn't do is walk through a lot of the actual evidence that's so far on the record. So I think one of things that you'll see in the presentation that I'm about to give is I'm going to walk you through some of that evidence. I'm going to walk you through what's already in the record, and in that way, when you start to hear what the witnesses are saying and when you hear what the testimony is here, I think that will give you a little more context, and I do note that some of what I will reference today is confidential information. I will take the appropriate precautions and break at the time that we need to do that. I think there are two instances where we need to do that. I think they are about an hour -- just over an hour in, but I will certainly alert for the feed to be cut off at that time.

And with that, let's get started. Over the course of the next couple of hours and, in fact, over the course of this entire week, what we

hope to be able to show you is why this claim simply cannot proceed. The claimant is attempting to bring claims to arbitration here which are excluded from the scope of Chapter 11 because they are not the acts of government or acts of delegated governmental authority because they have heard prior to the claimant even making its investment in Canada, because they are explicitly excluded from Chapter 11 by Article 1108, and because they did not cause the claimant any damages.

In fact, as I will get to later, the only claim that is within the scope of the obligations in Chapter 11 is the claimant's allegation, at least it made in its written submissions -- we didn't hear much about it this morning -- that the Bruce-to-Milton allocation process, the June 3rd directive, violated Article 1105. But that claim is barred as well because as I will explain to you, the conditions of Canada's consent to arbitration were not respected by the claimant, and as a result, this tribunal lacks jurisdiction to hear this claim.

Now, this might seem like a drastic result in the end, but what I hope to be able to show you is that, in these circumstances,

it is not only an appropriate conclusion, but it's the only possible one that you can draw as a matter of law. But even if you did go further and even if you did consider claims of the claimant here, we will show you that there is nothing to them as a matter of merit.

Let me take a little more time to explain that point: This is a case which is, as the expression goes, about sour grapes. It is a case about an investor who took a business risk and is unwilling to accept that that risk did not pay off. It is a case about an investor who wanted Ontario to buy what it was selling, and when it failed in the procurement process that it applied to, it looked for someone to blame. It's pointed the finger at the government, but as the evidence in the record shows, it has only itself to blame for its failures.

Indeed, while the claimant would have you believe -- and it seems so this morning -- that the FIT Program and the GEIA are the source of its problems, the record shows otherwise. This story actually starts long before any of those measures occurred. About a year prior to any of the measures in question, the claimant bet over

$150 million in the form of a nonrefundable deposit in a turbine purchase agreement with General Electric that it would be able to develop a massive wind farm, not in Ontario, in Texas, which is known as the Pampa Project. At the time that it did so, the claimant had no prior experience developing wind farms, no contracts to sell the wind power, no permits, approvals, or anything else. There weren't even the wires to carry the electricity.

Now, this was certainly the claimant's risk to take, but not all risks pay off, especially in a nascent industry like the renewable energy industry, and it turned out the result for Pampa was exactly as one would expect. It failed. And this is how the claimant ends up in Ontario, carrying a $150 million albatross around its neck.

So what did the claimant do in those circumstances? Did it approach the Government of Ontario, trying to negotiate a specific commercial deal? No. Many other companies did, and one of those companies we've heard a lot about this morning, Samsung. Samsung was able to successfully conclude an investment agreement with the government. The claimant, however, never approached the government about

an investment agreement.

Instead, it applied to the FIT Program. So what was that program? It was a standard offer procurement program that Ontario directed a state enterprise called the Ontario Power Authority to run. The goal of the program was to procure renewable energy generation, but to do so also in a way that stimulated jobs in the local economy. Applicants to the FIT Program competed with each other for access to space on the existing transmission grid. So in essence, when the claimant decides to apply to this program, what it decides to do is to compete for limited transmission capacity with hundreds of others of experienced developers, all with the same idea, all with the same hopes and dreams. And in a standard offer program like the FIT Program, developers can't compete on price. They can't compete on other terms that allow themselves to differentiate. Instead, they are evaluated on the quality of their applications with respect to pre-existing specified criteria.

Now, this morning we heard almost nothing about the claimant's applications to the FIT Program. The fact is, as the evidence will

show you, they were poorly done. They were sloppy. They seemed to rely on an assumption that they would be well received simply because of who was involved, Mr. Pickens and General Electric. That was not enough. The FIT program was administered without regard for who was submitting it, without regard for reputation and name.

The sole question for the Ontario Power Authority in scoring the applications was whether the required information was provided. The claimant's applications were scored by the OPA in a process monitored by an independent third party, exactly as they deserved. And as a result, they were not highly ranked in the process. And when the time came to hand out contracts, they did not get one. And ultimately that is what this case is about. On July 4, 2011, the claimant was not offered a FIT contract. If they had put together better applications, they may well have been.

And I think that this is an important part to remember. This is not a case where the claimant had an operating wind farm and the government decided to revise the contract after all the capital was expended. This is a case about a claimant simply failing in the procurement

process in which it applied to. The claimant asked that this tribunal find that this failure results from a failure of NAFTA Chapter 11.

As I will show this morning and as the evidence will prove this week, its claims are meritless.

For example, the claimant alleges a breach of the National Treatment Article, Article 1102. But in order to prove such a breach, the claimant must prove that it received less favourable treatment than the treatment accorded in like circumstances to Canadian investors.

But here, as we heard this morning, the claimant compares itself to entities which are not Canadian investors; they are the investments of U.S. and Korean investors. Such investments cannot be the basis for claim under Article 1102.

And now, as we'll find out later, there are indeed Canadian investors who actually applied to the FIT Program and applied in the same areas that the claimant did. The claimant ignores those, and it does so for an obvious reason. All applicants to the FIT Program received the same treatment. There was no discrimination.

And so instead of looking to the Canadian nationals who were accorded treatment in the same circumstances that it was, the claimant tries to stretch and distort Article 1102 into something that it is not. The tribunal should deny those efforts.

The claimant also alleges a breach of Article 1103, and that's, in fact, what they spent almost all of their presentation on this morning. That's the MFN clause, NAFTA. In order to prove such a breach, the claimant would have to prove that it was accorded treatment that was less favourable than that accorded in like circumstances to an investor of some third state. The claimant cannot do so.

In its written submissions, it referred to the treatment accorded to NextEra. NextEra, formerly known as Florida Power and Light, is a US company. It is not a national of a third state. It is a US national.

It also spent much of its time talking this morning about the Korean Consortium, and, well, Samsung and the Korean Consortium are obviously nationals of the third state. The claimant tries to get you to understand that the

one fact that is important is not. The Korean Consortium was not seeking a contract under the FIT Program like the claimant was.

Again, there are investors from third states who were FIT applicants in this program, like the claimant, but the claimant doesn't point to those. And, again, the reason is obvious. They received the same treatment that the claimant did. The FIT Program was designed and implemented on a nationality-neutral basis. There is no violation of Articles 1102 or 1103 here.

The claimant also alleges that the treatment it was accorded violates the customary international law minimum standard of treatment in Article 1105.

Now, in order to prove such a claim, the claimant is required to show how the treatment that it was accorded is of the egregious sort that sort of shocks the judicial conscience. The classic example is a denial of justice. To meet its burden, though, in this case, the claimant conjures up a conspiracy theory that defies reason and suggests distorted interpretations of the FIT rules and the FIT program that do not withstand scrutiny.

Further, it ignores -- and it ignored this morning -- the sloppiness of its own efforts. It demands that it be given treatment that would be contrary to the expectations of everyone else in the FIT Program, and it ignores all the legitimate policy reasons why the FIT program developed the way it did.

Ultimately, the claimant can offer all the speculation it wishes, make all of the unsupported allegations that it wants, and cast all the aspersions it desires. Nothing changes the fundamental facts of this case. The claimant was afforded a level playing field. There was no favoritism, no unfairness, no discrimination, and no manifestly arbitrary or other egregious act.

The claimant simply failed to succeed. NAFTA is not an insurance policy to protect investors from their own bad business decisions or their own mistakes. There is no breach of NAFTA in this case.

I would like to pause here and explain how I will structure the remainder of my remarks. In the next part of my presentation, I will give you an overview of some of the relevant facts and walk you through some of the relevant

exhibits and documents already in the record. Then I will highlight, to the best my ability, at least, which of the measures are being alleged to be a breach of NAFTA.

Now, this is certainly a little bit complicated because, in the written submissions, the claimant seems to challenge everything from the Electricity Act itself to conversations and meetings that the government had with other investors.

They were much more focused today in their oral remarks, but I will at least highlight in their written submissions the challenges that they made so that we can understand perhaps from them if they are, in fact, dropping some of these claims.

In the next part of my remarks, which will be the third part, I will explain why the challenge to the measures are outside of the scope of Chapter 11 and not within the jurisdiction of this tribunal.

And finally, I will discuss why, even if this tribunal were to consider the claimant's allegations, did not have any merit, and even if they did, why the claimant's request for

damages, at least as what stood before today, is grossly overinflated.

So now let's go to the facts. And I won't attempt to go through all of them here. There are too many, and they are fully detailed in our written submissions. Rather, what I will do here is try to give you some signposts. And in this regard, I will note that, in the materials that we have provided to you, there is a timeline at the back. It's rather large; it's been folded in. I won't be specifically referring to the timeline at the end, but if you want to take a look at it, at the end of the day, so that you can situate yourself on where some of these key events are, then I think you are more than capable of doing so.

There will be four major areas that I will cover today in my discussion of the relevant facts. First, I will talk to you about the FIT Program, which is a program to which the claimants applied. Second, we'll discuss the Green Energy Investment Agreement with the Korean Consortium, which was being developed at the same time the FIT Program was being developed. We'll then talk about the claimant's applications to the

FIT Program, and finally we'll come to the Bruce-to-Milton allocation process, which would have been the first time that the claimant could possibly have gotten a contract.

So let's start with the first, the FIT Program. To understand the story of the FIT Program, we need an understanding of where Ontario found itself at the beginning of the new millennium in terms of its power systems and the challenges they presented, both as a matter of infrastructure and as a matter of the environment.

By 2003, Ontario was faced with electricity growth, but in the past decade, it had not added significant generation capacity. At the time, its generation assets were largely nuclear and hydro, but it also was reliant upon coal. That accounted for about 25 per cent of the capacity, and the new government promised to close the coal-fired plants for health and environmental reasons. As Sue Lo, who is now an Assistant Deputy Minister at the Ontario Ministry of the Environment and who was previously an Assistant Deputy Minister at the Ministry of Energy explained:

> "Ontario's was a system that was heavily reliant on

coal-burning generation plants, which polluted the air and possibly increased the risk of respiratory illness. Studies that the Government of Ontario had done indicated that the potential health and social costs of relying on coal were in the order of billions annually." [As read]

So there was a desire to get rid of coal by 2014. But, of course, you can't just take a major source of electricity supply out of the grid. You do that, and the lights go off. So in deciding to eliminate coal generation, the government knew that it would need to procure new types of generation as well. Ontario looked to refurbishing nuclear power plants into natural gas facilities, but it also decided, as many jurisdictions had, to make a push for green renewable energy sources.

And I think it's important here to step back and also understand the broader context in which all of this decision-making and this

pushing is happening. At the same time these decisions are being made, the world economy is falling apart in the financial crisis. By the time we get to the fall of 2008, things are bad. Banks were failing, including some of the largest in the world. Unemployment rates were exploding, and whole industries, like the auto industry, were on the verge of collapse, requiring government bailouts.

As Canada Governor-General said in her speech from the throne at the beginning of 2009, it was a time of unprecedented economic uncertainty. The credit crunch had dragged the world economy into a crisis from whose pull we cannot escape. The impacts of this were being felt everywhere but particularly in Ontario which had a large manufacturing sector. When credit dries up, people can't buy goods, and when they aren't buying goods, then the business of making them dries up as well. And this is what happened in Ontario, idling plants, idling workers, and creating a unsustainable situation. As Sue Lo has explained:

> "In these circumstances, Ontario determined that not only would it use Green

Energy to fulfil its power needs but that it would use its purchasing power as a government to acquire that energy in a way that stimulated the economy and created jobs and investment opportunities in the province." [As read]

Now, I just want to pause on that policy point. A government's purchasing power is one of the most effective tools that it has in the times of economic crisis to stimulate growth and create jobs. There is a reason why, in Canada, in the U.S, and elsewhere, stimulus programs during the financial crisis included infrastructure projects. It is because government money can be spent in a way that puts people back to work. The ability to do this is a fundamental tool in the government's toolbox. That is also why governments the world over have carefully circumscribed any international procurement commitments that they've entered into.

So in the face of this context of the need for new energy but the fiscal crisis,

Ontario embarks on a procurement effort to change the face of energy production in Ontario, and there were several aspects to this initiative.

The one that has the most relevance is, of course, the FIT Program, because that's the one the claimant applied to. And so the other is a Green Energy Investment Agreement, and we'll get to that in a little bit. Right now I want to focus on the FIT Program, not an agreement that the claimant wasn't a party to.

The FIT Program finds its origins in Ontario's Green Energy and Green Economy Act of 2009. That Act was introduced into the Ontario legislature and was made public on February 23, 2009, and the proposed escalation added Section 25.35 to the Electricity Act. This article authorized the Minister of Energy to direct the OPA to establish a FIT Program.

And as we can see on the slide, that article makes clear that the FIT Program was to be designed to procure energy from renewable energy sources and was expressly designed to be a program for procurement.

I think here's a good time to stop just for a second to explain the Ontario Power

Authority. Obviously, we have had a lot of submissions on it, but it is the OPA that's being directed here. The Ontario Power Authority is an independent state enterprise. It is a corporation created by the Government of Ontario and owned by the Government of Ontario. It is created pursuant to the 2004 Electricity Restructuring Act.

The Electricity Restructuring Act amended the Electricity Act by adding to Article 25 to create the OPA, and, among other things, the OPA was to ensure adequate and reliable and secure electricity supply and was given the express power to enter into contracts relating to the procurement of electricity supply and capacity.

That's what the OPA was designed to do: Procurement. And in accordance with its role, when the legislation was introduced into the Ontario legislature for the Green Energy and Green Economy Act, the OPA began its work on the FIT Program and the development of it, including holding numerous stakeholder presentations.

During these sessions, all aspects of the proposed program and rules were discussed, consulted on, evaluated, and considered. Jim MacDougall, the manager of the Feed-in Tariff

program at the time of its development, in 2009, explains:

> "Representatives from all sectors of the energy industry, energy associations, nongovernmental organizations, and aboriginal consumer groups participated." [As read]

In the very first stakeholder presentation to the public, which was held on March 17, 2009, the OPA clearly described what the FIT Program would be.

It said:

> "A FIT Program provides a simple standardized procurement method to contract for renewable energy supply technologies." [As read]

The GEIA was passed and received Royal Assent on May 14, 2009. A few months later, after a summer of public input, meetings, and consultations with all relevant stakeholders, on September 24, 2009, the Ministry of Energy directed

the OPA to create the FIT Program. Let's take a look at that direction.

As we can see from that, the OPA was to establish a Feed-in Tariff program that was specifically designed to procure energy from a wide range of renewable energy sources. One week later, on September 30, the FIT Rules are released, and the OPA opens the process to applications.

So now let's try to understand how the FIT Program was designed to happen. The first step was for an applicant to submit an application to the OPA. The OPA would then review the application for completeness and eligibility. Now, this first stage of the review was designed to consider formalities, really. Are all the right boxes checked? Are all the right parts of the form filled out? It was not a substantive review like the review for criteria points we will discuss shortly, and it wasn't intended in its design to be a major choke point to eliminate applications.

However, intentions do not always play out in the real world, as Mr. Duffy, the manager for generation procurement at the OPA, has testified:

"Approximately 95 per cent of

the applications would have failed and been rejected simply on the grounds that they provided insufficient or incomplete information to establish their completeness and eligibility." [As read]

That's an obvious problem. Remember, the FIT Program is intended to do two things: Help change Ontario over to a Green Energy infrastructure and to stimulate economic jobs and growth. But if 95 per cent of the projects had failed at this first stage, the whole initiative would have failed, as it would not have created enough energy to accomplish its goals. In essence, the consequences of failure of this landmark initiative were understood by the OPA, and so it reached out to applicants and helped them to ensure their applications were complete.

In fact, they reached out to the claimant as well. As Mr. Duffy has testified, if the OPA had not reached out, the applications for the Arran and TTD Wind Projects would have been rejected at the first stage of our review.

Now, let's come back to the

schematic that we had up showing the steps in the FIT Program, and we see that once the OPA had a collection of eligible and complete applications, it then had to figure out how to rank those applications in terms of who would get contracts.

Now, one might ask why this step is necessary. Why couldn't everyone just get contracts? It seems to be part of what the claimant's theory is. Well, to understand why not, one has to understand about electricity. In essence, one can think about electricity in terms of supply and demand. It is generated and it is consumed, but things are more complicated because of the history of how and where it is generated to how and where it is consumed.

First, generations centres are typically far away from population centres, that is, population centres that consume that electricity, so you need a way to transmit that electricity, and in Canada, the distances can be vast. And as a result, when you speak about electricity, it is all about the wires and, in particular, how much can be transmitted across those wires. And in this sense, an electricity system is not all that different from a road

network. You need to have highways in the right places so the cars can get from the places where people live to the places where they need to go.

But the problem is that, unlike with cars, electricity simply can't idle, waiting for the traffic to clear. As Rick Jennings, an Assistant Deputy Mister of the Ministry of Energy, has testified:

> "The challenge of electricity is that, unlike other goods or services that may be procured, electricity, once generated, must be simultaneously transmitted and consumed. It cannot simply be stored away in a warehouse waiting for demand to allow it to be brought out of mothballs." [As read]

What does that mean? It means you have to consume what you generate. Supply must always equal demand. If there is too much supply, the wires can't handle it. They sag; they short out; they fail. If there is too little supply, people flip on that light switch and nothing

happens. So what you need is an electricity infrastructure system and generation resources capable of being flexible, and you need to have the flexibilities of government to respond to changes in demand and supply.

As Rick Jennings explains, this has to be done with three principles in mind: Reliability, cost, and sustainability.

So in considering how to design the FIT Program, the OPA had to deal with the fact that not all projects could come onto the grid at the same time because of transmission constraints. That would impact reliability, and, further, that any system that allowed more generation than was needed would not only lead to such issues, but that it could not, in the end, be either cost effective or sustainable.

What the OPA adopted is the most basic principle of ordering and ranking possible. Get in line, and we'll look at you in that order. But for the start of the program, this would create a race to the front, and then it's a question of policy. Is that what the government wants?

Let's come back to the ideas behind the FIT Program here: To transition to

renewable energy, sure, but also to create jobs and stimulate the economy and to do so as quickly as possible.

And what projects are going to do that? It's the ones that are closest to operation, the ones that are most shovel ready, and a simple ordering by time of filing won't get you that at the start of the program.

As Richard Duffy explains:

> "In an environment of limited transmission capacity, a simple ordering by timestamp would reward those who got their FIT applications in quickly rather than those whose projects were the furthest advanced in terms of development." [As read]

So the OPA creates the launch period for the FIT Program when it opens to applications on October 1, and all applications filed in this time period were to be considered to be filed at the same time, and then their merit-based criteria would adjust their order in the position in the queue.

In short, it was simple: The more points you were awarded, the higher rank you would get, which meant you would be considered for a contract sooner. And in figuring out what those criteria points should be, the OPA looked to its past practices in its past programs and chose four. First, was the program exempt from the renewable energy approval process, which is essentially an environmental approval process?

Second, did the applicant already at the time of application own or have a firm order for major equipment components?

Third, had the applicant successfully developed a similar facility to the project in the past?

Fourth, did the applicant have the financial capacity to successfully develop the project?

These are laid out in the FIT Rules in detail, and the requirements of proof for these criteria were also laid out in the FIT Rules. All of this had been publicly discussed in advance.

Now, in the interest of time and efficiency, I don't propose to go to these right now, but we will come back to them when we actually

look at the launch period applications filed by the claimant.

Let's come back to our program schematic here, at least as it was initially designed, and once the ranking was determined, we see the next stage is whether the project passed what was called the transmission and distribution availability tests, the TAT/DAT.

In essence, these were the initial tests done to see if the OPA believed there was enough existing capacity on the transmission and distribution systems to add the project to the grid.

If you pass these tests, a contract can be awarded. But that's not the end of it, because while the OPA does the planning, it doesn't actually control the wires. So there was still other assessments that had to be done, other tests, before a connection would be permitted, including environmental assessments, but also technical assessments done by the transmitters. As a result, passing the TAT/DAT or even being granted a FIT contract did not guarantee that your project would ever reach commercial operation.

Now, up on that schematic there,

as it was initially contemplated, if the project failed this test, it says it would be terminated, but ultimately some more flexibility is introduced by the Ontario government and the OPA. The FIT Rules designed the Economic Connection Test. So let's talk about that because it didn't factor at all, I think, in the claimant's remarks this morning, but certainly a lot was made of it in the written submissions.

The Economic Connection Test was designed by the OPA as part of the FIT Program to accommodate expansion, if feasible. The FIT Rules provided that the intent of the test was to ensure that the cost of connecting a project that would be borne by rate pairs were reasonable. And so what is key here is that the Economic Connection Test would never have guaranteed anyone a contract.

The question was always whether it would be economic to develop additional capacity, and expanding the transaction system can be very expensive and very time consuming. As I said earlier, every system has its limits, and governments have to make decisions on what could be done based on principles of reliability, sustainability, and cost effectiveness.

Now, other than its intent and purpose, the details of what actual steps the ECT would contain were essentially left undescribed in the FIT Program and the FIT Rules, and the OPA was responsible for figuring that out, and it did so in a series of public presentations by Bob Chow, who will be here this week, including presentations in March and May of 2010.

The first step would be essentially a window to change connection points. This was part of what was called the "individual project assessment phase," and this phase was essentially an opportunity for everyone to readjust to most efficiently use the system resources with the knowledge of what had happened in the first TAT.

So as Bob Chow explains, during this period, companies would have been allowed to change connection points; enabler-requested projects would whose have been able to decide what to do -- I'll talk about what those are in a second -- and generators would be able to decide whether they were willing to bear the cost of paying for upgrades.

Why was this contemplated?

Because when you are applying to the FIT Program, developers would have had no idea where other developers were trying to connect. You went in blind. And so some might have picked a particular connection point, but everybody else might have been piling up on that connection point, not knowing it. Others might have elected to be a request to what is called an enabler, which meant they were seeking other nearby proponents to join with them to share the cost of the connections. But they might find out after the first test was run and after the first results were published that no one nearby wanted to be an enabler with them, and so they had to be allowed to readjust.

The second phase of the Economic Connection Test after everybody readjusted for efficiency was an analysis done by the OPA to see if the expansion was what it believed was economic. But that wasn't the end of it, because the OPA isn't the final approval body. Even if the OPA thought that an expansion could be economic, it would still need to be approved, permitted, and constructed. None of these things are certain. So a project that might even have passed even the second phase of the ECT, again, would not

necessarily be offered a contract and would have no guarantee of commercial operation.

So that's the FIT Program in a nutshell. It was a first of its kind in North America and certainly a first for Ontario. It was an initiative adopted at a great time of great economic uncertainty that had the challenging goals of stimulating jobs while reinventing the electricity system, and it was into this program and this environment that the claimant applied.

Now, I want to mention one other thing that was raised this morning, and that's about the domestic content requirement. I've obviously already explained to you the policy reason for why those were included and what the Ontario government was seeking to accomplish. But I think it's also important to remember in this context that you had to meet your domestic content requirements not at the time of application. You did not have to have domestic content when you applied to the FIT program, and, in fact, Mr. Duffy testified people got contracts even without showing that they had any domestic content under a contract. And that's because you just had to meet those requirements before you came into

operation, which was years into the future.

Now, before I get into what happened with respect to the claimant's applications to this program, I want to spend a few minutes talking about the GEIA, because this morning was almost entirely devoted to it, but, again, the claimant -- this is a Green Energy Investment Agreement. It's between Ontario and the Korean Consortium. The claimant is not a party to it.

The claimant has suggested, somehow, that there was a secret. That's not true. Let's go through some of the history here, and we'll see what was publicly known and what the claimant knew before deciding to invest in Ontario. In the summer of 2008, Samsung reached out to Ontario to see if they could negotiate a specific deal with the government. It was not the other way around. The government didn't invite it; this was a Samsung-initiated deal, but the government was certainly interested. Rick Jennings and Sue Lo told you why, and Sue Lo, in her witness statement, has explained that Samsung was offering not only to help bring jobs and manufacturing to Ontario, but to act as an anchor and a marquis tenant in the

renewable energy sector.

Remember the context of everything that's happening here is the fiscal crisis, and while Ontario was hoping to incent investors with the FIT Program, it was unclear whether there would be sufficient interest in that program. It was unclear whether that capital would get off the sidelines. In short, Ontario was worried that they were going to throw a party, and no one would come. Getting Samsung to commit a marquis name was a huge win in and of itself for investor confidence.

Now, in December 2008, a Memorandum of Understanding was signed between Samsung and Ontario, and the claimant has made much of this. In reality, there is not much to it. It's a deal to try and negotiate with each other. And if we go to the MOU and we look at paragraph 4, it provides that:

> "The parties agree to cooperate and negotiate exclusive with each other in good faith in connection with wind and solar procurement of 2,000 megawatts of wind power and 500 megawatts of solar."

[As read]

But look to the next paragraph. It says:

"Nothing in this MOU shall affect the rights of the Government of Ontario or the Ontario Power Authority concerning any current or future Government of Ontario or Ontario Power Authority programs related to renewable energy procurement." [As read]

So what is the agreement really here? Ontario agrees to negotiate exclusively with Samsung towards an agreement for 2,000 megawatts of wind and 500 of solar, and Samsung agrees to do the same. That was important. Ontario did not want Samsung also to go off to another jurisdiction to see if it could get a better deal elsewhere.

Now, with respect to this clause, recall also that Ontario is using renewable energy to replace, at least in part, its reliance on Coal. There were more than 2,500 megawatts needed, and the second paragraph recognizes this and allows

Ontario to embark on programs for other procurement initiatives.

In fact, it's exactly what the Premier of Ontario himself said when announcing the Green Energy Investment Agreement publicly on January 21, 2010 when it was signed. Specifically, he said:

> "If there are other companies out there who have in mind to put in place this kind of manufacturing infrastructure that enables us to go beyond meeting our own demand, our own needs here in Ontario, to reach into the Ontario market, we are all ears."
> [As read]

Other companies did exactly that. They reached out. They negotiated both before and after the GEIA was announced. You have the evidence in the record. I'll take the time since we didn't do written submissions to point to some of the new evidence, R204 and R205.

Now, none of these negotiations were ultimately successful, and that's because none

offered the same value to the Government of Ontario that Samsung did, but, importantly, the claimant was not one of those companies. Instead, it only applied to the FIT Program in November of 2009, in May of 2010.

The claimant made a lot of the confidentiality of these negotiations this morning. Of course, no party is required to disclose the terms of its commercial deals, certainly not while negotiations are ongoing. I need only remind the tribunal that the claimant has fought hard to keep all of the contents of its deals confidential even long after they've been terminated. Ontario is no different. But in this case, any claim that the claimant could not have known about this deal with Samsung prior to making its first investments in Ontario simply does not withstand scrutiny.

Let's look at what the claimant would have known prior to making its investments and prior to applying to the FIT Program. On September 26, 2009, before the FIT Program even launches, the Minister of Ontario and Samsung jointly issued a press release explaining that:

> "Efforts are progressing well toward the signing of an

historic framework agreement." [As read]

And while they indicated that the contents of an agreement were commercially sensitive, they both committed to giving a formal public presentation once the agreement was signed. Then, on September 30, the claimant pulled this exhibit up, but now with the context, we can understand it:

"The Minister of Energy directed the OPA to hold in reserve 500 megawatts for proponents who have signed a province-wide framework agreement." [As read]

That's four days after the joint press release with Samsung.

What happens over the next couple of months? On October 31, in an article in one of Canada's largest newspapers, the Toronto Star, it was reported that the deal with Samsung would give them priority access to Ontario grid space. It's these parts of the GEIA and particularly the priority access to Ontario's grid space that the claimant is concerned about here. The claimant did

not make its investments until November of 2009, after all of this was publicly released.

Now, that's the claimant's choice to make, but let's be clear: It made it with the full knowledge of at least the competitive environment, and it chose to apply to a standard offer program with hundreds of other applicants. It may not have known of the exact terms of this commercial deal, but it knew that it was out there, and it knew exactly the terms that it's concerned about now.

So at this point, I want to now come back to what's really relevant here, and it's the FIT program, and look at these applications that were actually filed by the claimant, and the claimant didn't discuss this at all this morning, besides pointing, I think, to where they were.

But let me go through this in a little more detail because I think it's a key to understand. The claimant made two applications during the launch period which were ranked according to those merit criteria I had discussed earlier, which were the TTD and the Arran projects, and two afterwards, the North Bruce and the Summerhill. Those were ranked purely according to

the time that the OPA received them and nothing else.

Now, as I discussed earlier, there are limits as to how much electricity can be transported on the transmission infrastructure, and those limits apply at different bottlenecks in the system. The claimants, all of their applications, were in an area of Ontario known as the Bruce Region, so let's take a look at a map. This shows the transmission capacity coming out of the Bruce Region at the time of the launch of the FIT Program. The Bruce Region is shaded in orange. It is down there at the bottom there because the capacity was zero, and everyone knew it was zero. The claimant applied to connect its projects in a region in which there was no possibility to connect at the time that it filed its applications.

Now, it did that because it was betting on a new line called the Bruce-to-Milton line receiving its final approvals, but it did that also knowing that it would need good applications because of the strong wind resource in that area, and that's shown by the purple blob on the OPA's map there. And if there is a strong wind source, it would know that others would want to relocate

there and locate their project there as well, others, who it should know, would include the Korean Consortium, and that's, in fact, what happened.

In September of 2010, the Minister directed the OPA to hold 500 megawatts of capacity in the Bruce Region for the Korean Consortium. Given what was public knowledge at that time and before the claimant even filed its applications, any applications to the FIT Program, to suggest that this somehow caught them by surprise, just defies reason.

Let's look at the claimant's actual applications to the FIT Program. As I noted, Richard Duffy has testified at length about the problems of those applications and about how poorly they were put together, and I should note here that, unlike the completeness and eligibility review where the OPA reached out to applicants, that was not the case here. And Mr. Duffy has explained why in his testimony:

> "The OPA couldn't put itself in a position of assisting particular developers at this stage. All applications --

All applications, everyone's.

"-- were assessed solely on what was within the four corners of the paper in front of the OPA. The OPA would not assume; it would not do any other research; it would not contact anyone to confirm any facts." [As read]

That applied to everyone. So let's go through this and compare what the claimant submitted with what the FIT Rules required to get points.

I'm sorry. Here's where we're going to have to go into confidential session, so if we can cut the feed for a second here.

MR. APPLETON: Confidential or restricted?

MR. SPELLISCY: Confidential. It's your application.

--- Upon commencing the confidential session under separate cover

--- Upon resuming in public

MR. SPELLISCY: As can be seen, the claimant did not file good applications. And

as a result, their applications were not highly ranked.

The first FIT contracts were awarded in April of 2010, 184 in total for 2,500 megawatts. In addition, there were 242 large FIT projects that received rankings. They sought a total capacity of 6,000 megawatts. These rankings, which included the claimants, were published by the OPA on December 21st, 2010. Out of those 242 projects, the claimant's Arran and TTD projects came in at 91st and 96th in the province.

Now, what you can also see from these numbers is a huge amount of interest that the FIT Program actually developed and then generated. It was for more than the government had expected to launch, and the applications were still coming in, including the final two for the claimant, which didn't come in until May of 2010.

The success of the program was causing the impact on the ratepayers to sky rocket. While Ontario had been worried that no one would show up to the party, the reality turned out to be that too many guests came. At the same time, this is coupled with the decrease in electricity demand via brought on by the continued economic

difficulties that had stretched now for several years.

And so Ontario was faced again with the need to review its policies and programs in light of the core principles that I keep coming back to. Would it still believe the policies in place would lead to a reliable, sustainable, and cost-effective electricity system?

With that in mind, let's come to the final part of the facts, the Bruce-to-Milton allocation, and this involves how Ontario was looking to deal with the success of the FIT program in 2010.

As Sue Lo has explained, the culmination of these supply, on the FIT side, and demand factors confirmed that Ontario would need to slow down the rate of its procurement of renewable energy. As a result, we saw on the slide that I pulled up earlier from Mr. Chow that the ECT was originally planned to be run in August of 2010, but it was not. It was postponed. Instead, in the fall of 2010, the Ministry of Energy began work on what was known as a long-term energy plan, or LTEP. This LTEP was published on November 23, 2010, and it introduced a target of 10,700 megawatts of

renewable capacity by 2018.

Now, we've seen some of the numbers from the FIT Program. By the time that the LTEP was published, Ontario was already approaching this target, and as such, it had necessary implications for how the FIT Program could be pursued. In particular, it had implications for how that allocation on the Bruce-to-Milton line would happen. The plan had always been to allocate that capacity through an Economic Connection Test.

But by the fall of 2000, the situation had changed in terms of how much renewable energy needed to be procured as was recognized in the LTEP. So while the Ministry still wanted to allocate this new capacity on this new line for these projects in the region with a strong wind resource, it wanted to do so through a more limited offering than a full province-wide Economic Connection Test.

In early 2011, discussions started between the Ministry of Energy and the OPA. As Shawn Cronkwright has testified, at the time, both the OPA and the Ministry were proposing running essentially what was a revised ECT process toward the capacity, which would include a chance for

proponents to change connection points prior to that capacity being allocated, as we saw, which had always been contemplated.

The plan originally was to award contracts in June of 2011. However, as time went on and the decision wasn't made on how to proceed, the OPA began to get nervous, not about the process, but about the time for the work involved.

As Mr. Cronkwright has testified:

> "As time passed, we became concerned about our ability to complete the process in the time that remained." [As read]

Some steps would take a long time for the OPA to manage, and so the OPA recommended that, if contracts were still desired to be awarded in June, a simpler process be used. They recommended what has been called in the pleadings and the documents "A special TAT/DAT." Those are those transmission tests I talked about earlier.

What was special about it was that the ideas were not contemplated in the published FIT Rules. Those rules did not contemplate another TAT would be run for projects that had failed the

initial one, like the claimants' projects.

So what happens? On May 10th of 2011, the Bruce-to-Milton line received its final regulatory approval as the Minister of Natural Resources directed the Niagara Escarpment Commission to issue the final required development permit, and this final approval sets everything in motion.

Two days later, on May 12th, options are presented, both the ECT like process that had been originally proposed and a special TAT/DAT process, and they were put to senior officials in the Ontario government.

So let's look at what was being prepared for that May 12 meeting. We can see the preparations in an exchange of emails on May 11th, the day before, and if you look at the last email in the chain -- and it will come up -- which starts at the bottom of the second page, you see that the Ministry staff are asking the OPA to further flesh out the ECT like process option.

Shawn Cronkwright from the OPA, who is the Manager of Generation Procurement, and who is here to testify this week, responds at 10:00 p.m. the night before the meeting. In his

response, he compares the special TAT/DAT with the approach on which more information is being requested, the revised ECT approach.

And let's look at what he says.

He says:

> "Based on what appears to being proposed, what we are actually back to now is running a Bruce-to-London area regional IPA." [As read]

Which is the first step in the ECT process. And then he confirms in this email in 2011 that that process had always contemplated connection point changes, generator paid upgrades, and new plant and service transmission developments, like the Bruce-to-Milton line.

He then concludes:

> "The advantage of this process is that it would be consistent with the FIT Rules." [As read]

So what happens at this meeting, and here I need two minutes of confidential session again so that we can look at actually what happens.

--- Upon resuming the confidential session under separate cover

--- Upon resuming in public

MR. SPELLISCY: We can now come back out of the confidential session.

On May 27th, 2011, a week after the exchanges we were just discussing, the Canadian Wind Energy Association, or CanWEA, which is the industry organisation for renewable wind producers in Ontario, wrote to the Ministry of Energy. Let's take a look at that letter in detail.

CanWEA wrote that it:

> "... was writing to express the view of the majority of our members that the Government of Ontario and the Ontario Power Authority should follow through with the established Feed-in Tariff process by immediately opening the window for pointed interconnection changes."
>
> [As read]

They said developers were told by

the OPA on numerous occasions that the opportunity would exist to change their connection. They confirm:

> "Over the past several months our members have collectively invested significant time and money to prepare their strategies, their interconnection strategies." [As read]

One week after this letter with the information that he's had from his staff in the briefing and the support of what he understands is a majority of the industry, the Minister of Energy issues a direction to the OPA regarding the allocation of the capacity. Let's quickly look at the June 3rd direction which played a significant part at least in the written phase here:

> "The direction notes that the LTEP and its energy target and directs the OPA to: (1) Allow generator paid upgrades. (2) Reserve capacity for smaller FIT projects. (3) Allow

> connection-point changes over a period of five business days but only for projects in the Bruce and west of London regions. (4) Allocate 750 megawatts in the Bruce Region; and (5) allocate 300 megawatts in the west of London Region."

The reasons for this decision are explained by Sue Low. She says that the goal in designing it was to develop a fair process for allocating this capacity that would meet developer expectations by including the relevant components of an ECT without actually being a province-wide ECT.

As we have seen this morning, that evidence, the evidence in the record, supports what Ms. Low has explained.

We didn't hear about it this morning but in the written submissions the claimant asked the tribunal to ignore these events, and ignore these reasons for the allocation being made consistent with the FIT Rules and instead argues that the government's decision was motivated by the

desire to help another company, NextEra, a US investor.

What proof does it have? It has the fact that a meeting happened on May 11th between NextEra and Andrew Mitchell from the Minister of Energy's office.

Let's look at that evidence. We'll bring up the slide and we'll look to NextEra's own summary of it. Andrew, meaning Andrew Mitchell from the Minister's office was clear that a decision has not been made yet on whether or not to open the point of interconnection amendment window and whether, if so, to do so on a province-wide or just for Bruce-to-Milton and west-of-London basis. So NextEra is told nothing specific about what's going on and obviously no commitments were made to it. they themselves say so.

So what does NextEra ask for next? He asked for a meeting with Sue Low to explain why the point of inter-connection window is significant. But let's continue in the chain of this document. NextEra does not get a meeting scheduled until May 13th, after the meeting where the Premier's office expressed their preference or

process with the change window.

As we've seen just now, regardless of the points that NextEra may have made on May 13th, if that meeting did, in fact, even occur, whether or not there would be a change window was still very much in play by at least May 20th, so the claimant's suggestion that this decision somehow was made to benefit NextEra, simply based on the timing of a couple of meetings, is belied by the evidence.

Let's come back to reality and see what happens after this direction is issued by the Minister on June 3rd. Well, as CanWEA noted developers were ready. As a result there were a number of moves in this five-day period, 39 in total. The easiest way to understand exactly what happened is to start with the rankings on December 21st that were published for the Bruce Region and those will come up for you. Then we can amend that ranking by adding in those projects from the West-of-London region that switched into the Bruce Region, that either received a contract or that didn't and were ranked in the Bruce Region after.

You can see those in the next

table and they're highlighted in blue or white, depending on how good your colour sight is there on the screens.

This table here now shows the developers applying into the Bruce Region after the change in connection-point window closed on June 10th, and what we can see is that a number of very highly-ranked projects in the West-of-London region decided to switch into the Bruce Region to take advantage of the capacity there.

Unsurprisingly, they got contracts, as shown by the green highlighting on the slide in front of you. That is, after all, what a ranking is supposed to accomplish. From a policy point of view it was the best result possible. The higher-ranked projects got contracts, rather than the lower-ranked projects.

The results of the Bruce-to-Milton allocation were published on July 4th and two days later, on July 6th, the claimant filed its notice of intent to go to arbitration. Three months after that, three months after the events giving rise to this claim, the claimant submitted this claim to this tribunal.

I will now turn to the second part

of my remarks today, which is simply to identify the measures described above that the claimant alleges are a breach of NAFTA. Again, I said this is made complicated today because not many of these were mentioned today but I'll at least go from what the pleadings were.

First, the claimant seems to be challenging acts of the Government of Ontario associated with three groupings and measures and in particular it seems to be alleging as follows: That the domestic content requirements of the FIT Program violated Article 1106; that the Green Energy Investment Agreement violated Articles 1102, 1103 and 1105; and that the June 3rd direction violated 1102, 1103, 1105. That's Ontario.

I think we heard nothing about it today but the claimant in its written submissions also challenged certain acts of the OPA and in particular, in its written submissions, is alleging that. The OPA's ranking that we just looked at, of the claimant's TTD and Arran project in the launch period violated Article 1105 and that the OPA's awarding of contracts to certain projects connecting at certain parts of the transmission

system as part of the Bruce-to-Milton process violated Articles 11102, 1103, 1105.

Some of those allegations in the written submissions are quite complex. They have numerous sub-parts but I think we can leave that aside for the moment and just focus on these general groupings.

With that, I'm going to come now to the third part of my presentation, and that is explaining why these allegations are outside of the scope of Chapter Eleven and beyond this tribunal's jurisdiction.

Now what I'm going to do in this section is explain a number of provisions of NAFTA, and why they block, as a matter of law, the claimant's claim from proceeding any further and, in particular, we're going to look at, first, why the claimant's challenges to the measures of the OPA, if they're still making them, cannot proceed because those acts are not subject to the obligations in Chapter Eleven.

We will then examine why certain of the claimant's allegations with respect to the Green Energy Investment Agreement are beyond the jurisdiction ratione temporis of this tribunal.

Then I will discuss why all the claimant's claims for breaches of Article 1102, 1103 and 1106 are included by NAFTA Article 1108.

Next I will show how many of the claimant's other claims cannot be brought because they did not result in damages to it. That makes them beyond this tribunal's jurisdiction. Finally, I will show that the claims are barred from proceeding because the claimant did not respect the conditions of Canada's consent.

Let's first start with the acts of the OPA. For that we go to Article 1101 to start because that act says that in order for Chapter Eleven to apply, the measure has to be adopted or maintained by a party. If we go and we look at our own measures, the two slides that we have there, there were a number of the acts of the Ministries of the Government of Canada, the entering into the GEIA, the June 3rd directive. There is no dispute. Those are subject to the obligations in Chapter Eleven.

The June 3rd direction which directed the OPA to act in a certain way, that's an act of the Government of Canada. It is subject to Chapter Eleven.

But in its written submissions the claimant also challenged the two other things I mentioned, the ranking of the launch period applications and the awarding of contracts to certain applicants.

So the question arises: What is the OPA?

As I mentioned earlier, the OPA is a corporation owned by the Government of Ontario with independent legal personality.

The question here is when will the acts of such a corporation be subject to the obligations in Chapter Eleven?

The claimant mentioned Article 8 of the ILC Articles but that does in the apply here because NAFTA sets up its own rule on when state enterprises are subject to the obligations in Chapter Eleven. As the tribunal in UPS confirmed:

> "Chapter Fifteen provides a lex specialis regime in relation to the attribution of acts of monopolies and state enterprises of the party." [As read]

Let's go to chapter 15 and let's

look at Article 1503(2) which is the NAFTA provision on state enterprises and we see that the rule for state enterprises that the acts are only subject to the obligations in Chapter Eleven where the entity is exercising delegated governmental authority.

There are two questions. Is the OPA a state enterprise? I've already answered that one. Yes, it is.

The second one, and we can look at that. We can go to Article 1505 of NAFTA because it defines what a state enterprise is. It says it's an enterprise owned or controlled through ownership interests.

The only argument that the claimant presented in its written submissions to the contrary was based on Annex 1505 to this article but that annex is irrelevant. It specifically says for the purposes of Article 1503(3). We are not talking about Article 1503(3), we are talking about Article 1503(2).

Let's turn to the second question which is the specific question of whether in ranking the launch period applications, and coming

to the determinations that it did, and in determining which applications or which contracts could connect to which points on the technical electricity system in Ontario, in its view.

Was the OPA exercising delegated governmental authority in those acts? It was not. An entity does not exercise delegated governmental authority simply because it has been created by state or is owned by it. There is something unique about governmental authority.

As the tribunal Jan de Nul explained, what matters is not the service publique element, but the use of the "prerogative de puissance publique" or governmental authority.

Some examples of governmental authority are provided in Article 1503(2) itself.

That article provides:

> "Governmental authority includes such things as the power to expropriate, grant licenses, approve commercial transactions, impose quotas, fees or other charges." [As read]

In the particularly challenged

measures of the OPA here, it did none of these things. It carried out technical analysis based on criteria points and it made technical decisions based on things like capacity and transmission limitations. None of those acts are exercises of delegated governmental authority.

So now I want to take you through actually a demonstrative on the screens in front of you to help you walk through and I'm going to be coming back to this in a number of parts in our session over the next few minutes.

Let's go back to the slide that we had earlier concerning the challenged measures of the OPA. You will see it up there. We saw that the claimant again was challenging the two groupings and measures that we've discussed. However, as we just saw and as we can see represented on the screens in front of us, these claims are barred from proceeding under Article 1503(2) because these acts are not subject to the obligations in Chapter Eleven of NAFTA.

Now let's talk to the second point that I identified above, the limits of tribunal's jurisdiction rationatum point.

For that we go back to Article

1101 and we see that another limitation on the scope of Chapter Eleven is that the measure has to be related to the investor of another party. Logically and fundamental to this notion is that the investment in question must exist at the time of the alleged measure.

As the tribunal in Gallo explained recently in context of another claim under NAFTA:

> "It does not need extended explanation to assert that a tribunal has no jurisdiction, ratione temporis, to consider claims arising prior to the date of the alleged investment." [As read]

The claimant invested first in Ontario in the Arran and TTD projects in November of 2009. Prior to that, Ontario had no NAFTA obligations with respect to the claimant. Hence, when we're talking about the confidentiality or exclusivity clauses with an MOU with Samsung, the fact is they cannot be challenged by the claimant under NAFTA.

Further, with respect to the North Bruce and Summerhill investments of the claimant, they're not made until May of 2010, after the Green Energy Investment Agreement is signed and publicly announced. As a result, no claim with respect to these projects can be brought even for the Green Energy Investment Agreement itself.

Now let's go back to our demonstrative and this time we are going to look at the one for the Ontario measures. We'll see that one of the challenges was to the Green Energy Investment Agreement there and the benefits accorded to the Korean Consortium under it.

The claimant has alleged that those benefits were a breach of Canada's obligations under NAFTA. But for those claims, as we can see, much of this claim is barred because of the ratione temporis limits in Article 1101 of NAFTA.

Now let's move to the next limit on the scope of the obligations in NAFTA that I talked about. That is the exclusion presented by Article 1108 which the claimant has actually talked about this morning. Let's pull up Article 1108. It is called, "Reservations and Exceptions". There

are a number there but the ones identified by the claimant and the ones that are relevant are Article 1108(7) and 1108(8). Article 1108(7) and Article 1108(8) provide that Articles 1102 and 1103 and eventually 1106 do not apply to procurement by a party or a state enterprise.

There is no definition of procurement in Chapter Eleven, but there are Chapter Eleven tribunals, as the claimant identified you've interpreted the term. Let's go back to the Vienna Convention analysis. What's it's ordinary meaning? As the tribunal in ADF explained the term with its ordinary meaning, and the claimant quoted some of this today, but we'll quote some of the rest, is, "to get, to gain". The tribunal in UPS actually adopted a similar definition.

So these particular Articles in 1108 what do they do? They function as a carve-out for when the NAFTA parties themselves or the state enterprises decide to enter into the market and acquire, get or obtain goods and services.

The claimant talked a lot about Chapter Ten this morning. We're not saying we've never said that Chapter Ten is in context. But we

have said that it is as relevant in its differences for what it does. We have to look at the different purposes of Chapter Ten and Chapter Eleven. All three NAFTA parties have agreed in this arbitration; chapter Ten imposes obligation on the parties with respect to certain types of procurement. It is doing something quite different than Article 1108 which is carving out obligations.

Ultimately, the NAFTA parties made the express choice to broadly carve out procurement obligations by the governments and state enterprises for Chapter Eleven and then to specifically impose certain limited obligations on limited types of procurement in Chapter Ten.

Tellingly, when the NAFTA parties agreed to impose some obligations on procurement in Chapter Ten, they excluded provincial and state procurement. That's not because provinces and states don't procure; of course they do. It is because the NAFTA party wanted the provinces and states to have a free hand when it came to procurement initiatives in terms of 1102, 1103 and 1106.

That is why it makes sense that procurement is defined in a limited way in Chapter

Ten because you want to impose the limited obligations but the exclusion must be understood broadly in Chapter Eleven. Both have the same result, and it is a result that I mentioned for the policy reason earlier. Governments want limited obligations on the procurement powers.

So is the FIT Program a procurement measure? It is. In fact, we don't have to go far to understand this. I've already walked through the evidence from the statute creating the OPA to the statute authorising the creation of the FIT Program to the direction to the OPA to establish the FIT Program. There is no need to bring them up again. As you will recall, all make clear that the FIT Program is designed to be a procurement program.

Let's go one step further and let's look at what the OPA actually does. In the FIT Program itself, the OPA enters into Power Purchase Agreements. Why? In order to acquire the renewable generation that Ontario has determined that it wants to acquire.

The undisputable fact is that if the OPA did not enter into these procurement contracts, such power would not be produced. You

don't need a contract with the OPA to sell power into the grid in Ontario. You don't need one. But the reality is that the market prices are too low to justify the costs of renewable energy investment.

So in order to get renewable generation that the government wants, the OPA is required to pay for it, through PPAs. That is procurement.

The claimant contends that this tribunal should ignore these basic facts because of restrictions found in other treaties. In particular, in its written submissions, at least restrictions found in the GATT and the WTO. We'll get to some of that in the closing. But just note that the same limitations are not found in NAFTA. The NAFTA exception is broader. Thus, the claimant's claims for 1102, 1103 and 1106 are excluded from the coverage of Chapter Eleven.

So let's go back to Ontario measures slide and the demonstrative that we're building up. As we are showing you on this slide, Article 1108 walks the complaints about the domestic content requirements of the FIT Program. As well as 1102, 1103 complaints about the GEIA and

the 1102, 1103 complaints about the more favourable treatment allegedly afforded to NextEra.

Let's go to our OPA measures slide. If we look at that we see that Article 1108 would also exclude any claims under Articles 1102 and 1103 that other companies were being treated more favourably in being allowed to make certain connections as part of the July 4th award of contracts.

Finally, with respect to the scope of Chapter Eleven we'll come to the fourth point that I noted above. That is the fact that claims cannot be brought where damages have not been suffered.

Let's look to Article 1116 and we see that there are limitations on the ability to bring a claim and one includes the requirement that the investor in question has incurred loss or damage by reason of arising out of that breach. It's this last point that I want to focus on because tribunals are not courts of plenary jurisdiction.

It is not enough for the claimant to simply show a breach and to simply show separately that its business failed. For you to

bring a NAFTA claim there must be a causal link that you establish and there must be actual loss or damages.

As the NAFTA tribunal in Feldman accurately stated:

> "A Chapter Eleven tribunal can only direct compensation in the amount of loss or damage actually incurred." [As read]

For example, for a claim of breach of Articles 1102 and 1103, it is not enough to show simply that a claimant received less favourable treatment. That just establishes a breach. The claimant must also show how that less favourable treatment resulted in actual loss to it. It must establish how it suffered a loss in the "but-for" world which would have, in all probability, existed if the measure had not occurred.

Similarly, the claimant alleges a breach of Article 1106. It must show how that breach of the imposition of domestic content requirement resulted in specific actual losses; i.e., how much more did it actually cost it to use the domestic content requirement. If we apply that

rule we see that a number of the challenge measures had no actual impact on the claimant at all.

Let's go back to our demonstrative slide on the Ontario measures. The claimant challenges the domestic content requirements of the FIT Program. However, the fact that the claimant did not spend an actual cent, the fact is he did not have to spend an actual cent more because of those requirements. It entered into a contract for the purchase of wind turbines from GE before the FIT Program even existed, and while it claims to have renegotiated that deal there is no evidence that it cost them anything to do that.

Hence there are no actual damages related to the domestic content requirements of the FIT Program in this case.

With respect to the GEIA, we have explained in our submissions how none of the alleged breaches, aside from the allocation of the transmission priority to the Korean Consortium in the Bruce Region, could have possibly caused any harm to the claimant. So anything other than that 1102 and 1103 claim could also be blocked by this requirement in the Article 1116, and if we could pull it up for the GEIA as well.

Finally, with respect to the June 3rd Ministerial Direction:

> "The claimant has failed to show how many aspects that it complained about in its written submissions other than the cap on procurement and the ability to change connection points could have possibly caused it any damages." [As read]

There would have been no difference in the "but-for" world. So much of those claims too would also be blocked by this requirement in Article 1116. if we look at our page for the measures of the OPA that the claimant has challenged, we reach a similar conclusion.

The claimant has failed to show how the acts of the OPA, like allowing certain connections as part of its award of contract, could have caused it any damages. Again, for many of those acts which were identified, the situation would not have been different.

Now, where does that leave us? If you go to the next slide and we look at the screen

there, you will see that all the claims that the claimant has, at least in part, the ones that they've thrown are outside of Chapter Eleven, because of various hurdles, various roadblocks to their proceeding.

But when I said earlier that some of these claims that are quite complex, I think if we take it down one level of granularity we can see that in, fact, there is no block on a couple of claims. In fact, there are still claims relating to the alleged breach of Article 1105 concerning the June 3rd direction and that's on the cap on procurement and the change in connection points. That's what's left.

Now, again as I mentioned earlier, that might seem like a drastic reduction but it makes a lot of sense. The fact is that the claimant could not have had a FIT contract until the Bruce-to-Milton allocation was completed. There was no capacity before that moment. So any claim that it had arose no earlier than when it did not receive such a contract on July 4th, 2011.

Any claim that either of those measures, breaches, Article 1105, is without merit -- and I will get to that in a second. But

leaving that aside, it is at least a claim that could have been brought after arbitration.

Now, let's come back to the last point that I identified above, which is the bar that results because the claimant did not respect the conditions to Canada's consent to arbitration.

The claimant has talked about this. I won't go into as much detail as he did. We'll address this in our closing. But let's look at Article 1122. We see, as the claimant pulled up, that it provides a NAFTA's party consent that the claim has been submitted in accordance with the procedure set out in these agreements.

Those procedures are outlined in the preceding articles, Articles 1118 and 1121, and they include a cooling-off period of six months from the events giving rise to the claim. Obviously, you don't have a claim until you've suffered loss. We've looked at that. We've seen that in Article 1116(2), and so the claimant could not have suffered a loss prior to the allocation of the capacity in the Bruce Region. It could not get a contract before then so, in fact, that cooling-off period, six months, runs from that date.

If that cooling-off period is not respected there is no consent on behalf of the state to arbitrate. This isn't procedural. Consent is a fundamental question of jurisdiction.

This was recognised by the tribunal in Methanex where it held that:

> "In order to establish the necessary consent to arbitration all preconditions and formalities required under Articles 1118-1121 must be satisfied." [As read]

So the question is: Did the claimant satisfy those preconditions or formalities? It did not. All the claimant had to do was wait six months after the award of contracts on July 4th, which was a point at which it allegedly a suffered a loss. There would have been no prejudice to it in doing so but instead it chose to ignore the clear procedural rules in NAFTA.

So, if we come back to the slide that we had up earlier showing the one claim that could have arbitrated and we pull that one up, we see that it was blocked by Article 1122 of NAFTA.

Because of the claimant's choice

Canada has not consented to arbitrate these claims but, in fact, I want to pause here because as July 4th was the first time the claimant could get a contract, the reality is that all of its claims arise solely from this event and they would all be blocked because of a lack of consent to arbitrate.

So, if you look up at that slide you can now see all of the hurdles to this claim proceeding in this case.

This brings me to the final part of my presentation, and what follows is that I will very briefly highlight the key flaws in all of the claimant's arguments on the merits.

I will show you why the claimant's claims for breach of Article 1102 have no merit; why its claims for breach of 1103 have no merit; why its claims for breach of 1105 have no merit; and why, finally, the claimant's damages arguments are deeply and fatally flawed.

Let's start with Article 1102, NAFTA's national treatment. There are a number of allegations at issue in this obviously but first I want to take a step back. As this title states, this obligation is about national treatment.

This obligation is about not

ensuring that everyone everywhere is treated identically. It is about nationally-based discrimination. We have never said it is about intent but it is still about nationality.

In situations where nationality is not important, situations where the evidence is, that some Canadian investors do well, but others don't, some U.S. investors do well, but others don't, this provision is not violated.

The reason is simple. Ultimately many regulatory programs result in winners and losers. Article 1102 does not guarantee that all U.S. investors will always be winners. It just requires state measures to be nationality neutral.

As the tribunal in Lowan explained, this article is directed only to nationality-based discrimination and it proscribes:

> "... only demonstrable and significant indications of bias and prejudice on the basis of nationality." [As read]

A U.S. investor cannot prove a breach of Article 1102 by referring to the treatment afforded to other American companies and,

as the claimant itself admitted in its opening remarks this morning, that is what it is trying to do. It has talked about, in its submission, Pattern Energy, which as a California company, Boulevard Associates, which is a subsidiary of Florida Power & Light, and NextEra which it is now called, and Samsung Canada which is a subsidiary of Samsung.

Those, as I mentioned at the beginning of my remarks, are investments of foreign investors in Canada. They are not Canadian investors, and thus they cannot serve as a basis for an Article 1102 claim.

In fact, I think that some of the real proof of this is shown in the fact that the claimant wants to use the same treatment to prove a breach of 1102 and 1103, but national treatment and Most-Favoured Nation treatment do not overlap.

Leaving aside for the moment this most fundamental problem, I want to come back to how NAFTA's nationality-based discrimination prohibition is operationalised in 1102.

In order to show you that even if these comparators were Canadian, and they're not, but even if they were, there has still been no

breach of NAFTA here. If we look at the slides and we pull up the relevant language, the first question is whether there is treatment about the claiming investment of nationals.

The second is whether that treatment was accorded in like circumstances. Let's pause on that for a second because we've heard about like circumstances at length this morning. We would agree there are a number of factors that go into considering it, but one that has been consistently emphasised is that the treatment must be accorded by the same entity and in the same program, but again that's a rather obvious point.

People under different regulatory programs are treated differently. People under the FIT Program are treated differently in terms of the contracts and the rates that they get than people under other procurement programs in Ontario.

It is for this reason, why here, that -- and I'll explain this more when we get to the GEIA because it is really more about 1103. But even if Canadian investors were the ones who entered into the GEIA, that's a separate investment agreement. It is not the same regulatory program

and so the treatment is not accorded in like circumstances. But, as I say, I'm going to come back to this more in 1103 where I'll discuss this in more detail.

The final question for Article 1102 is whether the treatment afforded to U.S. investors is less favourable than that afforded to Canadians, and again I want to leave aside the claim that somehow the subsidiaries of Samsung or Pattern Energy, the U.S. investors could somehow be used under the GEIA under this Article.

What I want to focus on, instead, and I'll get to Article 1103, but what I want to focus on here is the other entities that actually applied to the FIT Program which, in its written submissions, the claimant alleged received more favourable treatment than Boulevard Associates and Suncorp.

Now, a guarantee against less favourable treatment in like circumstance does not mean that everyone is guaranteed the same outcome. It does not mean that everyone gets a contract. The same outcome, the same contract, that's all impossible to guarantee. Rather, when it's a program at issue, a regulatory program, it is

about guaranteeing the same process to the people.

If we look at the treatment accorded to those who were FIT applicants in the Bruce Region, the claimant has failed to show that the treatment was, in any way, less favourable. FIT applicants were afforded the same treatment. All were assessed by the OPA in terms of the scoring of their applications in the same way. All were subject to the June 3rd direction. All had access to the same information in making their decisions.

Again, we don't dispute, and there is no question, that the outcome of the treatment was different for different companies, but that's in the nature of any procurement programs. Not everyone can be a winner. 1102 doesn't require that and if we look at the FIT Program, again what we see is that some Canadian investors ended up winners, some losers; some U.S. investors ended up winners, some losers; and the same with nationals of third states. What does that show? Objectively, the measures were enacted on a nationality-neutral basis.

Now let's turn to Article 1103. Article 1103 provides a very similar obligation to

Article 1102 but instead of regulating discrimination vis-a-vis Canadians, it regulates a treatment accorded to nationals of third parties.

So, if we look at this provision, and again, we will see the same three-part test that we saw in 1102, and the first task remains the same though, to identify the right set of comparators. So let's look at this language because the claimant has focused on it. This morning it said that an investor from any NAFTA party other than Canada would qualify under that provision, so I want to understand this because the language there says:

> "... of any other party or of a non-party." [As read]

The typical MFN clause in a bilateral treaty, and we pull up one of our own bilateral treaties here, one of Canada's, contains a reference only to investors of a non-party. It's a bilateral treaty.

But of course, in a multi-lateral treaty that doesn't work. It would exclude a relevant comparison. The parties to a trilateral treaty do not want to give license for one party to favour the investors of essentially what is the

non-disputing party and it is for this reason why in multi-lateral treaties, the MFN clause looks the same as in NAFTA. We can look to the Energy Charter Treaty in one of the MFN clauses there. We pull that up, it has the same language that NAFTA has: Any other contracting party or any third state.

None of this is meant to revolutionise the MFN clause and somehow allow comparisons between the claimant and an investor from the same state as the claimant. Where it is two investors from the same state who are being compared then there is no nationality-based discrimination and the MFN provision doesn't apply.

Now let's come back to Article 1103 and again, as with 1102, the overarching fact is that Article 1103 does not guarantee that every particular investor will be a winner and nor does it guard against all differential treatment. What it protects against is nationality-based discrimination. Let's focus here on the allegations regarding the Korean Consortium because it is at least an investor of a third party. Here what I would like to do is focus on the second part of the test which is in

like circumstances.

The claimant has talked a lot about this and it's looked at the contracts under the FIT Program, and the contracts under the GEIA and had a slide where it went through all the similarities. But of course they looked alike. That was part of the rule itself, that was part of the GEIA, that they be modelled on FIT contracts. But that doesn't change the fundamental fact, the one that matters: Contracts under the GEIA are not FIT contracts. The claimant is not alleging here that the contracts, that the FIT contracts entered into for other third-party investors were somehow more rich or more valuable than the FIT contracts it sought to obtain. All FIT contracts were the same. The GEIA contracts were different. They were under a different program. That is critical.

As UNCTAD noted in its oft-cited study of the MFN clause:

> "Freedom of contract prevails over the MFN clause. The foreign investor that did not enter into a contract is not in like circumstances with the third foreign investor

that did conclude the contractual arrangement with the host state." [As read]

There could not be a clearer statement of the law in this regard. This rule makes perfect sense.

If an investor without an investment agreement can prove a breach of MFN by referring to the treatment accorded to another investor who had an agreement, there would be no such thing as investment agreements. No party enters into an investment agreement if there is not some benefit for it doing so and such agreements are signed all over the world by numerous states, many of whom had treaties guaranteeing MFN treaty.

Holding that the benefits granted in such investment agreements violated MFN would destroy the ability of states to enter into the bilateral deals with investors necessary to bring development. But it would also mean, essentially, that a state could never try to negotiate for itself a better investment agreement with somebody else because it would breach the MFN clause. That is not right.

Now, the claimant has spent a lot

of time seeming to try and get around this by trying to argue that Ontario did not get value for what it gave to Samsung and the GEIA. They brought in an expert to do an analysis of the terms of the GEIA. They've had quotes from him up this morning. His conclusion is that Ontario gave up too much and got nothing in return.

You've also heard this morning, from counsel, that he's obviously trying to convince you of the same and he's actually put up bits of sworn testimony from witnesses who are not here and we have no opportunity to cross-examine.

Rick Jennings and Sue Low, they have offered testimony to explain why they believe that the claimant is wrong, couldn't find it in their witness statements. We'll hear it this week. The GEIA had value for Ontario, mentioned earlier, was an anchor tenant, was a Marquis tenant. There are other reasons they felt it would stimulate manufacturing and jobs. We'll likely hear from Mr. Adamson this week that he disagrees, that he believes the Ontario government is wrong in it's evaluation.

But in the end I don't think it matters who's right and who is wrong on that

substantive analysis. Even if Ontario negotiated poorly that doesn't give rise to a breach of MFN. Investment tribunals are not set up to second guess the wisdom of policy decisions made by governments. The fact is that governments are constantly called upon to make controversial decisions. There is no question the GEIA was controversial at the time.

Many people disagreed with it. Many thought that too much was given up. But tribunals simply can't be put in a position where they're being asked to take sides in such controversies. They can't be asked to evaluate whether a government entering into an investment agreement gave up too much or got too little. Those are decisions for elected officials to make and the evidence on the record here shows that this was all extensively discussed by the government. Ultimately, we've heard a lot about the public and the ratepayers from the claimant this morning.

Well, if the people of Ontario feel like too much was given up and not enough obtained in return, they have a remedy, a vote. What cannot happen is for investment tribunals to sit in judgment of the quality of the choices made. What investment tribunals can do is to determine if

there was been a breach of the provisions of an investment treaty. As UNCTAD so aptly noted, when it comes to investment agreements, freedom of contract prevails over the MFN clause.

Now I would like to briefly touch on the claimant's allegations regarding 1105. If we pull up that article we can see that Article 1105 establishes a floor for treatment. That floor is set as a customary international volume minimum standard of treatment, that this is a case that was definitively clarified by the NAFTA parties in the 2001 note of interpretation which confirmed that 1105(1) proscribes:

> "The customary international law of minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party." [As read]

Under Article 1131(2) of NAFTA, that interpretation is binding on this tribunal. Indeed, every tribunal since that note has considered itself to be bound to apply the customary international law minimum standard of

treatment. Now, of course, that doesn't answer the question of what is that standard. So let's look at that.

As the tribunal in Aziniana explained:

> "Article 1105(1) was not intended to provide foreign investors with blanket protection from disappointment." [As read]

Similarly in SD Meyers the tribunal explained:

> "It is not an open-ended mandate to second-guess government decision-making as governments have to make many potentially controversial choices." [As read]

What it really is, is a very basic standard and the threshold for breach is high.

We don't have to go very far back in history to see what the current thinking on the threshold is. We have recent decisions, Glamis, Cargill, Mobil. They all basically say the same thing. As the Glamis tribunal described it:

> "... 1105 protects against acts which are sufficiently egregious and shocking, the gross denial of justice, manifest arbitrations, complete lack of due process, evident discrimination or manifest lack of reasons."
> [As read]

The claimant cannot prove that the standard has been breached.

As I noted at the beginning of today, these claims are really just about a disappointed investor looking to blame the government when its gamble did not pay off. Ultimately, the claimant's Article 1105 claim is based on the global assertion that everything that Ontario and the OPA did with respect to the consideration of the claimants' launch period applications, from the ranking to the ultimate award of contracts, is a violation of Article 1105 but the evidence doesn't support that.

With respect to the rankings we walked through it and Mr. Duffy's testimony, which stands unchallenged, is that those applications

failed to receive the points because they did not objectively qualify for them. There was nothing arbitrary or unfair at all about that, with respect to the Bruce-to-Milton process. The parties had debated at length how similar it was or not to the original process envisaged for awarding the capacity on the Bruce-to-Milton line.

The evidence in the record, which we walked through earlier, from the time in question, shows that all believed, all involved who believed that it was similar to what was envisaged. The only differences were the cap that was being proposed in order to control megawatt purchases. This didn't matter that much in the Bruce Region because the limit was physical and that's where the claimant applied but the claimant has focused on this and its effects but let's think about that.

Article 1105 does not require the government to buy electricity that it cannot afford and that it does not need. Nothing in Chapter Eleven does.

We have heard at length as to why that particular approach that was adopted was followed as opposed to other approaches and options that were also being discussed, and it was because

it was considered the fairest approach that would respect developer expectations.

But I want to pause here because even if the process adopted for the Bruce-to-Milton allocation was different than what was originally planned, and it really wasn't, but even if it was, that doesn't matter. Remember what the tribunal in Mobil recently said:

> "Article 1105 is not and was never intended to amount to a guarantee against regulatory change or reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change." [As read]

The claimant no doubt would have preferred an approach that benefited it to the detriment of the majority of the other developers who applied to the FIT Program but Article 1105 does not require that. You have seen and heard all

the evidence presented so far in our written submissions and today that I've gone through. There is nothing here that violates Article 1105. Finally, in what time I have remaining I'll briefly touch on the issue of damages.

Let's recall Article 1116 here and the burden that it places on the claimant to establish how the measures in question cause it losses.

The claimant has failed in this regard to meet its burden of proof. We've already talked about this with respect to a number of claimants and how they are not even within the scope of Chapter Eleven but if we look at it from the other angle and we see that, in fact, some of its biggest items in its claims have no connection to the measures in question here.

For example, this morning the claimant said, and it put up on the screen that it had invested $160 million into Ontario; that is not true. $150 million of that seems to be in relation to a contract with General Electric with the turbines.

It did not enter into that contract as a result of any measure of the

Government of Ontario. It entered into that contract and put that money at-risk before the FIT Program, before the GEIA, before any of it even existed.

Sure, one can think of it this way: Even if the FIT program in Ontario never existed, the claimant still would have lost this sum. Similarly, the claimant is seeking to recover hundreds of millions of dollars for its later applications for Summerhill and North Bruce. Again, those applications are ranked solely in accordance with the time at which they were received. They were just put in line.

Those projects would not have received contracts, even if none of the allegedly wrongful behaviour ever happened. As we can see, they were simply too far down the list because of nothing more than when their application was filed.

As I will show throughout the course of this week, the claimant's claims for damages amount to an attempt to have Ontario insure the claimant's bad business decisions. The vast majority of the losses have nothing to do with anything that Ontario allegedly did. Further, the claimant has failed to provide anything amounting

to reasonable documentary evidence of its alleged sunk costs.

Even if we look at the remaining 10 million that's left out of the 160 million, we don't have an invoice. We don't have any bills. We have no hard proof of any of their sunk costs, and its is alleged future losses are remote and speculative and based on error.

Now that I've been talking for a while I want to wrap up here, and I will close with just these final thoughts: After Chapter Eleven is not there to provide investors with the ability to challenge the results of a procurement process, unless they can show that the customary international law of minimum standard of treatment has been violated.

In this case, the evidence is clear: The actions of Ontario and the OPA in implementing the FIT Program were consistent with all of Canada's obligations.

The reason that the claimant did not get a FIT contract has nothing to do with anything egregious done by the Government of Canada or the OPA. Both acted reasonably and consistent with rational policy at all times. And, moreover,

both acted in a way that best respected the expectations of the participants in the program.

The reason the claimant did not get a contract is much simpler; it submitted bad applications. That is no fault of the government and it is not the basis upon which an after claim can be founded. Thank you.

THE CHAIR: Can I have from the secretary the time? It was a little below two hours.

MR. DONDE: One hour and 48 minutes.

THE CHAIR: That's what I have here.

MR. SPELLISCY: I won't dispute that.

THE CHAIR: And since on both sides you still have some time left within your maximum 2 hours, we will take a break now but just to know what happens after the break, does -- does the claimant wish to use the time for rebuttal?

MR. APPLETON: We think it would be more useful to remaining the use the remaining time for witness examination than rebuttal on the opening statements.

THE CHAIR: Fine, and that results the question for the respondent because if there is no rebuttal there is no surrebuttal and the tribunal certainly thinks it is more useful to go over to the witness examinations.

So we can now take a break. We can take until let's say four o'clock. And then we will start with -- we will continue with the examination of Mr. Pickens. Good. Thank you.

Then we will start with -- we will continue with the examination of Mr. Pickens. Good. Thank you.

--- Recess taken at 3:40 p.m.

--- Upon resuming at 4:01 p.m.

SWORN: THOMAS BOONE PICKENS:

MR. APPLETON: Are we swearing witnesses in?

THE CHAIR: I will ask them to speak the truth. So I will start and I do this -- and then I pass him over to you.

MR. APPLETON: Right. Thank you.

THE CHAIR: Is everything fine, Mr. Pickens? Welcome here. We are pleased that you are with us. For the record, I would like to ask you that you confirm that you're Thomas Boone

Pickens --

THE WITNESS: Yes.

THE CHAIR: -- known as T. Boone Pickens?

MR. APPLETON: Sorry, Madam President, I don't believe we're transmitting.

THE CHAIR: Oh, we should, of course, stream this. Is it not being done?

SPEAKER: Yes, it is.

THE CHAIR: How come we don't have the pictures on these screens?

---(Pause)

Now we do. Yes, fine. So sorry about that, but we have it on the transcript -- we have the start on the transcript and the confirmation of the identity of Mr. Pickens. You're the ultimate owner of the Mesa Group?

THE WITNESS: Yes.

THE CHAIR: You have given one written statement in this arbitration, that was dated 29th April 2014; is that correct?

THE WITNESS: Yes, that's here in front of me.

THE CHAIR: That is what you have in front of you, absolutely. And as you know you

are heard here as a witness. As a witness you are under a duty to tell us the truth. Can you please confirm that this is what you will do.

THE WITNESS: Yes.

THE CHAIR: Thank you. Now you know how we proceed: I will first give the floor to Mr. Appleton for his questions, and then we will turn to Canada's counsel, and the tribunal may have questions as we go along or at the end. Thank you.

THE WITNESS: Yes.

EXAMINATION IN-CHIEF BY MR. APPLETON:

MR. APPLETON: Can you hear me on this?

THE WITNESS: I can't hear you.

MR. APPLETON: Yes, nobody can. We're all dead. We'll try this. You can hear me now; yes?

THE WITNESS: Yes.

MR. APPLETON: Thank you, Madam President. You took some of my questions away. That is wonderful. Thank you very much.

Q. So you are T. Boone Pickens?

A. Yes.

Q. What does the "T" stand for?

A. Thomas.
Q. And you are 86 years old, sir?
A. Yes.
Q. I see that you're wearing an assistive audio device; you can hear everything clearly now?
A. Yes, I can.
Q. But if you don't understand, you will let us know?
A. I will.
Q. I'm sure that myself, counsel for Canada, the tribunal will happily repeat everything, whatever you might need so that you can hear -- yes?
A. Yes.
Q. Very good. Now, you're the founder and chairman of BP Capital; correct?
A. Yes.
Q. And BP Capital is the owner of all the equity -- or sorry, you are the owner of all the equity in Mesa Power Group; is that correct?
A. Yes.
Q. Now, you submitted that one

witness statement here that is in front of you in the binder, on April 29, 2014; correct?

A. Yes.

Q. And you had a chance to read that before you came here today?

A. Yes, I did.

Q. Did you have any corrections to make, sir?

A. No.

Q. All right. Now in your witness statement you refer to the "Pickens Plan". Could you briefly tell the tribunal what this is?

A. The Pickens Plan, I presented at or announced it at the Washington Speakers Bureau, July the 8th, 2008 and it was a plan for America. We needed an energy plan for America. We didn't have one. We're the only country in the world that doesn't have one, and that was where I started. Simply what the plan was: Get on your own resources and get off OPEC oil, because on OPEC oil you are paying for both sides of the war and just -- we had plenty of resources in America which were renewables, wind and solar, and natural gas and oil. We had resources, did not need anything from OPEC. That was the whole thing.

Q. And Mr. Pickens, you've had a considerable career in the energy business. Could you tell us about your business involvement in Canada before you made your investment in Ontario in 2009?

A. I got out of school as a geologist in 1951, Oklahoma State University, and went to work for Philips Petroleum. I worked for them for three and a half years. I left and went out on my own. That was in November of '54. Then I started a company in the United States, PEI, and then I started a company in Canada, Alteron Gas (phon.), and so I was involved in Canada from '59 to '79. I went to Canada with almost -- I have to smile when I tell this story, I went there with less than $100,000 in '59, and sold out 20 years later for 610 million to Dome Petroleum, and so that 20 years in Canada was not the end of investing in Canada. I had other investments in Canada over the years, after that.

I was in Calgary last weekend for a function there at the Hotchkiss Brain Institute, to which I've been -- I've been a sizeable contributor to that, but I still have great Canadian connections and did very well in Canada

and it was -- it was very much like operating in the United States. Rule of law was practised in existence and all, and it was really a great experience to -- I can't remember who it was that said it, but it was one of the premiers of Alberta said, "The best ambassador, non-Canadian ambassador for Canada is Boone Pickens," because always -- my experiences were so good that I enjoyed telling people about it, just like I enjoy telling you now. I would tell somebody in the hallway, if they asked me, so it -- it was a good period in my life.

Q. Mr. Pickens, I can't ask anything else after that. I'm going to turn the questions over to Canada.

As the president explains, Canada will ask you some questions. They'll be standing over there. They will give you some binders to look at, and various things from there, and at any time the tribunal might ask you questions, so we'll proceed that way.

THE WITNESS: Can I tell another Canadian story?

THE CHAIR: Yes, you can.

THE WITNESS: When -- I have four children, and we moved to Canada. My oldest

daughter graduated from Henry Wise Wood High School, but my second daughter was -- she was in the ninth grade and she came home and we had a family -- you could ask for -- to be the one to present at dinner, and she said, "i want to tell my story tonight at dinner." And she was very anxious to do it.

When she got around to it she said, "You, the family, have to understand we're in a minority here," and I said, "Pam, tell us about us being in a ..." She said, "We are foreigners in a foreign country." And I said, "I told you all of that before we ..." She said, "I know, but I experienced it today." And I said, "Tell me. What was it that you experienced?" She said, "They sang the national anthem and it wasn't the Star Spangled Banner." And she is a big singer. So I said, "How far did you get into the national anthem before you realized everybody else was singing another song?" She said, "I was too far in because they all quit and started laughing at me."

---(LAUGHTER)

THE CHAIR: Fine, so I think we can now go over to Canada's questions, Mr. Spelliscy. Will you stand there, I assume, and

take your microphone.

CROSS-EXAMINATION BY MR. SPELLISCY:

Q. Good afternoon, Mr. Pickens.

A. Good afternoon.

Q. My name is Shane Spelliscy and I'm counsel for the Government of Canada. As Mr. Appleton indicated, I am going to be asking you some questions today in connection with your testimony so as far this dispute. And as Mr. Appleton indicated, if you don't understand my question -- not just if you don't hear it, but if you don't understand what I am asking you, just stop me and I'll clarify. It is important that we understand each other here.

A. Thank you.

Q. In this respect, if you can answer a question "yes" or "no," I would appreciate you doing that for the record first. I will then offer you any opportunity that you want to explain your answer, to offer context, whatever you need.

I don't expect us to go all that long today. If you do need a break, just let me know and I'll find an appropriate time to take one as soon as possible.

A. Thank you.

Q. I believe that won't be needed, but if you do need one, let me know.

And just to let you know as well, there are a couple of confidential documents that we will likely turn to, so I'm going to pause when I get there and I'm going to tell them to turn the feed off, so we will just take a few moments to allow that to happen. So before offering any sort of comment on the document in front of you, please let them turn the feed off before we get to it.

A. Okay.

Q. Before we get started, I do have to confirm just one thing. As you are aware, you were required to be sequestered prior to your testimony this morning and I want to make sure that since the start of today you have not had any discussions with counsel or anyone else about what has happened so far, that you weren't watching the hearing or anything like that. If you could confirm that for the record.

A. Yes, I have not had any -- talked to anybody.

Q. Perfect.

I would like to start with just a few questions -- and I should just say you have

a binder there, there are a lot of tabs in it, hopefully we won't have to get to all of them, but I'd like to start with a few questions about the structure with respect to some of the companies that you discuss in your witness statement.

So you control what you call the Mesa Group of Companies; correct?

A. Yes.

Q. And the original company in that group was Mesa Petroleum; right?

A. Yes.

Q. Now, Mesa Petroleum was an oil and gas company; correct?

A. Yes.

Q. It had no investments in renewable energy production at all; correct?

A. No.

Q. You say in your witness statement that you left Mesa Petroleum in 1996; is that correct?

A. Yes.

Q. And it was in 1997 that you resigned from the board of directors; is that right?

A. Yes.

Q. And that's when you sold all of your shares as well, in 1997?

A. Yes.

Q. As of 1997, then, you no longer had any affiliation with Mesa Petroleum; right?

A. No. Well, just a second, I still was a shareholder.

No, you are exactly right. I sold the shares coincident with me leaving.

Q. With you leaving. So all of your shares --

A. There was a couple of months in there, but it's very close.

Q. Now let's turn to the Mesa Power Group and ask a little bit about that.

So, Mesa Power Group in its first formation, I think was formed in 2007; is that correct?

A. I think that's right, I'm not sure.

Q. You're not exactly sure, but that sounds about the right timeframe?

A. Yes.

Q. So that's -- I mean just to

give it -- it's about a decade or so after you left Mesa Petroleum -- "yes" or "no" for the record.

A. Yes. Yes.

Q. Thank you. So then to be clear, Mesa Petroleum and Mesa Power Group, they are not related at all? They are not the same entity?

A. No.

Q. I think earlier you said and you confirmed that you are the sole member of Mesa Power Group?

A. Yes.

Q. I think you confirmed, but we'll get it for the record again, when you formed Mesa Power Group LLC, you had never developed a wind energy project anywhere; correct?

A. That's correct.

Q. In fact, you had never developed any sort of renewable energy projects at all; you were just oil and gas?

A. That's right.

Q. Now, if you can turn to your witness statement that you have in front of you there, and if you could look at paragraph number 2 in your witness statement. There, in the first

sentence, you attribute Mesa Petroleum's success, at least prior to you leaving, I guess, to:

"... careful management and hard work of our employees ..."

Do you see that?

A. Yes.

Q. But I want to be clear, the employees who were managing Mesa Petroleum and making it successful, those were not the same employees who were managing the Mesa Power Group; correct?

A. Yes.

Q. They were not the same employees?

A. They were not.

Q. So Cole Robertson is the vice-president of finance for Mesa Power; is that correct?

A. Yes.

Q. He joined Mesa Power in June of 2008 -- about that date?

A. Yes.

Q. When he joined he was placed in charge of the day-to-day operations of Mesa

Power; correct?

A. Yes.

Q. And to be clear, Cole Robertson never worked at Mesa Petroleum; right?

A. No.

Q. Now, in paragraph 3 of your witness statement, you speak about Mr. Robertson's qualifications. But when he was hired in 2008, when he worked for Mesa, his only previous employment had been at Ernst & Young; correct?

A. Yes.

Q. And that was in their asset management practice; are you aware of that?

A. I'm not sure what group.

Q. But when you did retain him and you gave him the responsibility for Mesa Power's day-to-day operations, he had no direct experience in the electricity industry; correct?

A. I don't think so.

Q. And he had never developed a wind energy project; correct?

A. Correct.

Q. So at the time of his hiring, he didn't have any direct experience in renewable electricity generation; is that correct?

A. I'm pretty sure that's -- I'm trying to remember whether he did or didn't, but I think that's correct.

Q. You think that's correct. Mesa Power's first project was the Pampa project in Texas; right?

A. When you say "the first," we were looking at more than one project than Pampa. But that was central at that time.

Q. But all of the first projects were in Texas?

A. Pardon me?

Q. All of the first Mesa Power projects were located in Texas?

A. I think so.

Q. The Pampa project, it began around 2007; does that sound right?

A. It sounds right.

Q. Now, in order to supply that project in Texas, Mesa Power entered into a contract to purchase wind turbines from General Electric; is that right?

A. Yes.

Q. Here's where we're going to go into the confidential section because I want to

look at that contract with General Electric. So if we can just cut the feed to the room.

We're confidential.

--- Upon resuming the confidential session under separate cover

--- Upon resuming in public

BY MR. SPELLISCY:

Q. Let's talk a little bit more generally about Mesa Power's experience to date in the wind power industry and then we'll come to your investments in Ontario.

In addition to the Pampa project, which didn't work out, Mesa also pursued a project called Goodhue in Minnesota; are you aware of that?

A. Yes.

Q. And that project also you were unable to successfully develop; correct?

A. No, we didn't develop it. We sold the project.

Q. You sold it. But you sold it before the development was completed?

A. Yes.

Q. Now, in your witness statement you talk about Mesa's successful development of the Stephens Ranch Wind Project, but

I want to clarify, Mesa didn't actually bring that project into operation, did it?

A. No, we did not build it out.

Q. You sold it before it was built out; correct?

A. Yes.

Q. In fact, the Mesa Group has never actually brought a single wind farm into actual operation; correct?

A. That is correct but we have an interest in the Stephens Ranch deal, so ...

Q. But you didn't actually bring that into operation?

A. No, we did not.

Q. I want to talk about the investments now into Canada by the Mesa Power Group. Now, your first investments into Canada were in November of 2009; correct?

A. I don't know the date.

Q. If we look -- I don't know if this will refresh you, but if we look at tab 12 in your binder.

A. Can you read it to me?

Q. I can.

A. Okay.

Q. These are from the Registrar of Corporations of Alberta under the Alberta Business Corporations Act, and it is the Certificate of Incorporation, and it says:

"Twenty-two Degree Holding ULC was incorporated in Alberta on 2009/11" -- meaning November -- "17." [As read]

Does that sound about right with your recollection?

A. Yes.

Q. And you are aware that the other Arran project is about the same time --

A. Yes.

Q. -- in fact the same day?

Now, the FIT applications for those two projects, are you aware they were filed in November of 2009, as well, shortly after the projects were incorporated; does that sound right?

A. Yes.

Q. Now, of course before you invested, I assume you did your due diligence on these projects and in the market in Ontario?

A. Due diligence meaning what?

Q. Well, you invested the market, what the market conditions -- you investigated the market, what the market conditions were like?

A. You are asking me if I did that?

Q. Or if you had somebody do it and brief you on it?

A. Cole Robertson did that work.

Q. Did he brief you on the results?

A. Yes, he did.

Q. Now, your other two projects, they came later, right? They came in 2010, the Summerhill and the North Bruce projects?

A. I don't remember the names of those projects.

Q. You don't remember the names of the Summerhill and the North Bruce?

A. No. I don't. If you tell me that, I know you're reading from some ...

Q. Sure, I can point you to it. I mean, I think that if we go to Tab No. 13 in your binder, there is another Certificate of Incorporation, and this is for North Bruce Holdings

ULC, and it says it was incorporated in Alberta on April the 6th, 2010. Does that sound approximately right?

A. Yes.

Q. Other than for those companies, your companies made no further applications to the FIT Program, just for those four that I mentioned; are you aware of that?

A. I'm not aware of that but if that's the case, yes.

Q. Now, if you look at paragraph 17 of your witness testimony, you talk here about the fair competition to obtain power purchasing agreements. You say that it was fairly run and transparent; that's what you expected?

A. Yes.

Q. Now, considering there's competition then, when you made the applications you believed that a quality application would be needed in order to win that competition; right?

A. Give me the question again.

Q. When -- you are talking about the "competition to obtain," so you recognized it was a competition.

A. Yes.

Q. So then you understood that in order to win that competition, a good application would have to be submitted; correct?

A. Yes.

Q. And knowing also that it was a competitive environment, you or at least Cole Robertson kept yourself informed of what was happening in Ontario, so you were briefed on it?

A. I was not -- let me give you 30 seconds on my management style.

Q. Fine.

A. It is not the same as it was when I was 66, and so I did not -- I was not up-to-date, day-to-day operations on what took place on any of our projects, oil, gas, wind, whatever, but I did have briefings.

Q. So if something significant happened, you would be briefed on it?

A. I think so.

Q. Now, if we can -- if you can flip to what's tab 15 in your binder and I can read it to you. For the record it is R068.

A. In your binder?

Q. In this binder, yes. In the exhibits binder.

A. Okay, read it to me.
Q. This is an archived news release, it says, and it says:
"Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation". [As read]
It is dated September 26, 2009 at 10:00 p.m.
We can -- if we read from the third paragraph down, it says:
"Both Samsung C&T Corporation and the Government of Ontario are pleased to confirm that efforts are progressing well towards the signing of a historic framework agreement."
A. Okay.
Q. Would this have been something that you were briefed on in 2009?
A. I don't remember that.
Q. So you don't recall then, sitting here today, if you were aware of the fact that negotiations between Ontario and Samsung were

going on prior to the applications that your company has made to the FIT Program?

A. No.

Q. Now, we discussed earlier, and you had mentioned about the Pampa project, and you had said that there were two reasons why it couldn't go ahead and one of them was because of a lack of transmission capacity. So with that experience, you were aware of how important and essential access to the transmission grid was; correct?

A. Yes.

Q. Were you ever informed then about any of the press releases or news articles that were being published with respect to the Green Energy Investment Agreement prior to your projects investing in the FIT Program?

A. I don't recall.

Q. You don't recall that ever happening?

A. No.

Q. You do recall that your companies applied for FIT contracts in the Bruce Region of Ontario; does that sound right?

A. No, I don't -- I know that --

yes, I know, of course, that we were trying to do something in Ontario, but when you're asking me specifically about filing a brief, I don't recall that.

Q. Were you aware when -- were you briefed on the fact that at the time those applications were made, there was no transmission capacity in the Bruce Region or do you not recall being briefed on that?

A. I don't remember that.

Q. Now, you've seen it today, on January 21st of 2010, the formal announcement -- there was a formal announcement of the Green Energy Investment Agreement between Samsung and the Government of Canada; do you recall being briefed on that in January of 2010?

A. I don't recall.

Q. You don't recall. Let's take a look at -- it's the last tab in your binder. I can read out the relevant parts to you.

Tab 21, just for the record, is R076, and it's a -- what's called an archived backgrounder from the Ontario Government. And it's on January 21st, 2010 at 10:32 a.m.

You said you don't recall but

you've also said you would have been briefed on important developments and you've acknowledged also the importance of transmission capacity. So I want to look at some of what was publicly released in January of 2010 about the agreement and I'll try to read this out for you.

If you look at the bottom of the first page of this document, it is under a heading called "Stimulating Manufacturing" and in the second small paragraph there it says:

> "In addition to the standard rates for electricity generation, the consortium will be eligible for an economic development adder." [As read]

Then it goes on to talk a little bit about that.

So you don't recall being briefed in 2010 about the Korean Consortium being eligible for an economic development adder?

A. No.

Q. If you turn to the second page, and for everybody else I'm going to go down to the bottom heading that says "More Renewable

Energy," and in the last line there, that leads over to the next page, it says:

> "Assurance of transmission in subsequent phases is contingent upon the delivery of four manufacturing plant commitments mentioned earlier." [As read]

So you don't recall being briefed that in the agreement signed between Samsung and the Government of Ontario that they had an assurance of transmission capacity?

A. No, I don't.

Q. Well, let's turn -- and we'll do this, we won't do too many more, I think I'm getting close to the finish here. If we turn to tab 18 in your binder which, for the record, is C119. And this is a direction from the Ministry, the Minister of Energy to the chief executive officer of the OPA. It is dated September 17, 2010 and it says in the last paragraph on the first page, and I'll read it for you:

> "I now direct the OPA in carrying out Transmission Availability Tests and

Economic Connection Tests under the FIT Program rules, to hold in reserve 500 megawatts of transmission capacity to be made available in the Bruce area in anticipation of the completion of the Bruce-to-Milton transmission reinforcement, for phase 2 projects of the Korean Consortium." [As read]

You don't recall being briefed in September of 2010, that the Korean Consortium had been reserved transmission capacity in the very region in which your projects were applying for projects?

A. No.

Q. So I want to come then and ask you about your testimony in paragraph 18 of your witness statement.

In this paragraph you talk about a communication that you had with the Ontario Minister, Deputy Premier Minister of Economic Development and Trade, Ms. Sandra Pupatello, in

April of 2011; correct?

A. Yes.

Q. Now, this call did not discuss Mesa's FIT applications, did it?

A. No.

Q. And certainly Minister Pupatello made no commitments about those applications; correct?

A. Correct.

Q. Other than this communication, you had no earlier communications with the Ontario Government about the FIT Program or the GEIA; correct?

A. Yes.

Q. Now, in fact, you never reached out and you never spoke with the Ontario Minister of Energy at all; correct?

A. Correct.

Q. And you never spoke with the president or chief executive officer of the Ontario Power Authority at any time; correct?

A. Correct.

Q. Your call with Minister Pupatello that you are referencing here, this is about 18 months after you initially invested in

Ontario, as we saw from the documents, November 2009 to April 2011; does that sound right?

A. Yes.

Q. And as we see in the Summerhill and North Bruce projects, your other two that we saw, they were in April of 2010, so this conversation is about a year after those investments had been made; right?

A. Yes.

Q. So this call with Minister Pupatello had nothing to do with the reason why you invested into Ontario, did it?

A. Her call?

Q. Her call.

A. No, it had nothing to do with it.

Q. Your investment was made at that point already?

A. Yes.

Q. Now, in paragraph 18, you have testified there, and it's the fourth sentence in, about halfway down and I'll read it to you:

"Minister Pupatello did not make me aware that it was possible to participate in,

or negotiate, a special arrangement with Ontario, whereby Mesa could circumvent the requirements of the FIT Program."

Do you see that?

A. Yes.

Q. You would agree, even though you weren't briefed on it, this conversation happened about a year after the GEIA was publicly announced in January of 2010; correct?

A. I'm getting mixed up on dates but ...

Q. Well, we can go back and look, but the announcement -- the press release that I read to you -- was from January of 2010; correct?

A. Okay, yes.

Q. Do you agree? And so this call is over a year after that happened?

A. Yes.

Q. But you weren't briefed on any of this, so when you made your statement in your witness statement here, that she didn't make you aware, the fact is nobody had briefed you on

the fact that Samsung had entered into such a deal and that it had been publicly disclosed that they had entered into such a deal?

A. Yes.

Q. You never asked Minister Pupatello about negotiating an investment agreement with Ontario, did you?

A. No.

Q. In fact, to your knowledge, neither you nor anyone in any of your companies ever asked about negotiating such an agreement with Ontario?

A. Yes.

Q. You didn't do that, nobody asked; right?

A. Right.

MR. SPELLISCY: Thank you, Mr. Pickens, that was all the questions I have for you today.

THE CHAIR: Thank you. This doesn't entirely complete your examination. It won't be much longer, but if you just bear with us.

THE WITNESS: I couldn't hear you. Just a sec.

THE CHAIR: This does not yet

entirely complete your examination. There may be a few more questions, if you can bear with us.

Does Mr. Appleton have some redirect questions?

MR. APPLETON: I have one.

THE CHAIR: Yes, please.

RE-EXAMINATION BY MR. APPLETON:

Q. Good afternoon again, Mr. Pickens.

Do you remember when Mr. Spelliscy was asking you some questions about whether Mesa Power Group had developed a wind power project anywhere?

A. Yes, I remember.

Q. Besides Mr. Robertson, Cole Robertson who is here, did any other members of Mesa Power have wind experience?

A. We had, I think, Mark Ward had wind experience, but yeah, I believe that would be it.

Q. Would Mr. Robertson know of those --

A. Oh, yeah, Cole would know. And we could have had other people involved. I'm not sure. Ask Cole.

MR. APPLETON: Thank you very much. Nothing further.

THE CHAIR: Thank you.

Do my co-arbitrators have any questions for Mr. Pickens?

QUESTIONS BY THE TRIBUNAL:

THE CHAIR: I have one that goes more to your general assessment of what happened here. You have insisted both in your written statement where you have spoken about the particular fondness -- "I have a particular fondness for working in Canada," you wrote. And you have restated this today orally.

The reason why you are here today obviously means that this time it did not work out well; what did go wrong?

THE WITNESS: I'll go back in my recall again. I kind of look forward to doing business in Canada. And I had actually been at San Antonio when the NAFTA agreement -- I think it was signed there, but I was invited to be there and I remember I sat on the front row and I listened to what they had to say and it made a great deal of sense to me, NAFTA did, that we would work back and forth in North America, and I think from there,

that was where I started to think about the North American Energy Alliance, that North America could work together and cut out a lot of red tape and everything else if they -- if everything was above board and transparent, to companies that wanted to work back and forth.

And anyway, in that, I came up with a North American Energy Alliance which would be to get totally off OPEC crude.

And so -- then after the Minister -- after she called me, and encouraged me to come to Ontario and do business, and asked me to do some speaking engagements up here, and all, I felt like that -- and we were already into -- but I felt good about the call. I felt that we were going to be treated fairly. And -- but -- and then -- it said I was depressed over it, and I thought about it when I put "depressed" in there and I thought about it --

THE CHAIR: I think you said "disappointed," didn't you?

THE WITNESS: Did I say "disappointed" or "depressed"?

THE CHAIR: "Distressed".

THE WITNESS: "Distressed," not --

but I thought, "Is this too strong?" and I thought no, it really isn't, because I was disappointed that (A), a secret deal had been made with Samsung, and that we were now out and Samsung was in, and I -- and Cole briefed me on it, told me, he said, "Yes, they made a deal with Samsung." Later I know that the way I recall it in another meeting, we picked that up on discovery, that a secret meeting, yes, had been made between Ontario and Samsung. And that did -- that was very disappointing to me.

THE CHAIR: So the reason of your disappointment or being distressed was that Samsung made a deal with the Ontario Government or -- not that much that your FIT applications did not succeed and you didn't get contracts?

THE WITNESS: Yes, I --

THE CHAIR: What was it? Because there are two --

THE WITNESS: Well, the deal that was made with Samsung was not -- I didn't feel was -- it was made above board, and it was a secret agreement, and so I -- I felt like, you know, we lost. Well, you always feel bad when you lose, and then you look to see why you lost, and here we lost because we didn't have a level playing field.

THE CHAIR: Fine. Thank you. That answers my question, and unless there is any follow-up question...

MR. MULLINS: We just have one follow up question, follow up from the Chair's question.

THE CHAIR: From the tribunal's questions, yes. So please go ahead.

MR. MULLINS: Do you mind if I do it? I just thought of --

THE CHAIR: No, you can do it.

FURTHER RE-EXAMINATION BY MR. MULLINS:

Q. Mr. Pickens, to follow up on the Chair's question, between yourself and Mr. Robertson, who would be the best to be able to identify what Mesa's complaints are in this arbitration?

A. Well --

THE CHAIR: Yeah, maybe I should say, I wanted to have Mr. Pickens' personal opinion. I understand that you have made your submissions and Mr. Robertson will be able to explain tomorrow. I just wanted Mr. Pickens' personal opinion of what had happened.

MR. MULLINS: I'll take that from the record. I just wanted to make sure that the Chair understood that and that's fine.

THE CHAIR: Absolutely. That was the spirit of the question.

MR. MULLINS: Perfect.

THE WITNESS: I don't have a question?

THE CHAIR: You don't have a question because I answered the question.

THE WITNESS: Thank you.

THE CHAIR: So, that completes your examination, Mr. Pickens. Thank you very much for your explanations.

THE WITNESS: Well, thank you too, and you got me out and on my way home before I thought I was going to get home. Thank you.

MR. APPLETON: Is the witness excused?

THE CHAIR: Yes. So, you can either leave or you can stay; whatever you wish to do.

THE WITNESS: I can't hear you.

THE CHAIR: You can leave -- you hear me now? No, maybe I should wait.

THE WITNESS: The reason I can't hear is because I have shot a gun too much and I have one other reason. It's because I'm 86. The other day I did a physical with Southwestern Medical and they called and told me, they said, "We have good news and bad news." And I said, "Well, give me the good news first." And they said, "You are going to live to be 114." And I said, "Okay, bad news?" And they said, "You won't be able to hear or see." And I'm already there. Thank you.

THE CHAIR: Thank you. The question now is: Do we want to continue and start the examination of Mr. Robertson or do we do this tomorrow, which to me would seem more reasonable because it's five o'clock now.

MR. APPLETON: It would seem to me that tomorrow would make more sense. We won't get very far anyways.

THE CHAIR: And we would have to interrupt, which is never really good.

MR. SPELLISCY: Let's do it tomorrow.

THE CHAIR: You agree? And then tomorrow at some point the tribunal will come back to you on the issue of the damage expert evidence.

Is there anything that we need to raise before we can close for the day? No? Fine. Then have a good evening and we will see each other tomorrow morning at 9:00.

--- Whereupon at 4:59 the arbitration was adjourned to Monday, October 27, 2014 at 9:00 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided transcription and transcribed therefrom, the foregoing proceeding.

Teresa Forbes, CRR, RMR,
Computer-Aided Transcription

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided Transcription and transcribed therefrom, the foregoing proceeding.

Lisa M. Barrett, RPR, CRR, CSR
Computer Aided Transcription

PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE

PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONOURABLE CHARLES N. BROWER,
MR. TOBY T. LANDAU QC

held at Arbitration Place, 333 Bay Street,
Suite 900, Toronto, Ontario on Monday,
October 27, 2014 at 9:13 a.m.

PUBLIC ONLY

VOLUME 2

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Jennifer Kacaba
Saroja Kuruganty
Lucas McCall
Alex Miller
Harkamal Multani
Darian Parsons
Adriana Perezgil
Melissa Perrault
Chris Reynolds
Cole Robertson
Sejal Shah
Michael Solursh
Mirrun Zaveri

Lisa Barrett, CRR, RMR, CSR, Court Reporter

INDEX

Toronto, Ontario

--- Upon commencing on Monday, October 27, 2014 at 9:05 a.m.

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

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

Mr. Robertson, good morning.

THE WITNESS: Good morning.

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

THE WITNESS: I am.

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

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

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

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

THE WITNESS: Correct.

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

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

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

SWORN: LEE ALLISON ROBERTSON

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

EXAMINATION IN-CHIEF BY MR. APPLETON:

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

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

A. That's correct.
Q. What's your role with the Mesa Power Group; that's the investor in this arbitration?
A. Sure. I handled all the financial analytics, as well as the day-to-day operations of the company.
Q. Do you have any degrees or certifications?
A. I do. I have a bachelors degree in accounting and a masters degree in finance, both from Texas A&M University.
Q. Now I see on October 15, 2014, you filed some minor corrections to your witness statement. Those were, if I recall, some typographical errors and things like that; do you have any further corrections to make to your witness statements?
A. I do not.
Q. Could you tell us a little bit about the Mesa Power wind team?
A. Sure. In addition to myself we have Mark Ward. Mark has a background in power development, both thermal and renewable, working with companies like Entergy, which is a large utility in the U.S., TXU who, at the time, was one of the largest

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

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

Q. How did your background add to this team?

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

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

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

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

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

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

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

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

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

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

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

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

A. I do not.

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

CROSS-EXAMINATION BY MS. SQUIRES:

Q. Can you hear me okay?

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

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

MR. BROWER: Unless you live to be 114.

BY MS. SQUIRES:

Q. That's what we're aiming for. Good morning, Mr. Robertson.

A. Good morning.

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

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

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

A. Okay.

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

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

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

A. That's correct.

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

A. That's correct.

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

A. That's correct.

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

A. That's correct.

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

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

Q. So then your job with Mesa

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

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

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

A. Okay.

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

A. It is.

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

A. That is correct.

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

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

Q. And at the time of the FIT

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

A. At the time of the...?

Q. Of the FIT applications.

A. FIT applications, yes.

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

A. I'm sorry, what paragraph?

Q. Paragraph 102.

MR. BROWER: Is that in the --

MS. SQUIRES: In the reply memorial. The claimant's reply. No, I'm sorry. I can give everyone a minute to get there.

THE CHAIR: Yes.

BY MS. SQUIRES:

Q. Now, Mr. Robertson, this paragraph lists the Applicant's control group of the investors TTD project, as consisting of Mesa Power Group, Mesa Wind, AWA, AWA TTD Development, Twenty-Two Degrees Holdings and TTD Wind; correct?

A. Yes.

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

purposes of the FIT roles; correct?

A. It does.

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

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

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

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

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

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

A. Okay.

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

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

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

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

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

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

A. They were.

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

A. That is correct.

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

A. Okay.

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

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

A. Yes, myself and Mark Ward, yes.

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

A. Yes.

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

A. I am.

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

A. I am.

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

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

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

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

--- (Off-record discussion)

MR. APPLETON: It is in the binder at

tab A.

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

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

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

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

Q. Are we there, Mr. Robertson?

--- (Off-record discussion)

BY MS. SQUIRES:

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

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

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

A. 24?

Q. 25 specifically.

A. Okay.

Q. So here you confirm that:

"Mesa believed that to ensure

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

Correct?

A. Yes.

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

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

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

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

A. Okay.

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

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

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

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

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

A. Correct.

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

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

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

A. That is what it says.

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

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

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

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

A. It does.

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

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

Correct?

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

Q. That's okay.

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

MS. SQUIRES: 4.1(a), yes.

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

BY MS. SQUIRES:

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

4.1(a), the first sentence says:

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

A. Okay, so what was the question?

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

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

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

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

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

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

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

Correct?

MR. BROWER: "Obligated".

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

THE WITNESS: It does say that, yes.

BY MS. SQUIRES:

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

A. It doesn't talk to whether they

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

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

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

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

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

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

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

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

A. Okay.

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

A. It does say that, yes.

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

A. Of Section 3 of the --

Q. Of the rules?

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

Q. Tab 9. 3.1(b).

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

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

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

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

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

A. Yes.

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

A. They did.

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

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

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

A. Okay.

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

Now, here the OPA is looking for

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

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

Q. Yeah. Absolutely.

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

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

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

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

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

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

time with these kinds of exchanges?

THE WITNESS: Sure.

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

THE WITNESS: Sure.

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

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

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

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

THE WITNESS: I did.

MR. LANDAU: Thank you. Sorry.

BY MS. SQUIRES:

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

A. Okay.

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

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

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

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

Q. That's right?

A. -- what you're referring to?

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

A. Okay.

Q. So, it indicates that the site

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

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

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

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

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

A. It does.

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

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

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

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

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

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

easement A and B referred to in Schedule 5."

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

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

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

A. Correct.

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

A. I don't recall.

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

A. Okay.

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

> "Mesa submitted its applications and it requested circuits B275 and B285." [As read]

Correct?

A. Yes.

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

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

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

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

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

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

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

Q. Right.

A. -- in the previous communication.
Q. Right. And there is further communication on the connection-point; correct? It indicates that the application specifies two circuits instead of one, which was required for your application to proceed properly; correct?
A. It says you may only have one circuit listed, yes.
Q. So the OPA reaches out for you to specify the one circuit; correct?
A. It looks that way, yes.
Q. Now there was an additional problem with Arran's application, when it was submitted because it also had a letter of credit issue; correct, the same as the TTD project?
A. I recall the letter of credit, yes.
Q. So the OPA then also reached out for this information?
A. Yes.
BY MS. SQUIRES:
Q. Now, I want to speak about the application, specifically, so in that regard, we are going to go into a confidential session and we'll have to cut the feed so ... I'll wait until that's done and

get the signal.

We're good to go.

--- Upon commencing the confidential session at 9:40 a.m. under seperate cover

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

BY MS. SQUIRES:

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

A. Okay.

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

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

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

A. Can I look at it?

Q. It is Exhibit C-0098.

A. There's the date.

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

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

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

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

A. I did not, no.

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

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

Q. Now, Mesa attended a webinar,

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

A. Correct.

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

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

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

A. Okay.

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

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

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

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

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

A. No, I attended some of the other

webinars from time to time.

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

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

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

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

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

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

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

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

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

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

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

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

Q. Now I'd like to turn to Exhibit

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

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

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

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

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

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

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

A. He does say that.

Q. And Capital --

A. Kind of.

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

A. I didn't really know what the

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

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

A. I'm not sure when they applied.

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

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

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

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

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

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

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

where...

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

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

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

A. Okay.

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

A. That sounds correct, yes.

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

A. Yes.

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

A. That's sounds --

Q. I've made that large for you.

A. I can refer back to the document. I don't have it open but, yes, I would assume it is the one that...

Q. If you want to refer back to the

document, it was tab 12.

A. 12, okay.

Q. Exhibit R-181.

A. Yes, those are right there.

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

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

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

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

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

A. That is where they are slotted on

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

Q. December 21, 2010.

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

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

A. It is.

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

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

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

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

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

A. The email does not say that.

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

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

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

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

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

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

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

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

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

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

circuit; correct?

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

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

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

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

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

You may have to have a different step

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

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

A. Not 2011. What I said was --

Q. Sorry, 2009.

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

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

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

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

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

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

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

A. Sure.

Q. He knew it was complicated essentially?

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

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

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

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

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

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

THE WITNESS: That is my testimony.

BY MS. SQUIRES:

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

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

BY MS. SQUIRES:

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

A. Okay.

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

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

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

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

A. Can I get this on the screen?

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

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

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

So zero capacity; correct?

A. (Reading):

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

Okay.

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

A. I don't believe I do.

Q. And let's turn to slide 14.

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

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

MR. APPLETON: I understand.

THE CHAIR: While we're --

MS. SQUIRES: We are confidential right now.

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

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

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

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

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

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

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

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

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

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

MS. SQUIRES: That's fine. When we

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

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

THE WITNESS: Yes, ma'am.

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

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

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

BY MS. SQUIRES:

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

A. Okay.

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

A. We're not using this one?

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

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

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

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

A. Correct.

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

A. I did.

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

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

A. Okay.

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

A. Okay, I follow the map.

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

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

A. Yes.

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

A. Yes.

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

A. Okay.

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

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

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

A. Okay.

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

A. Okay.

Q. Now, I want to talk for a minute

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

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

A. By the map, yes.

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

A. By the map, yes.

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

A. By the map, yes.

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

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

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

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

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

A. And this is the west of --

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

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

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

A. I have no idea.

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

A. Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Okay.

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

A. Yes, I see that.

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

A. By the map, yes, I agree.

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

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

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

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

MS. SQUIRES: Right.

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

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

THE CHAIR: Yes, sometimes, indeed, it

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

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

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

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

MR. WATCHMAKER: Correct.

THE CHAIR: Thank you.

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

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

THE WITNESS: And what -- is that

tab 9?

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

THE WITNESS: But no promises.

MR. WATCHMAKER: It depends how you respond.

CROSS-EXAMINATION BY MR. WATCHMAKER:

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

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

A. Okay.

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

A. I do.

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

A. Okay.

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

A. Page 18 or paragraph?

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

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

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

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

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

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

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

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

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

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

A. Uh-hmm.

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

A. I do.

Q. And it reports in the first

paragraph that:

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

Do you see that?

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

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

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

Do you see that?

A. I do.

Q. It goes on:

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

Do you see that?

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

(Court reporter appeals.)

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

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

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

financial crisis touched, yes.

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

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

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

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

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

BY MR. WATCHMAKER:

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

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

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

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

Q. But you agree with Mr. Pickens

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

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

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

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

BY MR. WATCHMAKER:

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

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

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

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

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

Q. You try to maximise value; right?

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

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

A. I do.

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

A. I agree.

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

A. Correct.

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

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

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

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

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

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

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

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

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

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

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

A. Goodhue --

Q. Just Mesa Power now. Goodhue and Monterey?

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

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

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

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

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

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

A. Please.

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

A. Okay.

Q. At paragraph 29, you say:

"It wasn't until the commencement of this arbitration that Mesa began to fully appreciate the extent of the GEIA and the prejudice its applications were under." [As read]

Do you see that?

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

Q. Yes.

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

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

appreciate the extent to which the GEIA prejudiced its application for obtaining a FIT contract and to the extent to which the Korean Consortium used its leverage with Ontario in a competitive way against Mesa. When announced, the terms of the GEIA were secret." [As read]

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

A. Okay.

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

A. Yes, sir.

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

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

Q. Let's look at this, right?

A. I am looking at this.
Q. And this news release refers to a few things. It refers to the substantial scale of the agreement; do you see that reference?
A. In the next-to-last paragraph on the bottom I see the words "substantial scale of this proposed investment." Yes.
Q. It also refers to the commitment to manufacturing; do you see that?
A. It does. I don't see any other details though in this release.
Q. Sure. Let's look at paragraph 3. It refers to historic framework agreement; correct?
A. It does.
Q. I'd like to turn to tab 29. This is a Toronto Star article from the very same day. And in the second paragraph it refers to a multi-billion dollar investment; do you see that?
A. I do.
Q. And further down, it quotes the Energy Minister who refers to Samsung's potential investment as several billions of dollars; correct?
A. Yeah, it also -- it does. And it also says right above that they are looking to get into the renewable energy business in a big way.

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

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

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

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

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

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

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

I think we've now learned through this

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

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

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

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

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

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

A. The Toronto Star story?

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

A. The Ministry's press release

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

> "...concerning negotiations between Samsung C&T and Government of Ontario has prematurely entered the public domain."

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

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

A. I do see it.

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

A. I'll take your word for it.

I believe that timing sounds about right.

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

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

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

A. Right.

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

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

Q. If we look they at the third paragraph:

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

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

Do you see that, Mr. Robertson?

A. I see it in the letter, yes.

Q. And further below in the next paragraph:

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

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

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

Q. Yes.

A. Right, for solar projects.

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

framework agreement; right?

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

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

A. Umm...

Q. A billion dollars?

A. I don't know that.

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

A. Okay.

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

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

Q. Paragraph 55:

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

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

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

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

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

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

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

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

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

(Court reporter appeals.)

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

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

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

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

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

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

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

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

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

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

> "In addition to the standard rates for electricity generation, the Korean Consortium will be eligible for an economic adder..." [As read]

Do you see the middle of that page:

> "...will bring $7 billion of renewable generation investment to Ontario." [As read]

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

A. Okay.

Q. Did you contact the Ministry after that?

A. We did not. And I think since

this arbitration, we learned that the 16,000 jobs referenced in this document is very different than what's in the GEIA. I believe it's 700 to 900 jobs. We also know that the -- this agreement says:

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

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

> "The insurance of transmission".

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

> "Insurance of transmission in subsequent phases is contingent on the delivery of four manufacturing plants

commitments earlier." [As read]

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

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

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

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

A. No, I...

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

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

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

THE CHAIR: Oh, so can you --

MR. WATCHMAKER: -- which was --

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

the government on the basis of this information?

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

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

THE WITNESS: Yes, sir.

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

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

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

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

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

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

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

No, but the team did brief me every single day. I knew the minute these releases were made, maybe not the minute but within a few hours, that they were made, I was notified and reviewed.

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

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

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

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

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

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

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

THE WITNESS: I believe -- and I'm

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

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

MR. LANDAU: Thank you.

BY MR. WATCHMAKER:

Q. Maybe we can move on from the GEIA. Mr. Robertson, I'd also like to discuss your turbine agreement with GE for a few minutes, so at this time I'd ask that the public feed be cut off and we go into confidential session.

--- Upon resuming the confidential session at 12:06 p.m. under separate cover now deemed public

THE CHAIR: Thank you. Any redirect questions?

MR. APPLETON: I believe so.

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

THE CHAIR: Yes.

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

RE-EXAMINATION BY MR. APPLETON:

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

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

A. Okay.

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

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

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

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

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

SPEAKER: Go back on.

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

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

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

MR. SPELLISCY: Make that 30 seconds more.

BY MR. APPLETON:

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

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

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

A. I do.

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

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

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

Q. Do you recall when you started

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

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

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

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

BY MR. APPLETON:

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

A. Okay.

Q. "Confidentiality" is Mesa's

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

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

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

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

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

BY MR. APPLETON:

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

A. I can, yes.

Q. Could you tell us what this document is?

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

of 2009.

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

A. I did. August 14th, 2009.

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

A. Sure.

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

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

A. No, sir.

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

A. I recall.

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

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

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

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

A. No, they did not.

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

A. No, they did the not.

Q. They never told you that they had --

A. Higher in points.

Q. No, in rankings?

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

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

A. The OPA did not -- correct.
Q. And they did, in fact, tell you that Mesa had achieved priority rankings for these two launch period projects.
A. Correct.
Q. Okay, that was a little tricky. I'll try to make them simpler. Ms. Squires spent about 30 minutes today about criteria points; do you recall that?
A. I do.
Q. Did the fact that Mesa did not obtain criteria points prevent Mesa from getting these rankings?
A. No, it did not.
Q. So this was extra credit that would give you a higher ranking then?
A. You could characterise it that way, yes, sir.
Q. Did Mesa have to satisfy any criteria points to obtain a FIT contract?
A. No, sir.
Q. For example, when Ms. Squires said that the FIT Rules required an audited financial statement, that was actually only for this extra credit then; isn't that correct?

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

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

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

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

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

A. Yes, sir.

Q. Can do see that?

A. Yes.

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

A. (Reading):

"The OPA is pleased to advise that your application form and submit the documents have been reviewed in detail by the OPA and are deemed complete and that the project satisfies all the eligibility requirements set out in section 2 and 3 of the FIT Rules." [As read]

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

A. Yes, sir.

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

A. I do, sir, yes.

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

A. (Reading):

"The OPA is pleased to advise that your application form

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

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

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

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

A. It is.

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

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

vertical. Maybe we can assist you.

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

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

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

A. I do.

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

A. Sure:

"As per section 5.2 of the FIT Program rules, the OPA has completed an assessment of the transmission resources associated to the connection of for your project to the electricity system. The results of the transmission availability testing have identified that the connection resource

requirements identified within your FIT application do not have adequate system capacity in order to connect your project. Specifically, the letting resource for connecting your project is identified as this project exceeded the..." [As read]

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

A. (Reads):

"At this time, your project will proceed to the next Economic Connection Test, which is scheduled to be performed during the summer of this year." [As read]

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

A. I do not recall this document, no.

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

A. Okay.

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

BY MR. APPLETON:

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

A. I understand.

Q. -- in the binder. All right. The part I'm just looking for, this letter says:

"The OPA has completed an assessment of the transmission resources associated to the connection of for your project to the electricity system." [As read]

Correct?

A. Yes.

Q. Right. He's answered that. Sorry.

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

A. No, sir.

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

A. I was.

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

A. Yes, sir.

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

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

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

A. That's correct.

Q. Now, isn't it logical that if

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

A. Yes, sir.

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

A. Okay.

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

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

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

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

A. (Reading):

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

Samsung/Pattern. Selection points are B562L and B562L." [As read]

Q. Did that sale go through?

A. I believe it did.

Q. Why were Samsung and Pattern buying FIT projects?

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

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

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

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

A. Pattern Energy.

Q. Were buying low- FIT projects and

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

A. Correct sir.

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

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

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

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

Q. So, do you know who they used?

A. I believe they used Siemens, their turbines.

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

That's at tab 29 of volume 2.

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

A. Yes, sir.

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

A. I do not see it in this document.

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

A. No, sir.

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

A. It makes no mention.

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

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

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

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

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

A. Sorry.

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

A. Yes, I do.

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

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

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

MS. MOWATT: Two.

BY MR. APPLETON:

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

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

--- Upon commencing the confidential session at 2:26 p.m. under seperate cover

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

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

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

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

THE CHAIR: Okay.

FURTHER CROSS-EXAMINATION BY MR. SPELLISCY:

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

I just have a couple of questions and maybe before I could get a clarification so CO461 which your counsel showed to you, this is still a confidential document. I think you said you waived confidentiality but before I put it up on the screen I wanted to know for sure?

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

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

need to go confidential or not?

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

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

BY MR. SPELLISCY:

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

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

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

A. Okay.

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

A. Okay.

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

2009; do you see that?

A. I do.

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

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

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

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

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

THE CHAIR: Can you give us a page?

MR. SPELLISCY: It is on page 224.

THE CHAIR: Thank you.

MR. APPLETON: At?

MR. SPELLISCY: At paragraph 859.

BY MR. SPELLISCY:

Q. And the first sentence of that paragraph says:

"Mesa's first investment in

November of 2009..." [As read]

Do you see that?

A. I do.

Q. Okay, so is that just another mistake?

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

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

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

A. It is.

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

"As of August 14th, these are authorised and approved and each of the authorised party be and each of them acting singly hereby is, authorised, empowered and directed, to execute and deliver the agreement." [As read]

Correct?

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

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

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

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

A. I'm not sure if it is.

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

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

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

MR. APPLETON: One question.

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

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

THE WITNESS: Not home, just...

BY MR. APPLETON:

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

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

MR. LANDAU: Page 5.

MR. APPLETON: Yes.

BY MR. APPLETON:

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

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

A. I have.

Q. Yes. It says:

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

A. Correct.

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

A. I do.

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

A. Correct.

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

A. August 14 of 2009.

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

A. That would be my understanding.

Q. Right. Thank you.

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

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

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

THE WITNESS: It's multiple things

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

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

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

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

most.

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

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

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

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

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

THE WITNESS: Thank you very much.

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

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

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

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

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

THE WITNESS: That's correct.

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

THE WITNESS: Yes, that's correct.

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

THE WITNESS: That's correct.

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

THE WITNESS: Yes, I do.

SWORN: RICHARD JENNINGS

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

EXAMINATION IN-CHIEF BY MR. WATCHMAKER:

MR. WATCHMAKER: I only have one question.

BY MR. WATCHMAKER:

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

A. I have no corrections to make.

THE CHAIR: Fine, then Mr. Mullins.

CROSS-EXAMINATION BY MR. MULLINS:

THE WITNESS: I hope your questions are as easy.

BY MR. MULLINS:

Q. Unfortunately not. Good

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

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

Q. During the operative time?

A. Yes.

Q. And we have heard you've provided two witness statements to this arbitration and I understand that they are accurate, to the best of your knowledge?

A. Yes, that's correct.

Q. I'll probably be switching back and forth, if need be so, if you have both of them available that would be helpful.

THE CHAIR: The witness statements. Does the witness have his witness statements available?

SPEAKER: They are in the red cover.

BY MR. MULLINS:

Q. Thank you, Mr. Jennings. Now, I'm going to ask you a number of questions and I would appreciate if you could listen to my question and try

to answer them accurately. It may be very well that your counsel may want to follow up but we'll have them do so because you'll understand that we have a number of witnesses to talk to, and unlucky for you, you are number one for Canada, so we're going to be ask asking a lot of questions. So if you could please listen to my question and try to answer it "yes" or "no" if it's a "yes" or "no" question?

A. Yes.

Q. Thank you. Now, during the relevant time period and currently now you are involved in electricity pricing; correct?

A. Yes.

Q. Transmission planning?

A. Yes.

Q. Nuclear regulation?

A. Yes.

Q. Long term energy plans?

A. Yes.

Q. Supply director to the OPA?

A. Yes.

Q. Energy and trade and environmental issues?

A. Yes.

Q. And in doing your duties at the

Ministry of Energy, you agree that you should do so in a fair, non-arbitrary and transparent manner?

A. That would be a standard goal of public service, yes.

Q. For yourself and the entire Ministry; correct?

A. Those would be standard goals of public service, yes.

Q. In fact, specifically, you would agree that the Ministry of Energy had the duty to operate the entire renewable energy program in a fair and non-arbitrary and transparent manner?

A. Well, certainly there were -- operating the energy system requires taking several -- various things into account and certainly those are factors you would want to do and of course their people would challenge whether you're doing them that way, but that certainly would be the intention to be -- to deal with, as you stated.

Q. It would be the Ministry of Energy's duty to do so; correct?

A. Well, as I'm trying to ascertain where you're going, but certainly those are all noble objectives in the -- again, as public servant.

Q. Okay, it might be helpful if you

don't try to guess where I'm going and just maybe concentrate on the question. I'm going to ask it one more time just so the record is clear. It would be the duty, "yes" or "no", for the Minister of Energy to operate the renewable energy program in a fair, non-arbitrary and transparent manner, "yes" or "no"?

A. Yes, it would be.

Q. And being transparent means being truthful and open; correct?

A. So I don't have a dictionary in front of me but I think that is what it means, yes.

Q. Thank you. And all this work is really to regulate this industry on behalf of ratepayers; correct?

A. So there are principal factors that you have to take into account so certainly the ultimate customer is important, in terms of what prices they pay. They need reliable supply, they need to have a sustainable system, those are all factors that have to be taken into account.

Q. Well, ultimately it is the ratepayers that pay for the generation and transmission and distribution of electricity; right?

A. They are billed and they have to cover the cost. I'm just saying that in terms of --

it's not just rates, it's reliability and supplies.

Q. Correct. And you've talked about that in your statement, thank you. But the electricity that we're talking about is generally not consumed by the government, it is generally consumed by the consumers, the ratepayers?

A. So, the government in the system that we have here makes, I believe, the procurement decisions but ultimately how much power is used is the consumer. They turn the lights on and they are ultimately billed for those -- for that services.

Q. I use the word "Procurement". You are not a NAFTA lawyer, are you, sir?

A. I didn't say that I was, but I said that in terms of looking at even the legislation, various references are -- so renewable energy is procured through government decisions, Ontario Power Authority.

Q. Okay, but you're using that in the industry term, not a legal sense; correct?

A. Well, I'm --

Q. In the NAFTA legal sense?

A. I'm not sure what the distinction is but I'm just saying that the way the system operates here, the procurement is procurement of

renewable energy by the Ontario Power Authority.

Q. By the OPA?

A. Yes.

Q. Thank you. Now, in fact what you've said, the electricity once it's generated must be simultaneously transmitted and consumed; correct?

A. Yes.

Q. And as we talked about essentially that's consumed by the ratepayers; right, that's who consumes it?

A. Well, the system as a whole has to instantaneously meet -- so that is about the reliable supply of the system as a whole has to match supply and demand at any point in time and throughout the system.

But again, so the ratepayers -- so the consumers ultimately are billed each month. Those bills are paid by them and that covers the electricity that they consumed.

Q. They consume the electricity; that's what I asked; correct?

A. The final end point, yes.

Q. Because you actually say in your statement that the government can't store the power; it has to do it immediately?

A. No-one can store the power. There is no economic or technically feasible way of storing large amounts of power, but the electricity is, of course, moved through the Hydro One transmission system for the most part and that's government-owned.

Q. Fair enough, but what you're saying, also, in your statement, is that in terms of cost, we need to keep costs at reasonable levels because it's ultimately the commercial and industrial consumers that have to bare the costs; right?

A. Yes.

Q. And when you also talk about reliability, reliability generally, wind generations can be less reliable than other methods; correct?

A. Yes, that's correct.

Q. But that didn't stop Ontario from including wind projects in its green initiative, did it?

A. So the government decided to pursue, as many other governments have done, a policy of promoting Green Energy. In terms of its effect on reliability, there's no question that it has different impacts on reliability than other generation so that had to be taken into account in any of the system

planning.

Q. And it didn't stop Ontario from entering into a special deal with the green consortium for wind either, correct?

A. Well, again it was a priority of the government to pursue Green Energy.

Q. Now, as I understand it, the majority of what the GEIA was doing was for wind and then some solar; right?

A. Solar was a big component so I think it was 2,000 megawatts of wind and 500 megawatts of solar.

Q. So, the purpose of the whole renewable energy initiative was to reduce the coal for environmental reasons?

A. It was a factor in reducing coal, yes.

Q. And what happened is this renewable energy program became much more successful than you expected; right?

A. Yes.

Q. And what ended up happening was that the cost to the ratepayers went up; correct?

A. Yes, that's correct.

Q. And so what ended up happening is

that the customer started complaining about the high prices of this renewable energy program; correct?

A. There was particularly -- in 2010 there was quite a bit of consumer complaints. I wouldn't say -- there always is but it became a very particularly vocal issue.

Q. Because what you say is, and this is quoting your statement at paragraph 14 -- if you want to look at it, that's fine.

A. Is this the first one?

Q. Correct.

A. Okay.

Q. If you look at paragraph 14:

"In every electricity system, unless it is heavily subsidised by the government, electricity customers or ratepayers ultimately have to pay for generation, transmission and distribution or else the system is under-built and they have to cope with rotating alternatives." [As read]

Correct?

A. Yes.
Q. So, in fact, the Ontario electricity system is not heavily subsidised, is it, sir?
A. No.
Q. In fact, it is not subsidised at all, is it?
A. No, it is not. I guess there was a program subsequent to this concern about prices that led to the -- it is called the "Clean energy benefit for residential consumers."
Q. That has nothing to do with what we're talking about?
A. That's right.
Q. Let's talk a little bit about the FIT Program, the GEIA, but let me just talk a little bit, just generally about expectations. You understood that a lot of stakeholders ultimately invested in the FIT Program; correct?
A. There certainly was a lot of interest in the FIT Program and we did get proposals for several thousand megawatts, yes.
Q. From all over the world.
A. There was considerable interest and it was the -- I don't know about all over the

world but certainly there was international interest in it.

Q. International, thank you. And in fact it would have been important for Ontario to meet the expectations of the stakeholders in the FIT Program; correct?

A. Well, I don't know what you mean by "Meet their expectations." The principal thing that we have to get back to is what is the price impact, what is the reliability impact, what is the sustainability of the system.

Q. Let me ask it this way: Do you agree that it was important for Ontario to comply with those duties we talked about earlier, and also respect those duties on behalf of the stakeholders?

A. Yes, and I think that we did operate to the best of their ability to do that.

Q. Thank you. And Ontario shouldn't be playing any favourites in operating the renewable energy program; right?

A. Well, again, that would be -- people will look at things differently but, no, the idea was to have a widely-available program.

Q. Mr. Jennings, you agree with me that normally Ontario notified stakeholders in this

program, this FIT Program, of their rights through rules, webinars and directives from the Ministry of Energy; right?

A. Yes, so that was initially launched through a directive from the Ministry of Energy.

Q. She is going to be a lot happier, if you don't cut my question off. We're going to hear about that later. I'm trying to make sure we don't do that to each other.

In fact, these directives were very important and had to be very carefully written because it was the official government representation by the Ministry of Energy on these initiatives?

A. Yes, and they were also framed from the legislation.

Q. Did you have any say in the drafting or did you review these directives?

A. I was involved in them. They were ultimately of course signed by the Minister so they would be ultimately his.

Q. You were involved during the time in the period that you were at the Ministry of Energy during this program?

A. Yes.

Q. Let me finish my question. Thank you.

A. Sorry. I'm just trying to be cooperative.

Q. I appreciate you're being cooperative but I just want to make sure the record is clear.

Now, you understood that while the FIT Program was being announced and also it was become known that Ontario would be doing renewable energy, that stakeholders were, in fact, investing in Canada; correct, in anticipation of the FIT Program?

A. So, there was certainly the legislation which was passed in March of that year, had envisaged there would be a FIT Program so people were aware of it before it was launched, there was a lot of consultation going into it before it was launched.

Q. Can you remind us when that legislation was?

A. It was introduced in February and then several things before passage so I think it was essentially passed in April. It has been on the record...

Q. It would have been reasonable for

a potential stakeholder to recognise that the FIT Program was coming and to start relying on that fact throughout the summer of 2009?

A. I believe there would have been consultation with stakeholders during the summer.

Q. I don't think you answered my question, sir. Let me try to ask it again. It would have been reasonable for stakeholders to recognise that the FIT Program was coming throughout the summer of 2009 and rely on that fact and make an investment to your country; correct?

A. Yes, so the legislation was intended to promote it and there were specific consultations with stakeholders, some of them that I was involved in, so prospective investors not only knew of the program but had been involved in consultations on it.

Q. I'm going to go to a confidential provision now just for a short period of time.

--- Upon resuming the confidential session at 3:08 p.m. under seperate cover

--- Upon resuming the public session at 3:16 p.m.

MR. BROWER: The public.

MR. MULLINS: Yes. We're okay?

BY MR. MULLINS:

Q. Now, Mr. Jennings, let's talk a little bit about the GEIA, how that thing got started. You were responsible for negotiating the GEIA; is that right?

A. Yes, I was involved in the negotiations, yes.

Q. And your specific role ended approximately in January of 2010; right?

A. So that was when it was signed, yes, by the Minister at the time.

Q. So you're available to talk to us about all the events that occurred from when Samsung first approached the government to the signing of the GEIA, is that fair?

A. Yes.

Q. And then I can talk to Ms. Low about what happened after that?

A. Yes.

Q. But I'm probably going to -- you were still around after January 2010, you just weren't negotiating the GEIA?

A. Yes, I was around but it was not my direct responsibility after.

Q. In fact, though, before the signing of this GEIA, what you've told us in your

statement is that in the summer of 2008, Samsung approached the Ontario Ministry of Energy to do an investment in renewable energy.

A. Yes, in fact, ourselves and the Minister of Finance did.

Q. Now could you tell, please, the tribunal what Samsung's experience was with renewable energy at the time they approached you?

A. So they were certainly a very large international conglomerate that was substantially well financed.

They had not, themselves, developed, as far as I know, wind or solar. Again, this was a very large competent, financially-sound entity that was looking to invest in Ontario.

Q. So, the short answer to that question is "none"; correct?

A. Your question makes it sound like there was no reason for talking with them or having a meeting with them.

Q. No, no, we talked about not trying to figure out where I'm headed. Just answer my question, okay?

MR. SPELLISCY: I do think that the witness does need to be allowed to give context.

I appreciate your desires for "yes" or "no" but just as we allowed your witness to give context he does need to be allowed to give context.

THE CHAIR: I'm paying attention. It is true that the witness has been asked to respond by "yes" or "no," and a witness is entitled to give explanation if a "yes" or "no" is not feasible or if the "yes" or "no" requires some additional explanation.

However, I have noticed that you have given the explanations, I think, every time you wish to, so that -- therefore, I didn't think it was necessary to tell you more about it.

MR. MULLINS: That's fine.

THE CHAIR: And obviously "yes" or "no" is the rule whenever you can and then explain it.

MR. MULLINS: I think we're doing fine. I would ask if there is a "yes" or "no" then he could explain at some point, but go ahead.

My point -- I think we made the point, let me move on.

THE WITNESS: Yes, they were not an internationally known developer of renewable energy projects.

BY MR. MULLINS:

Q. And in fact they weren't operating in any renewable energy projects in Canada?

A. No, not in Canada.

Q. They weren't operating any renewable energy projects anywhere?

A. Not that I am aware of but I don't profess to be on expert on it.

Q. In fact, the main things they're known for were TVs and cell phones; right?

A. So electronics and control equipment -- certainly, they were a high-technology company. That technology would be certainly relevant in doing major projects.

Q. And based upon your prior answer, I take it then you were essentially relying on the fact that they're a big company in order to ascertain whether or not they could accomplish what they were promising to do; correct?

A. We certainly did get presentations from them, that explained what they planned to do, and how they would source. So one of the things is they would be accessed to supply chains in Korea and elsewhere so it isn't again necessary whether they themselves would build it all. They talked about how they would set up supply chains to

build these.

Q. So, it was perfectly appropriate then, Samsung then -- let me ask you this: So you knew at the time that Samsung had no intention of actually operating these renewable energy programs?

A. I wouldn't say at no -- whether they had no intention or not and what -- their proposal obviously evolved, over time, we did negotiate over time, so as I said, they approached us in August of 2008 so it's -- we obviously did due diligence over time, but a lot of it was they were bringing in partners.

So they brought in the Korean Electric Power Company, so we talk about Korean Consortium consists of companies beyond Samsung and included, I believe, CS Wind, which is a power manufacturer in Korea.

Q. So there was nothing inappropriate for Samsung or any FIT applicant to bring in partners and to have others operate actual projects themselves; correct?

A. Well, this was an example of bringing forward, a large project management team where they would bring in supply chain people so people did towers, people who did blades and they

would be really managing the project of 2,500-megawatts.

Q. I don't think you answered my question. There was nothing inappropriate for Samsung or any FIT applicant to bring in partners or others to operate the actual projects in the renewable energy program; correct?

A. Well, we're talking about Samsung so there was certainly nothing inappropriate about that.

Q. And there was nothing inappropriate about the FIT applicants doing the same thing; correct?

A. So about operating, I think there were rules about flipping the contracts but I'm not sure that's what you're asking.

Q. Okay, thank you. Now, when Samsung came to you, you immediately then did a bid to all the renewable energy companies in the world, to see if you could come up with a better deal; correct?

A. So, I believe you know the answer to that question.

Q. What's the answer, for the record?

A. So, there would be no reason for

doing that so of course we didn't do that because this was a company that had come in with an unsolicited bid. It was their proposal. For us to then say: Well, we'll take your proposal and shop it around to everyone else, I don't think that would be -- it would have been unusual, as far as I know, in terms of the government operating.

Q. Well, in fact, not only do you not do a bid, you didn't even go out and approach anyone who had experience in renewable energy to determine if they could do the same deal; correct?

A. Okay, so, again, it was an offer -- this was a proposal that Samsung came forward with. If it was a government initiative, to say we are going to go down this route, we've come up with this idea, we're going to put it out for tender, that wasn't how the idea came up. They came us to us with this proposal.

Q. At the time Samsung came to you, you had no obligations to Samsung to do that negotiation; correct?

A. We had no obligations to. Negotiations are, first of all, the discussions and then negotiations were entered into because it was seen by the government as a valuable exercise.

Q. Prior to the entry of the memorandum of understanding, Ontario had no obligation to be exclusively negotiating to Samsung; correct?

A. Memorandum of -- yes, that's correct. Memorandum of understanding was the framework that we signed to work on this.

Q. Well, I'm going to get to the memorandum of understanding but I was asking prior to the signing of that document, Ontario had no obligation to Samsung to exclusively negotiate this kind of deal; correct?

A. Yes, the discussions we had just led to the MOU.

Q. Right.

A. We weren't -- there was no commitment before then.

Q. And you do recognise that -- well, at the time you recognised that there were other companies that probably could have done the same deal; correct?

A. I'm not aware of any. We had discussions with some companies either -- concurrently, but no-one else offered the same type of arrangement.

Q. Concurrently?

A. Umm...

Q. Or later?

A. Well, actually later because the Samsung one was very early on in the stage. This is another thing. They came forward before anyone else was really interested in pursuing Ontario for these types of investments. We did have discussions with some other companies, but mostly -- so certainly they didn't have the same manufacturing commitments.

Q. So I understand your testimony, the fact that Ontario was -- sorry, that Samsung was a big company and the fact that they came to you first was the two reasons that you didn't try to look for any other competitor to see if you could get a better deal; is that correct?

A. Okay, so they had a specific proposal they came to us with, so, yeah, I think you were talking about this treating people fairly or transparently or whatever, if someone came to you with a proposal and you, in effect, stole it and then shopped it around to other people, that wouldn't seem to be a very fair way of dealing with people, in other words.

They came with the proposal and one of the things we did discuss at the time was that not

only would they have -- we're talking about exclusivity -- exclusivity for that amount of power and also that Samsung would deal exclusively with Ontario in the project.

Q. I think we made our point, Mr. Jennings. Let me go on. Just so the record is clear, how long was the exclusive negotiations before the entry of the MOU took place, how long was that period of time?

A. So, we initially, as I think I said, they came in August 2008. We signed the MOU in December, I think it was December 12th, but I could check that, perhaps, of 2008.

Q. All right, so from August to December of 2008 --

A. Yes.

Q. -- the Minister of Energy, the Ministry of Energy made --

A. Yes.

Q. -- made no public announcement to anyone that they were having these negotiations with Samsung; is that correct?

A. So, if you're having a commercial negotiation with someone and it would generally not be the case that we would be negotiating it in public.

Q. So the answer to new question is, "Yes, there were no communications"; correct?

A. Yes.

Q. Again, if you could just try and answer the question, if you want to explain that's fair.

A. Okay.

Q. I don't want to have to ask the questions twice. Now just so we're clear then, the two main agreements that we're talking about here are the memorandum of understanding and then the Green Energy Investment Agreement; right?

A. Yes.

Q. There are no other contracts other than the PPAs between Ontario and the Korean Consortium?

A. Yes, there obviously was a draft before it became a final but that was the agreement.

Q. Well, you knew where I was going.

A. Yeah.

Q. I was going to ask you about the draft agreement. So you mentioned in your rejoinder statement that there was a draft framework agreement but it never got corporate or government approval?

A. No, but it became substantially,

and I would say 90 per cent, I don't even -- I won't be able to say what the difference would be. It basically became the GEIA. When I say it didn't get agreement at the time, it had to get Cabinet approval in Ontario, and obviously, corporate approval at Samsung and its partners.

Q. Okay, so, if I understand what you're saying then, the framework agreement more or less went through revision and eventually becomes a GEIA?

A. Yes, but I think that there were very few, if any, actual revisions. Basically what was arrived at, September 2009 --

Q. Right?

A. -- effectively was the agreement. What happened was, there was time to get people on side with the approvals.

Q. I understand, but it wasn't signed until January of 2010?

A. Yes, that's correct.

Q. Thank you. Now let's go back a little bit to the MOU but could we bring that up. It's tab 2 of your documents and we can pull it up.

MR. MULLINS: What happened to the Elma.

MR. APPLETON: They can't tell us. We'll have to proceed without it at this time.

Is there any way we could pull up 536? Maybe Canada could bring up C-536? They have access but this side is not able -- there is something wrong for the feed here. We cannot bring it up. Well, that's kind of a shame.

MS. TABET: It is not an internet issue; it's a cable issue.

MR. MULLINS: Is it possible that I could ask Canada to bring it up?

MR. SPELLISCY: 536. There is a problem with the cable. They can't deal with it until they can get in here. They will do it over the break. We understand.

MR. MULLINS: You are a gentleman and a scholar, sir. I appreciate the cooperation from the Government of Canada.

All right. Thank you.

BY MR. MULLINS:

Q. Now, in the memorandum of understanding, you talk about in your statement that there were commitments. Now, you said in your witness statement it required the completion of a feasibility study.

A. I believe that is part of the memorandum of understanding, and...

Q. And then you also say they acquired exclusive negotiation for 2,500 megawatts between Ontario and the Korean Consortium; right?

A. Yeah, but there is reference to, I believe, nothing that's preventing -- yeah, so if you look at 4.2:

> "Nothing in this MOU shall affect the rights of the Government of Ontario or the Ontario Power Authority or any current or future Government of Ontario related to renewable energy procurement, including but not limited to programs such as the renewable energy standard offer program." [As read]

And that was really a precursor of the FIT Program.

Q. Correct. But I think you explained in your statement what this meant though was that Ontario had the exclusive to have 2,500 megawatts

reserved for the Korean Consortium and the Korean Consortium would shop that to some other jurisdiction?

A. Yes.

Q. Meanwhile, Ontario would not do a similar deal with anybody else?

A. For that 2500-megawatt.

Q. Okay, so pursuant to -- your understanding is it's pursuant to this memorandum of understanding nothing prevented Ontario, at this point, to enter into a similar GEIA-type contract with a competitor of the Korean Consortium; right?

A. So that's correct. It also leaves the room for the FIT Program which, as I said, adopts this what was called the RESOP plan, but it really that type of a program which was a standard offer program.

Q. I'm a little confused though. Why was it important to Ontario that the Korean Consortium didn't do a similar deal in some other country, like my country, for example?

A. Well, that was seen as a marquis project that would show that Ontario was pursuing Green Energy in a large way. If the Korean Consortium was doing a project of this magnitude in Ontario, it was also doing one in Ohio or Iowa or somewhere, then

that would make it more challenging for them to do this one. I mean if we wanted to make sure that the Ontario one was a success, you didn't want to have that work diluted by dealing with people all over the world.

Q. And you also wanted to be able to brag about it that you had this Green Energy?

A. No, as I said, it was intended to be a marquis event.

Q. And I take it from your answer, you busted me and realised I'm from the United States.

A. (LAUGHTER).

Q. The answer?

A. Or Iowa, I'm not sure which one.

Q. So let me go back to the memorandum of understanding.

Now, first off, just so we're clear, this was just a memorandum of understanding like we hear in commercial cases. This does not require either company -- sorry, either entity of Ontario and the Korean Consortium to actually enter into a final binding agreement; correct?

A. Yes, that's correct. That's what it -- a memorandum of understanding basically just sets out -- it's kind of an agreement to agree.

Q. So, if, for example, at any time Ontario or the Korean Consortium says "You know what, this is not working for me" they can just walk away from it; right?

A. So that's generally what an MOU is. I would have to refamiliarise myself with what -- there were specific things about the roles and relationships of each party.

Q. Now, I'm going to point you to Bates Number 99246.

The Bates numbers, this is a lawyer thing, that's a machine called Bates literally. So that's what that is and so I'm looking at paragraph 2.1, subsection 3.

A. Yeah.

Q. Okay, and we're going to go through this. First off, our copy was delivered with these handwritten conditions; do you know where that came from?

A. Well, this is the version that was initialed by people, and that must have been done at the time it was initialed.

Q. So it was important to both parties that these be conditions that the parties meet?

A. So, I'm just reviewing what they are. You're referring to what's numbered as 1, 2 and 3 at the bottom?

Q. Yes, sir.

A. So it appears really that was just at some point deciding to number these points. That's the only addition.

Q. Well, they were labelled -- sorry, I didn't mean to cut you off. They were labelled as conditions; right? I think it's being cut off on the screen but people have it in front of them they can see it now. Let's go to the top of that paragraph and again I appreciate the cooperation from counsel on the other side of the aisle.

Now, what it says is that, first:

> "Based on a mutual desire to determine the benefits for renewable manufacturing in green collar jobs..." [As read]

It goes on that the project would have a feasibility study; do you see that?

A. Yes.

Q. There was no feasibility study, was there, sir?

A. No, there was not.

Q. Okay, thank you. And in fact, the Auditor General looked at this in 2011 and found that there was no economic analysis or business case done to determine whether the agreement with the consortium was economically prudent and cost effective; do you remember that?

A. So I know there was Auditor General's study on renewable Green Energy in particular in total and I was certainly involved in some work on that.

Q. Well, if you go to tab 24 of your notebook.

MR. SPELLISCY: Which Exhibit?

BY MR. MULLINS:

Q. I'm sorry, it is Exhibit Number C-228 and I'm going to go way down. It is numbered page 91 from the document and the Bates Number is 9928.

And if you can go on the first – left-hand column about one quarter of the way down, starting with the word "However."

A. Yeah, yes.

Q. And exactly what I read was exactly what the Auditor General found.

A. Yes, yes, and this report, in general, is also critical of the FIT Program, basically the Green Energy Act.

Q. That's correct, the Auditor General was credited with all of the renewable energy initiatives, weren't they?

A. Yes.

Q. But this is a true statement, what they've said there, correct? It is not just the Auditor General saying it, you agree that that was true that:

> "No economic analysis or business case was done to determine whether or not the GEIA with the consortium was prudent or cost effective."
>
> [As read]

You agree with that statement don't you, sir?

A. There was certainly no independent economic analysis or economic business case done. So again they are saying criticism was made of the FIT Program.

Q. Now, you've said in your statement that the FIT Program was extremely

successful; do you remember that testimony?

A. Yes.

Q. And you also said that you could have walked away. So, how many applications in the FIT Program did Ontario get in the fall 2009?

A. Okay, so I don't have that at the top of my head, although I know that it is in some of the testimony. So the sequencing of it was that the FIT Program and the Samsung agreement had basically been done concurrently so that the Korean Consortium agreement had reached a stage that it was going for Cabinet approval. And the FIT Program had had ministerial directives so those were all very short time within each other. So it isn't that one was done and well-established and then you did the other. The idea was to do both of them at the same time.

Q. Now the chronology is extremely important here so let's go back. You remember that you started receiving FIT applications in November of 2009; correct?

A. Yes.

Q. And in fact you got an overwhelming response to the FIT Program in 2009; correct?

A. Yes, yes.

Q. And in fact you told us earlier that you could have walked away from the GEIA before it was signed in January of 2010; correct?

A. So, you asked about at the time of the MOU and certainly that was the case. By the time we get to September we have actually had a draft agreement prepared, that has gone to Cabinet, so that was in October. It would have gone to the decision-making at the Korean Consortium, Samsung and KEPCO, so it is much more advanced than what we are talking about of the MOU in December of 2008.

Q. I understand it was advanced but it wasn't signed until January of 2010?

A. Yes.

Q. And it wasn't a binding agreement until January of 2010?

A. Yes, so it was going through a decision-making --

THE CHAIR: This is a legal characterisation whether an MOU is binding on what it is binding and so I understand --

MR. MULLINS: I'll move on. I think he answered though so I think we're fine.

THE CHAIR: Yes, he answered. Just I'm not sure he's qualified to give this answer. So

we understand that this was Mr. Jennings' understanding?

THE WITNESS: Yes.

THE CHAIR: With this reservation, that's fine.

BY MR. MULLINS:

Q. Thank you. Now, the memorandum of understanding though did have a confidentiality term; correct?

A. Yes.

Q. And whose idea was it to keep it confidential?

A. I suspect that both parties agreed to it. I don't remember the exact sequence. I believe it's --

Q. And I understand that Samsung was supposed to be an anchor tenant; correct?

A. Yes. Yes.

Q. Normally anchor tenants are advertised to attract other tenants?

A. Well, that would be at the time, again, when it became final agreement. You're talking about the period before we had negotiated the final agreement.

Q. Okay, so it was important in

Ontario to keep this confidential prior to the signing of the final agreement in January of 2010.

A. So, there was -- in terms of what was -- I think there is discussion here about potentially announcing it earlier. These are all things that -- in the government context, communications people could think about this. I think there was contemplation of making it public at different times.

It was certainly public in September 2009 when, again, we had basically come to the agreement, was awaiting approval, there was coverage in the media, in the Toronto Star, both at the time there was the agreement reached, and at the time it was discussed in Cabinet.

Q. And you agree with me though, that it actually got leaked to the media; correct?

A. So we put out a news release just after it was reported on in the media. I believe the sequence was actually around the time that that the Minister had been interviewed so I'm not sure what the -- but anyway, that was how we responded with the news release after it was in the meeting.

Q. But you agree with me that had it not been exposed by the Toronto Star in the media, you

would have kept it confidential until its signing; correct?

A. So, again, that happened in October, as well, and so it was at least publicised three times. I don't -- again you are correct, I don't think -- it was certainly not the Ministry's intention to have it made -- we didn't do anything ourselves to make it public.

Q. We'll talk about --

A. It was responding to the fact that it had become public.

Q. And we'll talk about those reports in a moment but let me ask you this: Up to the signing of the GEIA in January of 2010, can you tell us any other reasons than what you've already given us, why Ontario favoured Samsung over its competitors, sir?

A. Well, again, I would say that it was Samsung's ability to manage a project. This is a very large project so it isn't that they would be equipment suppliers or that they would even be the project developers but they had the financial ability and the connections with other industries, to put together the supply chain to develop it.

They had agreed to make a commitment

to bring in four manufacturing plants which was actually, from the government's perspective, seen as very crucial, that's what they wanted to demonstrate to the Green Energy, and the Green Economy Act, so there is the commitment to bring in power manufacturers, blade manufacturers, solar converters, solar modules, and they also agreed to do a very aggressive schedule of phases for bringing in the projects, much more quickly than we could expect through the FIT or any other program.

So they would also be, if you had them bringing in -- the intention was to have manufacturing in Ontario. There was going to be provisions, content provisions for the FIT contractors. It wasn't necessarily clear how they would be able to -- that they would be able to generate enough business on their own so this was a way of attracting large companies that could then serve others as well.

Q. Well, I guess what I'm trying to understand, I understand why you wanted to deal with Samsung, which I think you answered. What I'm trying to understand is why you did not give that opportunity, up to January 2010, to any competitor of Samsung, the stuff you just talked about?

A. Yeah, so that, as I said, for

whatever reason, it basically had become public in the fall of 2009, and, in fact, quite well known, in the industry sector, and people at some of the industry conferences, for the most part complained about it. So companies did approach us, in that time period, but I would say it's fair to say that most of it wasn't about economic development in Ontario.

They may have been, in some cases, interested in selling excess equipment that they had, and lining us up for that, and then maybe down the road doing something, so there wasn't anything that was as comparable as this, which was four manufacturing plants, right out of the gate.

Q. At least for the 2500 megawatts that you talked about in your memorandum of understanding, Ontario believed that up to the January of 2010 that it had to give Samsung the exclusive to those megawatts; correct?

A. The agreement that led up to being signed was about the exclusive 2500 megawatts of that.

Q. But they could have walked away before signing, if the deal never went through; correct?

A. Yes, so it had gone through those

two decision-making processes. For instance, when we talked about it having gone to Cabinet, if ultimately it had not been approved at Cabinet, that would have been where that decision would have been made, then there would not have been a deal.

Q. And do you know whether or not Samsung paid any special benefits for this deal, sir?

A. Special benefits?

Q. Yeah, any money was paid or anything like that?

A. None. I would be -- so, certainly not that I'm aware of but I would be surprised if that was the case.

Q. Okay.

A. Actually I'm not exactly sure what you're implying, but there was no -- there was a commercial negotiation.

Q. Just a second. Now, memorandum of understanding was signed by the Korean Consortium; correct?

A. I believe that. I'd have to check whether it was Samsung.

Q. Go back to tab 2, I think you'll find that it was signed by KEPCO and Samsung and --

A. Yes, yes.

Q. And if you look at page 2, it was the Korean Consortium?

A. Yes, correct, and by the Minister at the time.

Q. And who decided would be part of the Korean Consortium, sir?

A. Well, I think it was -- Samsung approached us initially but they then brought on KEPCO as a partner.

Q. So Ontario allowed Korean Consortium to decide who would be the members?

A. Well, we didn't disagree. I guess if it was someone that we had disagreed with, we might have raised it but KEPCO was a very large electricity-generating company, they were not unknown to us.

Q. You didn't, in fact, insist that they open this opportunity to other entities. You allowed Samsung to decide who the membership of the Korean Consortium would be; right?

A. So I think if it had been some entity that did not make sense being in the consortium we might have raised it but KEPCO was a large electricity utility that would have been known to us. It would not have been a -- it wouldn't be a surprise

that they would participate, yes.

Q. In fact, after the contract was signed, the Korean Consortium brought in Pattern; right?

A. Yes.

Q. And you allowed the Korean Consortium to decide that it would pick which renewable energy entity it decided to partner with; correct?

A. The government didn't make that decision, no.

Q. You didn't insist that that be put out to public bid or other competitors would be able to compete to be part of the Korean Consortium; right?

A. So, I'm not aware of how Pattern and Samsung, how that was selected but I don't think it's unusual for people to develop partnerships. I don't know what exact mechanism they went through.

Q. And the fact that you recognize that being part of the Korean Consortium was a pretty good deal; right?

A. So I think that there were certainly priorities. There were things that they had out of that deal. Of course, there were things they'd

delivered to the government that were important to the government.

In terms of the role of Pattern, I think Pattern did have experience in developing projects, so I don't think there was a question from our part as to why they ended up with them as a partner, for instance.

Q. Right, but my point is by being in the Korean Consortium, a renewable energy project doesn't have to go through a FIT Program; correct?

A. Yes.

Q. Okay, so you can get a power purchase agreement, for example, Pattern was able to be in this joint venture with the Korean Consortium and get the benefits of the high rates for the renewable energy without going through the FIT Program because they were chosen by the Korean Consortium to be a member of that group; is that correct?

A. So, I don't know, again, details of how Pattern became affiliated with them but certainly Pattern was a developer and that added expertise to the group. In terms of the managers that the Korean Consortium had, certainly there were benefits they had. There were obligations they had.

But a point -- it certainly wasn't

a slam dunk. They were supposed to develop 2,500 megawatts and they were unable to do those in time for the phases that were done so it wasn't a slam dunk, if you were partners.

Q. Isn't it true, sir, that when Pattern got invited to this special Korean Consortium group, they dropped out of the FIT Program?

A. They may have. I don't know.

Q. And in fact what was happening is once the FIT Program applicants started being ranked, Pattern and the other members of the Korean Consortium started buying up projects that were ranked lower than in the FIT process; do you remember that, sir?

A. There was some -- because the Korean Consortium did have priority access, there was some benefit for them looking at projects that were advanced in development and taking on those projects but I'm not aware of the specific details but I know there was incentive to do that.

Q. Thank you, sir. Now, when the renewable energy initiative was going on, and we'll say throughout 2009, when you're around, do you remember any discussions within your Ministry or with others, as to whether or not this program was going to violate provisions of NAFTA?

A. So, the domestic content provisions...

MR. SPELLISCY: Wait, wait.

BY MR. MULLINS:

Q. Outside the scope of privilege?

MR. SPELLISCY: I just want to caution the witness of course that you can't disclose or divulge any discussions with counsel that you might have had about the FIT Program and its compliance with international trade agreements.

THE WITNESS: Okay.

BY MR. MULLINS:

Q. So, in answer to my question, you're claiming privilege on whether or not there was discussions about NAFTA? You can refuse to answer my question.

MR. SPELLISCY: I think you can acknowledge whether there were but you can't disclose the content of any of those discussions.

THE WITNESS: Yeah, so I don't actually recall any discussions with respect to NAFTA, no.

BY MR. MULLINS:

Q. Okay, well, let me try to refresh your recollection. Could you go to tab 4?

A. Yep.
Q. Okay, this was a document, Exhibit Number 692. Is it possible we could --
MR. APPLETON: I think we could probably get up. It is Exhibit --
MR. MULLINS: Sorry, C-692.. It is just the first page.
MR. APPLETON: It would be helpful.
MR. MULLINS: It would be helpful. How are we doing on that?
THE CHAIR: If it's more complicated than last time. It is almost 4 o'clock and so we could have a break. Here it is. I take back what I said. No break.
MR. MULLINS: We'll try to fix our technical difficulties during the break. But we're right on target to finish so I think --
THE CHAIR: Go ahead.
MR. MULLINS: And whenever the witness wants to take a break.
BY MR. MULLINS:
Q. So do you recognise this document, sir?
A. So, I don't actually recognise this but I know what it's from.

Q. Okay?
A. I was involved in the consultation session that it refers to.
Q. Well, why don't you identify for the record because it is really not self-explanatory.
A. Okay, so in the development -- while the FIT Program was being developed, in a lot of the consultations, details of the program itself would have been with the Ontario Power Authority but it involved the Ministry of Economic Development and Trade -- they change their acronym quite often, but anyway it was that Ministry. So we had joint sessions with different stakeholder groups on how domestic-content provisions could be put into the Feed-in Tariff program.
Q. Are these your notes or do you know?
A. So it doesn't look like my writing. I'm not sure. They may be Ministry notes though.
Q. We know they're not my notes because you can read them. If I do go, if I read this third one down there's you, right, Rick Jennings?
A. Yeah.
Q. And then we have CanSIA,

Elizabeth McDonald. Can you tell us who CanSIA and who Ms. McDonald is?

A. That is the Canadian Solar Industry Association and Liz McDonald was the CEO of it.

Q. If you go two-thirds down right where you're looking, I see that, it says CanSIA. How does NAFTA relate to this? And then MEI, I think it is a little cut off, you can't see it from there, MEI, Quebec has been able to do this, no NAFTA, can you read that?

A. So I think MEI that's the Ministry of Energy and Infrastructure which is what we were called at the time. I don't see the M either on mine but I assume that's what that --

Q. You see that in the corner. That's the Quebec?

A. So, one of the reasons that I hadn't really recalled NAFTA being raised -- I know that the WTO had been raised. I don't remember NAFTA being raised but Quebec has had domestic-content requirements in its RFPs, and in fact regional requirements related to the Gaspe area of Quebec, so I think that would have been a reference to that, to another renewable-energy program that had had

domestic-content requirements.

Q. So, if I understand what you're saying, it's that CanSIA, that is simply Ms. McDonald?

A. Yes.

Q. She asks does this local requirement violate NAFTA? Is that what she was asking, local content requirement?

A. How does NAFTA relate to this. How do the NAFTA requirements relate to what would be in the Feed-in Tariff program.

Q. So her concern was that the local-content requirements did have a NAFTA issue; is that fair?

A. So she would have been asking about what our view is on that. Now, I would note in my comments above, that the comment was really just to say that the domestic-content requirement was actually specified in the legislation.

Q. Okay, and so if I understand what you're saying, you are saying that if there was an issue for NAFTA, it wasn't the Ministry of Energy's fault, it was the legislature's fault; is that what you're saying?

A. I'm saying the domestic-content provision was pursued because it was in the

legislation. It wasn't an option from our perspective to not have it because it specifically said, "Shall contain domestic content."

Q. Well, Ministry of Energy wasn't against the global-content requirement, was it?

A. We didn't say it -- so, I don't know if that's relevant. I can explain the sequence of why it became shelved but I don't think that's --

Q. So the answer to my question is, "No, the Ministry of Energy wasn't against the local content requirement."

Correct?

A. Was not against it.

Q. And so this, again, was related to the FIT Program; correct?

A. Yes.

Q. It couldn't be related to the GEIA because that was still a secret, right, or the deal with the Korean Consortium?

A. This was a consultation on the FIT Program, the development of the FIT Program.

Q. And was there any discussion during this meeting about other potential violations of NAFTA?

A. I would have to look to these

notes to see if there is anything else that seems to raise that.

Q. You don't remember?

A. I don't recall.

Q. You don't remember any discussions about any other issues about maybe Most-Favoured Nation or minimum standard of treatment?

A. So, I don't think that would have been raised in this because certainly the FIT Program was. I don't see how that would have come up and I don't see anything in these notes referring to that.

Q. And if I understand what the answer was, the answer was: Well, Quebec has been able to do this before, and that was the response to the question whether or not there was a NAFTA issue here.

A. So it was an example of a renewable-energy program that had been launched in Canada with domestic-content provisions that had not been challenged under NAFTA.

Q. Just because somebody doesn't challenge something, doesn't mean it's proper; isn't that correct, sir?

A. That's correct but it obviously doesn't mean it is not correct proper either.

Q. Okay. I promised you I'd go back

to the Star story so that's where we're going now and we're going to tab 30. Again, if you want to take a break, I'm perfectly fine. We've been going a little over an hour but --

A. I'm fine.

Q. All right. Keep on going. So go to tab 30. Do you recognise this document, sir?

MR. SPELLISCY: If you wanted to -- we need an exhibit number.

BY MR. MULLINS:

Q. So it's R-68. Perfect, kind of, more or less. Kyle, can we do a little better than that.

I'm going to give an A to the Canadian group technology and ours, pretty much a C plus.

So let's go back to tab 30. This is R-68. So, I think, if I remember from your prior testimony, what you said was you knew the story was going to break, and is it fair to say that Samsung and Ontario wanted to get ahead of the story, in news terms?

A. So, that's dated at 10:00 p.m. and there was a -- it was in response to an article, maybe that they knew the article had come out, maybe that it had been on the website before, so I'm not

sure of the sequence but it was in response to the fact that it was reported on the Toronto Star.

Q. So, the first paragraph says:

"Recently, information concerning the negotiations between Samsung C&T Corporation and the Government of Ontario has prematurely entered the public domain." [As read]

Who is the corporation again?

A. I think that's -- so, Samsung, I think that's just the two initials for the corporation. That's one corporation, I believe.

Q. Oh, I'm sorry, I apologise. I understand that. Samsung C&T Corporation?

A. Yes.

Q. I apologise. So at this point you didn't think it important to identify that KEPCO was a party to this joint venture?

A. So, that may have been referenced to what was specifically in the article. And I'm not -- I don't recall that now. Maybe they only referred to Samsung in the article.

Q. Do you see KEPCO in here, sir?

A. No, I meant the article. This is in response or in relation to an article in the Toronto Star.

Q. Let me ask you a direct question, sir: Why was it that KEPCO was not identified in the joint release?

A. So, I'm speculating because I just don't write the press releases, that the article in the Toronto Star, that this was in response to, talked about Samsung and may or may not have mentioned KEPCO or not.

Q. So, because KEPCO was left out of the media, you decided you didn't have to put it in the press release; right?

A. So, this press release, and you can see it went out at 10:00 p.m., which is not normally when press releases go out, so it was obviously put together quickly to deal with a particular situation. So it was dealt with to deal with the article that was in the Toronto Star. So it would have been responding directly what was in the Toronto Star article.

Q. So you basically just put the limited amount of information possible that you felt like you needed to, in this rushed press release;

right?

A. If it had been at 10:00 a.m., it might have been more fulsome. I don't know.

Q. Okay. And if you go to the first paragraph it says:

"Recently, information concerning negotiations between Samsung C&T Corporation and the Government of Canada has prematurely entered the public domain." [As read]

A. Yes.

Q. And that's a true statement.

A. Yes, again the sequence, whether it had just been posted on the website, whether it had actually come out, whether they were informed it was coming out the next morning, I'm not sure what -- I don't recall which one of those it was, but it was that they knew it was going to be out.

Q. Let me break this statement down and make sure every statement is true:

"Recently information concerning negotiations..." [As read]

So it's accurate at this point as at September 26th, 2009, that the parties were all in negotiations; correct?

A. Well, it was advanced enough that it was not long after that, that it went to Cabinet on our side and discussions on their side. I mean it was -- so, that would still be negotiation until Cabinet agreed.

Q. Right. Again, on this point, the chronology is very important so I want to make sure we're all on the same page. It is accurate that as of September 26th, 2009, that Ontario and Samsung C&T were only in negotiations; correct? That's what you told the public; correct?

A. But so we would -- but that doesn't mean that the agreement was more or less in the stage -- so the agreement was in the stage that it was going for final decision so it isn't like...

Q. You told this to the public, Mr. Jennings. I want to make sure this statement is correct.

A. It is still in negotiation until it is actually signed by both parties.

Q. Thank you. That's all I needed, sir. Thank you, you told the public, so I assume this

was the truth.

A. Yes, I'm just saying that it's not like we just started, it was an advanced stage.

Q. You wouldn't tell the public something that wasn't true; right?

A. So it had not been signed. It wasn't signed until January of 2010.

Q. The Ministry of -- sorry, I don't want to cut you off. The Ministry of Energy would not tell the public something that was not true; correct?

A. It was still in negotiations. I'm just saying it was very advanced negotiations.

Q. Can you just answer my general question, specific question, that the Ministry of Energy would not tell the public something that wasn't true regarding this renewable-energy project; yes or no?

A. The Ministry of Energy would not tell the public something that was not true.

Q. Because that wouldn't be transparent; correct?

A. Correct.

THE CHAIR: Can I just ask one question about what is your involvement in the drafting the content of this press release?

THE WITNESS: So we would have communications people, communications director. I probably would have reviewed it at some point, but I wouldn't be drafting it.

THE CHAIR: But you are the one who provided the content to the communication people?

THE WITNESS: So, in this case, because, as I said, the timing of it is obviously was done fairly quickly, like 10:00 p.m., so, it would have been a combination. They would have checked with staff but probably the Minister's office would have been involved. Like it would have been done at a very high level. It is probably in response it to an interview the Minister might have had.

THE CHAIR: I understand it was a response and somewhat of a rushed response. I'm just trying to understand what your personal knowledge was because the communications people do not invent what goes into the press release. Someone tells them what to write.

THE WITNESS: So, it would have done this with the Minister's office business it involved the Minister. I would likely have seen a draft, perhaps, at 9:50 or something like that, 10:00, and so I would have reviewed it on a short-term basis. As

I say, I didn't write it.

THE CHAIR: Thank you.

BY MR. MULLINS:

Q. Mr. Jennings, I want to finish this sentence. It goes on to say that the:

"Information has prematurely entered the public domain."

[As read]

Do you see that?

A. Yes.

Q. And that's a true statement; correct?

A. Yes.

Q. And what was the plan of putting this information in the public domain?

A. So, normally it would have gone through the sequence of getting Cabinet approval, once it had Cabinet approval because, in effect, it wouldn't have been an agreement until we had -- of this making magnitude, until we had Cabinet approval. The government or Minister on its own wouldn't have been able to approve it. You go to Cabinet and you've you have a communication plan and the communication plan is approved and that's how it's released.

Q. So, if I understand your answer

then, the plan was to not publicly reveal the status of these negotiations until you obtained Cabinet approval; correct?

A. Which is -- yes, which is standard practice for anything that goes to Cabinet.

Q. It is standard practice then to enter into secret agreements and memorandum of understandings?

A. It is standard practice that until something has been approved by cabinet, it is not official policy of the government and so it would not -- an agreement would not normally be publicised until it had been approved.

Q. You wouldn't keep it secret though; correct? You just simply would not publicise an agreement; there is no reason to keep it secret?

A. So, I wouldn't agree with what you're characterising there. I mean if you are in commercial negotiations, you don't have those negotiations in the public. So the standard procedure is usually that an agreement is negotiated confidentially. It becomes public after it has been approved and announced.

Q. You agree with me that governments have different relationships with entities

than private entities have with each other, don't you, sir?

A. In some ways different, in some ways very much the same.

Q. Now it goes down to the next paragraph:

"Both parties regret that months of extraordinarily cooperative effort have become known even while serious discussions are ongoing." [As read]

That's a true statement?

A. Yes. So that would be reflecting the pact that the normal procedure would be to do this negotiate in confidence, negotiate a commercial agreement and get approvals from the various sides and then that would be announced through a -- at the time it was signed.

Q. Why did you regret it?

A. So that this was, in effect, a breach of the normal procedure.

Q. I see.

A. So you'd have -- so one of the things that happens if you do have these -- some of

these things become public, then people who would view it differently or have other ways of looking at it, it gives them an opportunity to raise issues with the people like Cabinet, people who would otherwise be making the decision.

Q. Okay, the next paragraph says:

"However, since both Samsung C&T Corporation and the Government of Ontario are pleased to confirm that efforts are progressing well towards the signing of a historic framework agreement." [As read]

Is that correct?

A. Yes.

Q. So it is accurate that as of September 26th, 2009, there was no signing of an actual framework agreement because you told us earlier that that happened in 2010?

A. Yeah, yes.

Q. Now, go to Tab No. 7. I'm sorry, I apologise. That's not the right tab number. I'm sorry, it is the right tab number.

A. It is article --

Q. It is R-177. Yes, that's the Star article that you referred to. This is the article that required the rushed public, the joint press statement; right?

A. I'm just looking because I know there is another one. The date unfortunately is the date that it is -- I've got June 20th is the --

Q. No, I think that's. Yeah, exactly. I think though if you --

A. September 26th, yes.

Q. If you look at the byline?

A. Saturday, September 26th.

Q. Yes. Thank you. So what happens here is this is the article that prompted the joint press statement.

A. Yes, so I guess further to the fairly quick nature that that was prepared, this was a Saturday, and so that was at 10:00 p.m. on a Saturday.

Q. Now, you've said in your statement that no other investor came to Ontario in the summer of 2008, throughout 2009 to do a similar deal; correct?

A. That's correct, so we did have -- there was interest, people from a couple of companies

did talk to us, about various things they could do but they were certainly not on the scale or the value-add that the Samsung one had.

Q. You testified earlier, sir, that those communications occurred after the designing of the GEIA?

A. Yeah. Well, I wasn't saying in '08, I was saying -- so '08 was just with Samsung but there were discussions.

Q. Well, let me just put it this way sir. The record is clear that no-one outside of Ontario, the Minister of Energy and the members of the Korean Consortium, even knew that you were contemplating a joint venture, or this GEIA, rather --

A. Yes.

Q. -- until September 26th, 2009; correct?

A. Yes, it was well known that the Ontario Government had an interest in doing expansive things in the green sector.

Q. What entity is responsible for administering the renewable energy program existed?

A. One prior to this?

Q. During this time period, what entity was responsible for administering the renewable

energy program? What entity, the Ministry of Energy, the OPA?

A. So the Ministry of Energy had policy oversight of the programs and procurements from the Ontario Power Authority.

Q. Okay, and you did not even tell the OPA about the proposed deal with the Korean Consortium until the summer of 2009; isn't that correct, sir?

A. That's correct.

Q. And why is it that you kept this information away from the entity that is responsible for administering it?

A. So, this would have been, you know, decisions made obviously at the political level but it was a decision to have this as a directly-negotiated agreement and, as I said, there was an interest in pursuing both a Feed-in-Tariff program and a large investment agreement such as this one at the same time.

Q. So you didn't tell the OPA because you thought you might not end up doing the GEIA at all and you might just do a FIT Program; is that what you're saying?

A. I think there was probably

an interest in having the OPA focus on an implementation of the FIT Program that was seen as complicated.

I mean they had to run -- set up a system for taking in bids, time stamping them, dealing with them. It was obviously a very complicated system to have in place in a short period of time.

Q. So, during 2009 they're trying to develop a FIT Program that is going to be fair, and due process in developing all these FIT Rules; right?

A. Yes.

Q. And you didn't think it might be relevant to them that at the same time you've entered a secret agreement with the Korean Consortium?

A. So there were other exercises, for instance, that the company can't see. As an example, there were some things, the domestic content provisions, for instance, that the Ministry did the consultation on. And this was seen at that time as, again, a separate agreement, Ministry and the Korean Consortium.

Q. Well, ultimately the OPA ended up having to essentially administer that program through the GEIA; right?

A. Yes, so the FIT -- it was, and I think it's -- just how it's described in here as well, that they were going to get basically FIT prices.

Q. You think -- can you go to the end of this article, sir?

A. Yeah.

Q. It says -- it reads at the bottom "Mr. Smitherman"; now, is who is he?

A. He was the Energy Minister, The Honourable George Smitherman.

Q. What happened to him?

A. What happened to him?

Q. I mean was he there for the signing of the GEIA?

A. He decided to run for Mayor of Toronto in 2010 so he resigned late 2009.

Q. He resigned after this deal became public, didn't he, sir?

A. I would say his motivation for resigning was that he decided to run for Mayor of Toronto, but you'd have to obviously ask him but I think that's --

Q. Fair enough, now it says:

"Mr. Smitherman said Samsung

as a developer will get the same rate as any every other developer taking part in the program." [As read]

The program he's talking about is the FIT Program; correct?

A. Yes.

Q. So that's a true statement, correct, what I just read?

A. Yes, except he has -- as noted here there is a potential for them to earn an economic adder.

Q. But he didn't tell us how much that would be; right?

A. So it is in the agreement which did become public afterwards.

Q. The GEIA agreement?

A. Yes.

Q. Sir, the entire GEIA agreement became public; when did that happen, sir?

A. So, I don't -- that would have been, again, after my direct involvement in it, but I believe it was in 2011.

Q. In fact, it didn't become public until I filed a lawsuit in San Francisco and got it

from Pattern Energy; isn't that correct, sir?

A. So I don't know the sequence of what it was but it wasn't made public on the government website. I don't know if it's here or not. I believe it was in 2011.

Q. Okay, now, go to tab 12, if we could, sir. And this is a confidential, so --

A. Isn't email a wonderful thing?

Q. It is, sir. But this is confidential, but I believe that our clients can stay. This is confidential?

MR. APPLETON: Confidential, everybody can see it, except the public.

MR. MULLINS: Except the public. Thank you.

--- Upon resuming the confidential session at 4:20 p.m. under seperate cover

--- Upon resuming the public session at 4:21 p.m.

MR. MULLINS: So, the document number I have is 683 and it is no longer confidential. So going back to my -- well, going back to the question, you said Mr. Lee worked for Samsung and he had the best English?

THE WITNESS: So he was, in effect, the kind of government relations person on from their

perspective and the other people that are on here, the cc's, various of them were engineers and people doing the negotiations.

BY MR. MULLINS:

Q. And he writes to Pearl, and who is Pearl?

A. Pearl Ing worked for the deputy Minister at the time.

Q. And Jennifer Morrison is the chief of staff there?

A. Of the Ministry, yes.

Q. And what he wrote is:

"We have been in close communications with Six Nations and we propose to execute the MOU ..." [As read]

Could you just tell us about?

A. So the Six Nations is the First Nations in the area around Haldimand, so Lake Erie North.

They had wanted, for their first phase project, to have solar and I think some wind projects down in that area, and because it was sort of a large reserve, but also traditional lands, they would have

had to get an agreement with the First Nations and so this is about an MOU with the First Nations.

Q. Okay, and he's asking to -- he wants to make this public; right?

A. Yes, that's what that email says.

Q. And Ms. Morris says:

> "Hagen, you should not be going ahead with any public announcements on this or any other piece of the deal until we have resolved the issue of the signing of the framework agreement." [As read]

What she's saying and that's, again, what you are referring to later is that the framework agreement had not been approved yet by the right parties?

A. Yes, so basically if you were to announce the MOU with Six Nations at a time when you had not announced the agreement that you had, then there would be obviously lot of questions about what the MOU was about and then that would lead to, in a sense, making public an agreement that had not been approved yet.

Q. Well, actually that's not what

she said at all, right? What she said was that this will simply elicit more questions from the media --

A. Yeah, yeah.

Q. Let me finish reading:

"...and we're not in a position to answer publicly yet and will put us in a difficult position." [As read]

A. Yeah.

Q. What was the difficult position they would be put in?

A. Well, I think that's what I was just explaining. That you would be in the position of having announced an MOU that was based on an agreement that had not been approved. So you would have to explain what the status of this agreement was, and if the government had to explain that this was an agreement that had not been approved there would be questions about why you were doing an agreement with the First Nations about it.

Q. Would Minister of Energy, as a common practice, have entered into MOUs with strict confidentiality or was this the only time?

A. Okay, so certainly we would do

them, if other provinces, for instance, they would tend to be public -- well, once they got entered into, they would be public.

Q. Well let me go now to tab 694. Sorry, tab 3, C-694, and I believe this is public, as well.

Now, again, this is just another document that shows that similar to your testimony before in February of 2009, if you go to page 48955 that, you're cc'd on this, where Samsung is asking you: Is there any reason why we can't release the MOU? Do you see that, sir?

A. Yes, that's what they're asking.

Q. And that refreshes your recollection that it wasn't Samsung that wanted to keep this confidential for business reasons; it was the Ministry of Energy that wanted to keep it confidential?

A. Well, this is two months after the signing of the MOU, so I'm not sure what they thought at the time of the MOU. Obviously this indicates at a later stage they wanted to make it public.

Q. You would agree with me, sir, though Mr. Yoo from Samsung did not have any problem

releasing the MOU as of February of 2009?

A. Yeah, yes, he's looking to do that.

Q. And in fact, that didn't happen. Let's go to tab 10. This is 782. It is an email from between Mr Lee, Samsung.

So, this is a document we obtained from Samsung and through litigation in the United States. And this, again, ask -- and email from Mr. Lee and from Mohamed Dhanani. Can you tell us who who that is?

A. Yes, he worked in the Minister's office, Minister Smitherman's office. He was a policy advisor.

Q. And this, again, refreshes your recollection that as of October 1, 2009 there still has not been a framework agreement; it looks like you are planning on doing it by October 29.

A. So, this was the expectation that we would get agreements from cabinet in time, that it would be signed and I guess this would have been Mohamed's expectation at the time, but as the reports on the cabinet meeting that -- Toronto Star reports that that didn't happen at that time, so again without the approval it wouldn't be a signing of the

agreement.

Q. All right. So let's go to tab 9, sir. And this is C-105. Now, could you identify this document?

A. So, this is a directive from the Minister of Energy George Smitherman to Colin Anderson who is the -- and still is the Chief Executive Officer at the Ontario Power Authority. So, what it is -- it references the earlier directive on the Feed-in Tariff and it talks about setting aside transmission availability.

Q. Can you read -- let's go to the third paragraph. It says:

> "I now further direct the OPA in carrying out the transmission million availability tests under the FIT Rules to hold 250-megawatts of Haldimand County in 260-megawatts for transmission capacity in Essex County and the Municipality of Chatham-Kent,"

Right?

A. Yes.
Q. And that was the original 500-megawatts that were reserved for the Korean Consortium?
A. Yes, and Haldimand County is the relation to the Six Nations discussion.
Q. So, if I'm reading this document correct, then the Minister of Energy is directing the OPA to withhold from the FIT Program, 500-megawatts before it had the GEIA signed; was that accurate?
A. Yes.
Q. And now the last sentence of that paragraph says:

"Jointly for renewable energy facilities whose proponents have signed." [As read]

Is there a reason why they need to identify who the proponents were?
A. Well, because it had not been signed yet.
Q. They could always change who it was?
A. What this does, so it doesn't set aside the capacity for somebody you haven't signed an agreement with, because if you haven't signed

an agreement with, you are not going to ultimately set it aside.

Now this -- had there not ended up being an agreement, then you would no longer have set this capacity aside.

Q. That's not what it says though. It says that they've already signed an agreement, doesn't it? Doesn't it say, sir, that I want you to hold off.

A. Okay.

Q. Doesn't it say we're holding back in reserve 500-megawatts of transmission jointly for renewable energy-generating facilities whose proponents have signed a province-wide framework agreement with the province?

A. Okay, so, this could be parsed a different ways, but the actual reference would be to -- so proponents who will be signed -- who signed one, so either it is written so it's proponents who have or proponents who ultimately signed, so in this case -- so that's what that -- who have signed, whose proponents have signed so...

Q. So, if someone read that and understood that an agreement had been signed, that would be a false statement; right?

A. I think the sentence should be read so it means that this is being set aside. It's being set aside for proponents who enter into a province-wide framework agreement with the province.

Q. All right. So, based on your interpretation of this directive then, what you're saying is that the Minister of Energy withheld 500-megawatts from the FIT Program for some future agreement to some proponents, who we don't know who are going to be, for an agreement that won't be signed -- will be signed for some point in the future; is that accurate?

A. So it was one that was in advanced negotiations, but it had not yet been signed.

There was, at that point, because the FIT Program had been launched, there was, I don't think, any evidence that there were proponents yet in those two areas, but it was -- so, if you were signing this agreement, working on this agreement with Samsung and you had not set megawatts aside, it would have been very difficult for them to proceed with their Phase I question.

Q. Mr. Jennings, I don't want to be difficult, but I need an answer to that question. I don't think you answered it. So I'm going to break it

down so we get a clear answer because your interpretation of this directive is not what I understood coming in here today, so I need to make sure I understand it. Based on your interpretation of this directive, what you're telling us is that the Minister of Energy reserved 500-megawatts in these areas for future agreement; correct?

A. Yes.

Q. Okay, thank you.

A. Yeah, so it's agreement...

Q. And, and -- let me finish, please (Simultaneous speakers - unclear).

A. Yeah.

Q. I don't want to cut you off --

A. No. Sure.

Q. -- I was trying to break it down because I need an answer to this so I understand what this means because you're the witness.

And you're also saying is that it would be -- from whatever proponents actually signed that agreement because it's not identifying who those two people are; right?

A. Yes.

Q. So what happens here, as of September 30th, 2009, the Minister of Energy has

carved out from the FIT Program, capacity for some future agreement, for some entities we haven't identified, that would be signed some time in the future; is that what you're saying?

A. So it reflects the fact that we were in advanced negotiations with the Korean Consortium. The agreement had to go to cabinet for approval. It had not yet gone to cabinet for approval, so if we had named them in the -- in this directive here, and referred to them as if they had signed, then that would be, in effect, presupposing that we could tell cabinet what we -- they could do, and, in turn, the legislature's content with the legislation...

MR. MULLINS: Madam Chair, I am about to go to a new area --

THE CHAIR: Maybe it is a good time to have a break.

MR. MULLINS: I feel that I could get done fairly quickly, and I'm confident that we could get done with the witness today. It depends on re-direct examination.

THE CHAIR: Certainly. How much more time do you estimate you will need?

MR. MULLINS: Given your reaction to

counsel on the other side to that answer, I'm going to try to get this down within 20 minutes, so we can get this witness done today.

THE CHAIR: Fine, then we have -- we will have redirect and we may have a few questions, so that allow us to finish approximately by six o'clock, I imagine.

MR. MULLINS: Right, and if we could go -- we'll take a five, 10-minute break.

THE CHAIR: No, maybe 10. I know that 10 will not be 10. I say 10, and I hope for 15, but I should not have said that. Mr. Jennings, throughout the break, you should not speak to anyone about your testimony about the case, please.

THE WITNESS: Yes.

THE CHAIR: But you can go and have a coffee.

--- Recess taken at 4:35 p.m.

--- Upon resuming at 4:54 p.m.

MR. MULLINS: Back on the record.

THE COURT: Yes. Can we just close the door and we're back on record, Mr. Mullins.

BY MR. MULLINS:

Q. Thank you, Madam Chair and you'll be delighted. I'm going to keep my promise. I took

out a whole bunch of pages, (indiscernible) his pages. I learned from the best, Mr. Oster...(indiscernible phon.)

So, Mr. Jennings, just so we're clear, can I ask you: Is it common for Ontario to enter into this kind of agreement. Can you identify a single project where you entered into a secret MOU, you kept the negotiations quiet for six months and then you entered into an MOU, you kept it quiet for nine months and didn't tell anybody, including the administrative agency that was going to be in charge of implementing it. Anything like that, so I can use that as a comparator; if you can remember anything?

A. No, I'm trying to think. I don't think of one, as an exact example. No, this was touted as a $7 billion project, so it was seen as a special deal.

Q. Special deal.

A. And it had -- I mean special from the -- I don't mean special deal, in that sense. I meant that it was something big. It was with -- as you had talked about, large international company that had proposed the project. Certainly there is, in most cases where there are commercial negotiations with someone, those commercial negotiations are not

publicized. The agreement only becomes public afterwards. In some case, it doesn't become public.

Q. I see, sir, but isn't it true though that for large projects, Ontario generally goes through RFPs?

A. If it was the case -- so the FIT Program which isn't an RFP in the sense we had done FIT RFPs for renewables. We had done three, two of which were managed initially by the government, but this wasn't a -- this was a, again, a proposal that came from the company. It was a unique proposal, so it wasn't just a generation proposal; it was an investment and generation proposal. So, I'm not actually sure how you would have structured an RFP where you would have been able to manage how many industrial plants you were going to bring; what the level of commitment was and --

Q. Sure.

A. How many generations. It would be very complex to have an RFP on that basis.

Q. Now, Mr. Jennings, I promised the Chair I would try to get through the questions. You answered a different question than I asked you.

I'm asking you about large projects -- I wasn't asking about the FIT Program -- for large

projects doesn't Ontario normally go through an RFP process for large projects?

A. Yes, unless there are unique circumstances. I can think of the nuclear plants that are leased by Bruce Power. We do that --

Q. What about the RESOP that you mentioned; that was a similar RFP program; correct?

A. That was more a standard offer program, so there was a price set as in the FIT Program and people get access to it, but they don't -- weren't bidding on price. Those are small projects.

Q. Thank you. Now, if you could go to your rejoinder statement, paragraph 8 and I'm going to point you to the last sentence of that paragraph. What you have written here is:

> "No single investor, including those under the FIT Program..." [As read]

So, you agree with me then that -- well let me just read this first:

> "No single investor, including those under the FIT Program stepped forward at the time or any subsequent time to commit to developing

such a large quantity of renewable energy capacity in Ontario or to commit to manufacturing." [As read]

Do you see that?

A. Yes.

Q. And I think what your -- this paragraph here, just in fairness to everyone, you're talking about in the summer of 2008; correct?

A. Yes.

Q. But I think you made it abundantly clear that it would be kind of odd, wouldn't it, for any anybody to come and suggest a similar program, when they didn't know that Samsung was proposing this one; wouldn't you agree with me?

A. Well, Samsung came forward to propose it when no-one else had proposed one, but it certainly had been announced by the Minister at the time that Ontario was very interested in launching Green Energy program. It was interested in green jobs. It was interested in green economy.

Q. I see what you're saying.

A. So, from the perspective of whether would Ontario be receptive to such a program, if somebody wanted to recommend it, I think -- just as

Samsung. I mean, they didn't approach us because they had looked us up and they randomly went through the map and thought we'd go there. They did that because they knew there was a big interest.

Q. I won't argue with you sir. I take it what you're saying is, it wasn't a secret that premiere was encouraging investors to do renewable energy, but you are saying -- but you do agree with me that it's not unreasonable for an investor to not come forward and try to match the deal, prior to the September 2009, when the deal -- some terms of the deal became public; do you agree with me, sir?

A. So, yes, no-one else knew that the exact type of thing that Samsung, but we didn't get comparable proposals either.

Q. And then what you're saying there is no other single investor, including those under the FIT Program, those are the type of people, that if they were going to come forward with a similar program would be the comparables, right? It would people who would be in the FIT Program?

A. So, not...

(Simultaneous speakers - unclear)

Q. That's what you would --

A. So you probably would have had to

have a fairly large company to look into this type of a program.

Q. But you said in your statement, you looked -- you suggested that it would be those in the FIT Program that would be the type of investors that would be also looking to do a deal like the Korean Consortium; right?

A. Yes, assuming --

Q. Assume they were developers.

A. Yes.

Q. So, in fact -- just so we're clear for the record because I don't think it is clear, maybe it is -- just so that we are clear, in fact, Ontario did not do a deal with any investor like GEIA, other than the Korean Consortium; correct?

A. So no-one else did propose a deal of anywhere near that magnitude.

Q. So, the answer to my question is yes, you did -- or sorry --

A. We did not do a deal with anyone else comparable. I'm trying to think whether I'm doing the double negative.

Q. I think I may have messed it up too. I'm looking at the question and answer.

A. Yes.

Q. Just so we're clear --
A. Yes.
Q. -- this is the only deal that Ontario did that looked like this?
A. Yes.
Q. In terms of the exact terms of the deal?
A. Yes, and in terms of size and manufacturing.
Q. Now, you talked about the fact that no other investor stepped forward to do such a large quantity, but we do know -- you do remember, that certain entities did come forward and try to get a similar deal anyway; right?
A. Tried to get a deal, yes.
Q. And for example, Recurrent Energy -- sorry, this is confidential.
--- Upon resuming the confidential session at 5:02 p.m. under seperate cover
--- Upon commencing the restricted confidential session at 5:10 p.m. under seperate cover
--- Upon resuming the confidential session at 5:21 p.m. under seperate cover
--- Upon resuming the public session at 5:24 p.m.
CONTINUED RE-EXAMINATION BY MR. WATCHMAKER:

Q. So you were also asked questions about the MOU, and you were specifically asked a question about whether a feasibility study was done and you said "No."

What I'd like to know is whether the Ministry did study feasibility of the agreement, though it didn't, perhaps, create a feasibility study?

A. We did work internally to assess it, and when I say "the feasibility study" as envisaged in here, the Deputy Minister at some point decided he didn't need to proceed. He was satisfied that we had done enough without a formal feasibility study.

Q. You were also taken to the Ontario Auditor General's report, and I believe you said that there was no independent economic assessment of the FIT Program and the GEIA done. Was the government internally keeping tabs on the economic impact on these programs?

A. In terms of job creation and in terms of -- so, things like the cost, dollars per megawatt of connections, those are obviously things that the government tracked.

Q. And you'd be tracking those -- if I recall your written witness statements -- you'd

raised issues such as reliability, cost and sustainability.

Are those the reasons why you would be tracking the -- ECID (phon.) doing internal economic assessments in the FIT Program and the GEIA?

A. So, of course there would be things that from the government's perspective, we would want to keep track of, yes.

Q. Now I'd like you to turn to tab -- I believe it's 17, and it's Exhibit R-76.

I don't believe you were taken to this particular -- oops, sorry, I don't believe you were taken to this particular document. I believe it's the backgrounder to the news release of January 21st, 2010.

A. Yep.

Q. I'd just like to take you through it. If you go to the third paragraph, the first paragraph under "Creating jobs." You notice a dollar figure attached to the investor of the Korean Consortium. How much is that?

A. $7 billion.

Q. Okay. Go down to "stimulating manufacturing." Can you just read the first two or three sentences there for the record?

A. (Reading):
"Renewable energy provided by the consortium would qualify for Feed-in Tariff prices available to all eligible projects. In addition to the standard rates for electricity generation, the consortium will be eligible for an economic development adder." [As read]
Q. Would you continue to the next sentence?
A. (Reading):
"The adder is contingent upon the consortium manufacturing partners operating four manufacturing plants, according to the following schedule." [As read]
Q. And if you could go down to ratepayer impact; could you read that sentence?
A. (Reading):
"The total cost of the EDA (economic development adder),

assuming the manufacturing facilities are built, according to schedule set out in the agreement, will be approximately $437 million net present value over the lifetime of the contracts." [As read]

Q. And under "more renewable energy" would you agree with me that it says that "Construction of 2500-megawatts of renewable energy including 2000-megawatts of wind power" is listed there?

A. Yes.

Q. Further down it says: "The first phase of the project is scheduled to be completed in 38 months. It will be a 500-megawatt cluster." [As read]

Do you see that?

A. Yes.

Q. The next paragraph says: "Insurance of transmission in subsequent phases is

contingent on delivery of four manufacturing plants..." [As read]

Then it says: "As mentioned above."

Correct?

A. Yes.

Q. And that's a public document, correct, Mr. Jennings?

A. Yes it is.

Q. Now, you were asked whether Ontario normally does large projects through RFPs, by counsel for the Claimant.

I believe you started to say something about nuclear, but I didn't catch what you were trying to say. I believe you were cut off. So, could you please just finish what you were trying to say about whether Ontario normally does projects or procures projects through RFPs?

A. So, a lot of projects certainly are done through RFPs. As the example I was giving, so that Bruce Nuclear leases the nuclear power plant on Lake Huron, so when the government entered into a contract to have them refurbish those units and extend the life, and because of the nature, they were

the ones leasing and operating the plant. We didn't put that out to public tender.

Q. How much electricity is the first nuclear generating facility ...

(Simultaneous speakers - unclear)

A. In total, 6300-megawatts.

Q. Thank you, Mr. Jennings. Those are my questions, Madam Chair.

THE CHAIR: Thank you.

MR. MULLINS: Madam Chair, I just have very few questions in follow up. Thank you.

THE CHAIR: Yes. Re-direct examination.

FURTHER CROSS-EXAMINATION BY MR. MULLINS:

Q. Thank you, Mr. Jennings. Thank you, Mr. Jennings. Can you hear me now?

A. Yes.

Q. Thank you. Going back to tab 24 of the Auditor General Report, which is C-228, Mr. Jennings, I want to make sure you're not retracting your prior testimony that you agreed with the finding by the Auditor General, are you? It's on page 9928.

A. I think the reference there was what were the known or the economic impacts of the study. That's what I was just asked her.

Q. Let me just ask you, so the record is clear, sir, page 9928; do you see it? It's the number on the bottom.

A. Yep. Yeah.

Q. Great. And remember I asked you when I did my questioning, in the left-hand column, one quarter of the way through, that the Auditor General said that:

> "No economic analysis or business case was done to determine whether the agreement with the consortium was economically prudent and cost effective." [As read]

And you said that was an accurate statement.

A. I said that we were also criticised for not having a business case done for the Feed-in Tariff program, as well, or for the Green Energy Act itself.

Q. Fair enough, Mr. Jennings. I took that answer to mean that you were saying that you agreed with that criticism, and that, in fact, there were other criticisms. So, just so the record is clear: You do agree with the finding by the

Auditor General that no economic analysis or business case was done to determine whether the agreement with the consortium was economically prudent and cost effective -- "yes" or "no"?

A. So there was no formal economic analysis that would have satisfied the Auditor General. I think the reference here was just to statements that were made in the news release backgrounder, about the size of the investment and the expected jobs.

Q. And you were pointed to the backgrounder at tab 17, that we'd already prepared, so obviously we were aware of it, and weren't trying to hide it. Nowhere in this backgrounder does it identify, sir, that the Korean Consortium could jump ahead in line to proponents who had been listed in a ranking in a FIT Program; correct?

A. So, I would have to read it through to see. I think it was either in -- it was certainly referenced in either a news release or something of that particular directive that you had drawn my attention to before that goes back to September. So, in fact, they were given that for the access for the Phase I advance of the FIT Program.

Q. You agree with me, sir, that

there's a difference between priority access and jumping in line; don't you, sir?

A. Sir, they were given that priority access in advance of anyone getting anything done on the FIT Program.

Q. And, in fact, as you just told us earlier today, when the FIT Program was announced and the directive, the FIT proponents were told where the 500 was going to be; right? Do you remember that? The directive said the 500 megawatts was going to be in those certain areas?

A. Yes, Haldimand County and Essex, yes.

Q. So, what you said is that the FIT proponents knew that those areas were going to be identified; right?

A. It was a -- yes, it was a public directive.

Q. And, in fact, this backgrounder never told anyone that the Korean Consortium was going to take megawatts in the Bruce Region, right, because at that time it hadn't selected that region; right?

A. So, that would be a lot of level of detail to have in the backgrounder. I know -- I believe the news release -- I'd have to look at it

together with the news release to see everything that was put out at the time.

Q. Well, sir, you do remember that it wasn't until September 2010 that the Korean Consortium -- the directive was issued that identified that there would be a reservation in the Bruce Region of 500-megawatts; does that refresh your recollection?

A. So, again that would have been based on them having priority access in areas where they were developing projects which was part of the agreement.

Q. My only point being: If that was done in September, it would have been impossible for that to be in this document in January?

A. Yes, that's right.

Q. Thank you. And I did want to point out one last thing because I think this is what you're referring to. And this is confidential, but it's not restricted access, just confidential.

--- Upon resuming the confidential session at 5:35 p.m. under seperate cover

--- Upon resuming the public sessions at 5:39 p.m.

THE CHAIR: You explained that there were these two approaches. One was the FIT Program and the other one was the agreement with the Korean

Consortium or commercial private negotiated agreement or however you want to call it. And I have some trouble understanding how you decide that one project falls under one heading or under the other. You have told us that it's just magnitude of the project you have insisted in your explanation now, which I had less understood from your written statement, than from your oral explanation, seems that the fact that Samsung took the initiative of approaching the government was an important consideration, seems it was important also that it was a large company, but there were other large companies in the world, so what exactly was the thinking behind having these two tracks?

THE WITNESS: So, the Samsung -- the Korean Consortium agreement -- again, it was a proposal that they came forward with to the government.

THE CHAIR: Yes, but if I come forward tomorrow, they will not give me a contract.

THE WITNESS: So, the context was that the government -- the Minister and the Premier were very interested in having a Green Energy industry in Ontario, and to show that Ontario would be a world leader. And I guess so the fact that this company was

talking about -- so 2500-megawatts in the context, there's now in total 2500-megawatts of wind in Ontario, there was virtually none before this --

THE CHAIR: Yes.

THE WITNESS: -- before this started and it's -- so, it's basically the whole wind capacity we have now, so it was seen as a very important measure. If you've got this wind and you wanted to have manufacturing, you have these big projects, so there are five phases of 500-megawatts, and they had strict timelines on for doing the phases, so it was like a huge jump start of the industry.

So, certainly, you know, and people like the Auditor General would have criticised the government for doing both, but it was a decision that the government decided was very big on keen on promoting Ontario as a big destination for green manufacturing.

So, at the same time, we had the proceedings so the Green Energy Act was really about this Feed-in Tariff program, which is really basically based on the program that Germany had. The Minister had, in fact, visited Germany in the summer of 2008, so that was really where most wind projects would come, would come through this program.

We had previously had competitive RFPs and, in fact, they had delivered fairly good pricing, but the idea was we want this big program, less limits. And so it certainly seemed that the government at the time, that they weren't mutually exclusive, they could both proceed, but where they interacted -- so the Samsung generation basically got the same price as the FIT price and the FIT price was the price developed to cover the costs of generators and give them a commercial rate of return, so the difference was they were able -- because of the size of it -- you wouldn't have been able to do this unless you gave them priority transmission access.

The transmission becomes a very big constraint; it's very valuable, and so they were given priority transmission access. They had to bring in manufacturing. They had to agree to this very ambitious phases of projects.

THE CHAIR: Yes.

THE WITNESS: Whereas the FIT projects were much more usually smaller, much smaller and while they had to meet the domestic content requirements, they didn't have a commitment to bring manufacturing in, so there was actually some uncertainty as to how that would really work out, whether you'd end up --

you'd have these contracts, and they'd say, "Well we can't end up building because we can't meet domestic content," or else they would say "Can we waive this domestic content, so we could go ahead?"

So, the Samsung thing, in part, was we would be get these big manufacturing projects so they could serve other people besides GE.

BY MR. MULLINS:

Q. So, it was an opportunity for a breakthrough and Green Energy; was that the idea?

A. So, the term that was used -- and I think was quoted there -- was an anchor tenant, so that when you have a mall, you have a big store that's Macy's or whatever it is, and so that was what Samsung was. It was going to be whatever the 2500, so it was demand, there was going to be manufacturing and then the other people coming in, smaller projects would have people building blades, towers, and the solar equipment.

THE CHAIR: And when this decision was made to have the two tracks, was there some thought given to the possible interaction of the two tracks? I mean one could effect the other? One could hurt the other or...

THE WITNESS: Yeah, so...

THE CHAIR: Or one could benefit the other?

THE WITNESS: Yes, so I guess the main area -- so as I said the pricing, so what Samsung would get the FIT pricing -- FIT pricing was going to come down year by year, as does the Samsung one for new projects.

But the main area, I think where they conflicted was on transmission access. So, this was envisaged early on which is why there was the directive to set aside 500-megawatts even before the agreement was finalized because the agreement wouldn't have been feasible unless you had set it aside. So that was the major area. There was a lot of documents in the evidence that would refer to of how we would fit in the phases on a transmission perspective.

So that really became the big constraint in the area that had to be dealt with and that was quite complicated because transmission systems are very complicated.

THE CHAIR: Thank you. That answers my question.

MR. BROWER: Just a moment. Am I correct that you've referred to 7000-megawatt towers, as some sort of a goal or figure that you...

(Simultaneous speakers - unclear)

THE WITNESS: 10700-megawatts was the capacity for -- we refer to it as non-hydro renewable, so, wind, solar, biomap.

MR. BROWER: Right.

THE WITNESS: So, that's by 2018. So that was the planning document. The most recent one has moved that out 2021. So that reflects, in part, looking at impacts on customers, looking at transmission availability, looking at things like what the contract is all about.

MR. BROWER: Was that adopted as part of or the implementation of the Green Energy Act? Did it -- did it relate to the FIT Program?

THE WITNESS: So it relates to all the renewable energy. It was adopted in the long-term energy plan, which was the end of 2010.

MR. BROWER: Yes.

THE WITNESS: So the Green Energy Act was actually in the spring of '09.

MR. BROWER: Right.

THE WITNESS: The FIT was in -- the FIT was September, October '09.

MR. BROWER: Right.

THE WITNESS: So, in effect, it was

originally seen as expansive, but we didn't know what the take-up was, and so as you've got the customer -- the impact on ratepayers, there's also a lot of opposition to wind projects which I don't think had been contemplated before, so there's a variety of reasons why the government moved to a cap on the amount of wind solar.

MR. BROWER: But that amount, as it turned out, couldn't have been taken up by FIT projects?

THE WITNESS: So, yeah, so certainly -- and I think that's partly -- if you look at the Auditor General's there's a question whether the government at the time did too much, did both these agreements, whether they were necessary. Again, the attraction for the Korean Consortium was that it was actually going to bring four manufacturing facilities, which it did, and which are still operating. So, how the -- it would have operated without them -- obviously the system would be different. There might have been more space, more stronger projects. We probably wouldn't have got to Green Energy manufacturing.

MR. BROWER: All right. So 2500-kilowatt hours were taken out of the

10700 megawatts --

THE WITNESS: Yes, megawatts...

(Simultaneous speakers - unclear).

MR. BROWER: -- by the Korean Consortium?

THE WITNESS: Yeah.

MR. BROWER: Okay.

THE CHAIR: No further questions.

MR. BROWER: That's it.

THE CHAIR: No further questions, then Mr. Jennings, thank you very much for your explanation and that concludes your examination.

THE WITNESS: Thank you very much. Thank you.

THE CHAIR: And that concludes our day. Tomorrow morning we will hear Ms. Lo. And then we will continue with Mr. Chow. Is that --

No, no, no that was -- there was a whole issue about that -- Mr. MacDougall and then Mr. Chow.

MR. SPELLISCY: And then Mr. Cronkwright.

THE CHAIR: Oh, yes, that's quite an ambitious program we have. Yes. We have to -- one has to be ambitious. Yes, Mr. Cronkwright, as well.

MR. APPLETON: Could the secretary give us a rough idea of time, just if he has it.

THE CHAIR: Yes.

MR. DONDE: So, the total amount of time consumed between yesterday and today by the Claimant, and this is a rough estimate is about 4 hours and 36 minutes, and by the Respondents is about 5 hours and 56 minutes, but I will send an email out later today with the exact time.

THE CHAIR: We apologize. The email went out in the morning for yesterday, but we will send it after the hearing.

MR. APPLETON: Great.

THE CHAIR: Thank you. There is another observation before we close. I realise that we have in the rules, that there would be a re-cross-examination in the discretion of the Tribunal. So far you have systematically asked re-cross questions. I'm not that sure that they're very useful, and they do take time. So, since we have the rule, we will, of course not prohibit asking re-cross questions. But nevertheless, I think we should be rather -- try to keep them as narrow as possible and remember that only ask them, if you think there is a very important point that was misunderstood

by the Tribunal. Good? Are there no further points that we need to raise now in terms of organisational procedure on the Claimant's side? No? On the Respondent's side? No. Then I wish you all a good evening and we will see each other tomorrow morning.

MR. APPLETON: Thank you.

--- Whereupon the hearing adjourned at 5:51 p.m.

CERTIFICATE

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided Transcription and transcribed therefrom, the foregoing proceeding.

_____

Lisa M. Barrett, RPR, CRR, CSR

Computer-Aided Transcription

PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONORABLE CHARLES N. BROWER
MR. TOBY T. LANDAU QC

held at Arbitration Place
333 Bay Street., Suite 900, Toronto, Ontario
on Tuesday, October 28, 2014 at 9:03 a.m.

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INDEX

Toronto, Ontario

--- Upon resuming on Tuesday, October 28, 2014
at 9:03 a.m.

THE CHAIR: On the record. Good morning to everyone. I hope everyone is fine and we are all ready to start day 3 of this hearing. Mrs. Lo, good morning.

THE WITNESS: Good morning.

THE CHAIR: For the record, can you please confirm to us that you are Susan Lo.

THE WITNESS: I am.

THE CHAIR: You're assistant Deputy Minister of the Drinking Water Management Division of the Ministry of the Environment at present; is this correct?

THE WITNESS: Yes, Ministry of the Environment and Climate Change, yes.

THE CHAIR: Thank you. At the time that we're interested in here, you were Assistant Deputy Minister of the Renewable and Energy Efficiency Division of the Ministry of Energy.

THE WITNESS: Yes, I was.

THE CHAIR: That is correct. You have given two witness statements in this

arbitration. The first one was dated February 27, 2014 and the second one was dated June 27, 2014?

THE WITNESS: That sounds about right.

THE CHAIR: You confirm that you have given two statements.

THE WITNESS: I have two statements.

THE CHAIR: If you don't remember the dates, that's fine.

You are here as a witness in this arbitration. As a witness, you are under a duty to tell us the truth. Can you please confirm that is what you intend to do?

THE WITNESS: Yes. Yes, I do.

AFFIRMED: SUSAN LO

THE CHAIR: Thank you. So you know how we will proceed. You will first be asked some questions by Canada's counsel, and then we will turn to Mesa's counsel.

THE WITNESS: Okay.

THE CHAIR: And the Tribunal may ask questions as we go along or at the end. To whom do I give the floor?

MS. KAM: Good morning. A new

face, so I will briefly introduce myself. My name is Susanna Kam and I am counsel for the Government of Canada.

EXAMINATION IN-CHIEF BY MS. KAM AT 9:04 A.M.:

Q. Thank you for your introduction, Ms. Lo. I just have one question for you. Do you have any corrections that you wish to make to the witness statements that you filed in this arbitration?

A. No, I do not.

Q. That is all of the questions that I have.

THE CHAIR: Could you get closer?

MS. KAM: That is all of the questions that I have.

THE CHAIR: Thank you. Could I then turn to Canada's counsel, Mr. Mullins -- to Mesa's counsel, sorry.

CROSS-EXAMINATION BY MR. MULLINS AT 9:06 A.M.:

Q. Good morning, Ms. Lo.

A. Good morning.

Q. Just before we start, just to understand, both sides have limited amount of time to ask questions, and in fact Canada's brought five factual witnesses and we both have a number of

experts. So I would ask you to try to listen to my questions and try to answer the question I am asking, and if you need to explain it, that's fine, but just try to listen to the question I am asking so we can go through this in an efficient manner. Is that fair?

A. That sounds fair. I will try my best.

Q. I appreciate that. So we just heard you have done two statements. What I will probably end up doing is going back and forth to them, so make sure they are in front of you. You should have both there in the binder.

In addition, you will see a notebook of documents, and we may not go through all of those documents. I think it is the notebook in front of you. It has a number of documents in it.

A. This one?

Q. Correct. Yes. So put that in front of you, as well. We may not go through all of those documents, but I will refer to the tab numbers so you will be able to find them.

And who assisted you in the preparation of your witness statement?

A. I believe the Government of Canada, JLT, as well as my own legal counsel.

Q. Okay. And you have no changes to your statements and they are accurate, as far as you know?

A. They are accurate, as far as I know, yes.

Q. Okay. And we heard from questions from the Chair that during the relevant time period, you were Assistant Deputy Minister of Renewables and Minister of Energy. Later you moved to the Drinking Water, Environment and Climate Change; correct?

A. Drinking Water Management Division at the Ministry of Energy, yes.

Q. Was that a lateral move or...

A. Yes.

Q. Okay. And would that move have anything to do with how this renewable energy project went forward?

A. No. It has nothing to do with that.

Q. Okay. And when you came into your position -- and we're going to be focussed on the renewable energy program -- did you make sure

that you understood the history and the background of the program in order to do your job?

A. I had a good grounding, yes.

Q. Were you familiar, personal knowledge, as well, or did you just learn it through what people told you?

A. I learned it from a number of sources.

Q. Were you involved at all personally in the, for example, memorandum of understanding and those programs before you took over your position?

A. Which memorandum of understanding are you referring to?

Q. The one between the Korean Consortium and the Ontario government?

A. After I had carriage of the Korean Consortium file, then I did have knowledge of it. When it was being negotiated back in 2008 and 2009, no, I did not know about it.

Q. Okay. Now, because it was a secret; right?

A. A secret to whom?

Q. To you, for example.

A. It wasn't my file and, hence,

I had --

Q. What was your position at the time it was entered?

A. In 2008?

Q. Yes, ma'am.

A. I would have been in the Ministry of Transportation. 2008? Probably in the Road User Safety Division as the director of policy.

Q. Okay. As far as you know, no members of the cabinet were aware of the memorandum of understanding until September 2009; is that correct?

A. I don't think I could answer that question, because I didn't personally speak to each member of cabinet.

Q. Okay, fine. I mean, do you have any knowledge, when you reviewed the file, that it was well -- that any members of the cabinet were aware of the memorandum of understanding prior to September 2009?

A. I'd only be speculating.

Q. Okay, thank you.

Now, you do agree that the -- when you took over, you did take over the management of

the GEIA when you took over; correct?

A. The G-E-I-A?

Q. Yes, ma'am.

A. In 2010?

Q. Correct.

A. Yes.

Q. You agree it was a significant agreement?

A. Yes, it was a significant agreement.

Q. And it had wide-ranging implications to Canada in renewable energy; right?

A. To Canada or Ontario?

Q. Ontario.

A. Ontario.

Q. And you also were familiar with the GEGEA?

A. Yes, of course.

Q. And can you tell us what that is?

A. That's the Green Energy and Green Economy Act that was proclaimed in 2009, in May.

Q. And was one of the goals of that Act to attract investment?

A. Yes, it was.
Q. And was that domestic and foreign investment?
A. Yes.
Q. Did the government have any preference as to what type of investment it was seeking to encourage, foreign or domestic, or did it matter?
A. I think at the time that the GEGEA was created, the idea was to attract any investment capital, and I don't think that the government had a preference in terms of whether it was domestic or foreign. And, in fact, there were domestic content provisions that were created to ensure that a certain amount would come from Ontario and create jobs in Ontario.
Q. So you agree with me it would be important to make sure that you treat investments in foreign and domestic the same?
A. I don't know. I just -- um..., that wouldn't be something that -- I think it's important to be fair, and, in principle, it was to try to create an excellent investment climate in Ontario.
Q. Do you agree with me that

when you talk about fairness, do you agree that the Ministry of Energy and the OPA should do its job fairly?

A. I believe it does.

Q. Well, thank you. That's one different question. But you should -- they should do the job fairly, is what I asked you. You said they did. I want to make sure you agree that both the OPA and the Minister of Energy should do their job fairly?

A. Yes.

Q. They should do it honestly and objectively with high ethical standards?

A. With high standards, yes.

Q. They should do it with transparency; correct?

A. Yes.

Q. Just so we understand the organization of how the Minister of Energy works with the OPA, do you agree the Minister of Energy works very closely with the OPA; right?

A. Yes, we did.

Q. And, in fact, though, the OPA though is required to follow the directives of the Minister of Energy; correct?

A. Directions, yes.

Q. Directions and directives?

A. Directions and directives of the Minister.

Q. Yes. I always have trouble. Can you explain the difference between directions and directives, if you can?

A. A directive has -- needs to go to the LGIC and is issued with respect to supply mix procurement.

Directives are issued by the Minister for anything else -- directions, sorry. So the first one is directives, LGIC; directions not LGIC.

Q. And the OPA has to follow both of them?

A. Yes.

Q. And even if they disagree with them, they have no ability to not follow them; right?

A. Personal beliefs or corporate? They would follow them essentially, yes.

Q. Okay, thank you.

Could you explain for us what the

LGIC is?

A. The Lieutenant Governor in Council, it needs to be delivered and signed off by the Lieutenant.

Q. That means the cabinet, doesn't it?

A. No, no, no. That's something...

Q. Is the cabinet involved at all in directions and -- directives or directions?

A. I don't know whether there is a formality involved with cabinet approval being required.

I know that many significant things that we dealt with at the Ministry of Energy went to cabinet for information or for decision, anyway.

Q. And despite the fact the OPA has to follow the directions and directives of the Ministry, you would expect that the Ministry would consult with the OPA on major projects; correct?

A. No, not really. It depends on the nature.

I mean, if it were a policy-type of a decision that needed to be made, the OPA

wouldn't necessarily be involved, because the government creates the policy and the government would consult with other ministries, for instance, but not necessarily the OPA.

Q. What about programs they would have to administer? Wouldn't it make sense for them to consult with the OPA on initiatives which they would have to consult?

A. Not necessarily. It really depends.

Q. Okay. Well, in fact the Ministry of Energy did not consult with the OPA or the OEB regarding the memorandum of understanding with the Korean Consortium, did it?

A. I understand that that's the case, but it wouldn't be a normal course of action to consult with the OPA or the OEB.

The OEB is a semi-judicial body that sets -- decides on rates paid for by ratepayers, and it just really does not -- it receives policy direction. The OPA receives policy direction, and then carries it out, but there wouldn't be any need to consult with either body.

If say they needed to be consulted with, well, that's their opinion, but working in

government for 30 years, they wouldn't be a normal body that one would consult with.

Q. Well, frequently during the implementation of the FIT program the Minister of Energy did consult with the OPA?

A. The FIT program is very different, because it is operationalizing a renewable energy program that was already created in a higher level policy.

So, for instance, the Green Energy and Green Economy Act, would the Ministry of Energy consult with the OPA or the OEB? No. Not necessarily, no.

Q. Okay. Well, there were parts of the GEIA that the OPA had to implement, correct, for example, the power purchase agreements?

A. Yes, but you are mistaking the difference between high-level policy and implementation of that policy.

Q. Mm-hm?

A. The FIT program is something that was directed by the Minister to be implemented by the OPA. So once you're into implementation, of course they would be consulted.

Q. Okay. So both the GEIA and

the FIT program both were, in some manner, implemented by the OPA; correct?

A. Yes.

Q. Thank you. Now, one of the reasons we heard why the GEIA was not announced until later was due to lack of cabinet approval. That's what we heard in testimony yesterday.

In fact, there was no cabinet approval of the GEIA, was there?

A. I don't think that cabinet approval was necessary, but the GEIA investment agreement, I believe that it went to cabinet several times for discussion.

You need to recall that our Minister at the time, the Minister of Energy and Infrastructure, was also the Deputy Premier.

Q. So the answer to my question was that there was no cabinet approval; correct?

A. Because it was not necessary.

Q. Remember I was asking you at the beginning you said you would answer my question, if you needed to explain it -- I said a "yes" or "no" answer to question --

MR. SPELLISCY: I'm sorry. She answered his question. I understand we're going to

move carefully, but we talked about this yesterday. The witness has to be able to give an explanation. I am not going to allow you to cut her off like that.

MR. BROWER: Is your microphone on?

THE CHAIR: I understood you, Ms. Lo, to say there was no cabinet approval requirement for the GEIA, but that cabinet was consulted on the GEIA.

Is this a correct restatement of what you said?

THE WITNESS: Yes, absolutely. And it was discussed more than once at cabinet meetings.

THE CHAIR: Thank you.

BY MR. MULLINS:

Q. And it was discussed at the cabinet. Why was it discussed at the cabinet if they weren't seeking their approval?

A. Can you ask that question again? I lost the last part.

Q. Well, what I was asking is you've said there was no cabinet approval. You agree with me they were originally seeking cabinet

approval. That is why they brought it to cabinet; correct?

A. That's not what I said.

Q. Well, I am asking you, then. Why was it being discussed at cabinet if they weren't seeking the approval of cabinet?

A. Cabinet can discuss anything it chooses to discuss. I don't set the cabinet agenda. I would think that as a team of cabinet ministers, they would like to have a frank discussion.

Q. There would be no reason to delay, then, the implementation or perhaps the signing of the GEIA for cabinet approval because, as you said, it wasn't required; correct?

A. Cabinet approval was not required, yes.

Q. So that would be not a reason, then, to delay the signing of the GEIA; correct?

A. That would not be a reason.

Q. Thank you. You also are -- in fact, that was identified by the Attorney General that although the cabinet was briefed, there had been no cabinet approval. Do you

remember the Attorney General's report -- Auditor report, I'm sorry, Auditor General's report. I apologize.

Do you remember the Auditor General's report?

A. I recall the Auditor General's report.

Q. Do you remember they recognized that there had been no cabinet approval?

A. They reported that as a fact, but I think it was also pointed out to them that cabinet approval was not required.

Q. And they also identified that the GEIA was neither a non-competitive procurement nor a sole-sourced deal. Instead, it was an investment arrangement with an objective establishing a sound green energy sector in Ontario. Do you remember that statement?

A. That sounds correct.

Q. And, in fact, that absolutely was, according to the Auditor General, the position of the Minister of Energy; correct?

A. I don't know. That's the position --

Q. Let's look at it. It's at

tab 21.

THE CHAIR: It may be fair, yes. Are you referring to the report?

MR. MULLINS:

Q. Yes, yes. Let's go to tab 21 of your book.

A. What page?

Q. Go to page 108. Have you found it?

A. Mm-hm.

Q. If you go to the right-hand column, one-quarter of the way down.

A. Yes.

Q. And it says, "According to the Ministry..." So it says:

> "According to the Ministry the sourcing agreement is neither a non-competitive procurement nor sole-source deal. Instead, it is an 'investment arrangement' with an objective of establishing a sound green energy sector in Ontario since no other company has proposed to

invest in Ontario's renewable energy sector at the size and scale of the consortium and its partners."[As read]

Do you see that?

A. Yes, I do.

Q. What I just want to make clear, you agree that that was an accurate statement of the position of the Ministry of Energy?

A. Yes.

Q. Thank you. Now, in your statement, you say that the Government of Ontario was transparent as possible about the GEIA's assistance and implementation?

A. To the extent possible, the Ministry was transparent, but it is a commercial arrangement, and so there were certain aspects that could not be transparent.

Q. Okay. Until it's signed?

A. No. I think the commercial sensitivity would extend beyond the signing.

Q. So your position is that it was -- well, first of all, what do you mean by transparent, to make sure we're on the same page?

A. Transparent is to release the entire agreement unredacted to everybody.

Q. Okay. I guess I was really asking what you meant by transparent, in general, not specifically to this agreement. But that was helpful.

What I was asking is: What do you mean by transparent, generally, in terms of how the Minister of Energy operates?

A. Transparency would be to -- well, I can answer it in the negative. It's not to keep a whole bunch of reports or analyses hidden from public view. That would be not transparent.

Transparent would be to disclose everything we did and said and reported and looked at.

Q. And I guess you kind of answered my question, but I want to explore it a little bit.

So now you're saying that not only was it important for Ontario to keep the negotiations non-transparent, but even after you signed the agreement it was still important to keep some portions secret. Is that what you're saying?

A. I don't think that's exactly what I said. You're putting words in my mouth.

Q. I don't want to do that, so why don't you explain what you mean?

A. Can you ask the question again?

Q. Sure. Can you explain to us why it was important not to have the GEIA to be transparent and complete after it was signed?

A. After it was signed, I believe that there was a lot of the agreement that was made public in terms of how many megawatts and what the government would get in exchange for those megawatts, so, for instance, the manufacturing plants and the jobs and what the Korean Consortium was going to invest in Ontario. You know, it was touted as the $7 billion investment.

I think in terms of what was kept confidential were some of the commercial terms.

Q. Did you make that decision of what was going to be released and what was not?

A. I wasn't -- I didn't have carriage of the GEIA in 2008 or 2009.

Q. Well, is the GEIA released now, ma'am? It's on the website, isn't it?

A. I believe it was released quite a while ago, quite a while ago.

Q. I didn't want to cut you off, I'm sorry. I was told yesterday it is now available on the website.

A. Not just now, but before.

Q. Okay. And so what's changed, ma'am?

A. I think it was released back in 2011.

Q. I understand that, but what's changed? Why now is it public, but back in 2009 and 2010 it wasn't public?

A. Well, I can't speak to 2009, because I didn't have carriage of the file. I think you had your opportunity to ask Rick Jennings yesterday.

In about May or June of 2010, I had carriage of the file and I know that --

Q. Was it public when you took over the file, ma'am?

A. It wasn't public at the time that I took over the file, but I was involved in the renegotiation, and right after we renegotiated it, it was made public.

Q. Okay. So when you took over the file, it was still secret, right, the entire agreement.

A. The entire agreement? It was not released. It's not that it was a secret. It was a commercial deal and it was inappropriate to release it.

I believe that it was the Korean Consortium itself that felt vulnerable in terms of their commercial arrangements with other developers, and they didn't -- they felt that it would disadvantage their negotiations with -- in forming partnerships if it were released.

Q. So the reason why the Government of Ontario when you were in charge did not release the entire GEIA was to protect the interests of the Korean Consortium?

A. I think that what had been released was the most important detail, which is the manufacturing plants and when they were supposed to come online, the jobs numbers, the number of megawatts that would receive transmission, the five phases, the adder. Those were all revealed, and that's what affected the public in terms of how the agreement would be borne

by ratepayers.

Q. Did you make any thorough analysis -- scratch that.

You yourself, did you make any opinion as to whether or not you should release the GEIA when you took over or were you just following the policy that had been followed by your predecessors?

A. I don't understand the question.

Q. I understood when you took over the file the GEIA had not been released, and I also understand that you personally didn't release it when you took over the file. Now I am asking you: Did you make an independent analysis of whether or not it should be released, or were you just following the policy that had been established by your predecessors?

A. I think that working in government, you can have your own views in terms of whether something should be released or not released. But at the end of the day, some decisions aren't made by yourself, and releasing the GEIA certainly was not a decision that I could make as the Assistant Deputy Minister.

Q. Who can make that decision?
A. Probably the Deputy Minister and the Minister.
Q. Did you ask them whether or not they should release the GEIA when you took over?
A. But you seem to imply that there's all sorts of hidden and veiled secrets.
What was released were the most important aspects already. It was the manufacturing. It was the adder. It was the jobs creation. Those were the key aspects.
And every time there was a separate phase of the agreement to proceed, the Minister made it very transparent, in terms of providing a direction to the OPA, to talk about where transmission was being protected for the Korean Consortium.
Q. Again, I really need you to answer my question.
I asked you whether or not you asked the Deputy Minister or the Minister about that they should release the GEIA when you took over. That was my question.
A. We discussed it all the time.

We discussed it all the time --

Q. Okay. And --

A. -- about when was the most appropriate time to make the entire document public. I think when I took over, one of the things that we wanted to do was we wanted to renegotiate it.

We knew that we had a strong negotiating position. We wanted to renegotiate it and release the amended agreement.

Q. Okay. And so -- fair enough.

Now, you also talk about, in your statement and with others, that the government -- the Ministry would have been open to competitors to do a similar project that the Korean Consortium did; correct?

A. Can you ask that again?

Q. In your statements and others from Canada have said that the government would be open to having similar deals with competitors of the Korean Consortium, with a similar deal. Do you agree with that?

A. Yes. Yes.

Q. Okay. Do you agree with me, though, by not giving the entire agreement, Ontario

made it difficult for someone to compete with the Korean Consortium, given they didn't have all of the details that the Korean Consortium agreed to? Wouldn't you agree with that, ma'am?

A. I don't believe that they were in competition with the Korean Consortium. Not necessarily. I mean, it -- if an investor wanted to create their own deal, why wouldn't they bring that proposal forward to the government? And, in fact, some companies -- many companies did come forward, but they didn't have the scale or scope of proposal. They had very small -- like small, small proposals that didn't -- that we weren't interested in.

Q. Well, let me ask you this, then. When they came to you for a proposal, did you give a copy of the GEIA to them so they could look at it so they can compare to their proposal?

A. I don't see the need to. Investors come forward all the time to the government with their own proposal.

It's not about copying somebody else's proposal. It's not what investment proposals are about. Different companies have different strengths.

Q. You don't agree with me it would be more easier for an investor to compete with a -- well, scratch that.

Would it be easier for an investor to come up with a proposal if it had all of the details of the proposal that had already been agreed to by the government?

A. I'd only be speculating. It's up to each investor to negotiate their best deal. So I don't know why we would turn over an agreement for somebody else to copy.

Q. And you're speculating --

A. It doesn't make sense.

Q. I'm sorry, I cut you off. You're speculating, because in fact the government never gave a copy of the GEIA to any proponent of a GEIA-like deal; isn't that correct, ma'am?

A. It is inappropriate to provide the agreement to another competitor at the time that the Korean Consortium was still working out their proposal.

Q. No. I'm sorry, ma'am.

After it was signed, after it was signed and proposals are coming in, we saw yesterday the proposals came in after it was

announced, not before, because they didn't know about it, ma'am.

I'm talking about after it was signed.

A. Right.

Q. Okay. The government never gave a copy of the entire GEIA to any of those proponents to prepare to give a proposal; isn't that correct?

A. That's correct.

Q. Thank you.

MR. SPELLISCY: I would just like to clarify the record. I don't think what counsel said is accurate there in terms of when the proposals came in from what we saw yesterday. Obviously Ms. Lo wasn't here yesterday and has been sequestered, so she has no idea. I would like to clarify the record. I don't think that is accurate.

MR. MULLINS: The record speaks for itself. All of the things I showed yesterday were after September 2000.

BY MR. MULLINS:

Q. Okay. In fact, the GEIA did not become public until -- I followed the lawsuit

in San Francisco -- in order to obtain it; correct? Do you remember that?

A. I don't know what you're referring to.

Q. You don't remember the 1782 action against Pattern where we got a copy of the GEIA, and that was actually the first time we were able to get a copy of it? You don't remember that?

A. I wouldn't know what you did.

Q. Okay.

A. When did you get it?

Q. 2012. Does that refresh your recollection about when was the first time it became public, 2012?

A. No, no. I thought that the agreement was released after the renegotiation in or about August of 2011.

Q. Was the amendment released at the time?

A. The amendment was released --

Q. Immediately?

A. The amended agreement, so that would be the valid agreement, was released right after the negotiations in August. It was made available to anyone who requested it.

Q. The amended?
A. In August, the amended agreement.
Q. So the amended agreement was made public immediately?
A. In August of 2011.
Q. Okay. And the amended agreement had -- I would take it would have the same type of terms that were in the original agreement; they were just amended?
A. No. There were some really major differences.
Q. But I guess I'm a little confused, ma'am. It still was a GEIA; right? It was just amended; right?
A. It was an amended GEIA.
Q. Okay. What I'm trying to understand is: Why was the amended GEIA released when the original GEIA was not released?
A. I don't know. I can't answer that.
THE CHAIR: Can I ask this differently? What were the amendments? What were the main amendments?
THE WITNESS: The main -- so the

main amendment was that what we had done was renegotiated the adder. So the adder originally could have been maxed out at $437 million if the manufacturing were brought in at specific times.

And the amended agreement reduced that adder to $110 million, maximum. And so that was a significant gain for the Government of Ontario.

In exchange, the Korean Consortium received an extension to the COD dates -- that's the commercial operation dates -- of the first two phases of the GEIA.

And so the extensions were for one year. They needed more time to complete their projects.

THE CHAIR: Thank you.

BY MR. MULLINS:

Q. So let me go back to that, then. I thought you told us earlier that the most important elements of the GEIA, the adder and the -- and these manufacturing commitments were already public; right? That was never -- that was public. That was not held back after 2010; right?

A. I think in the news release that was sent out when the agreement was signed at

the stock exchange in January of 2010, there was a news release that went out that spoke of the jobs and the manufacturing and the adder. So those were the key elements, and they were disclosed in January of 2010.

Q. Right. So again I go back to my question followed by the Chair's question, which is: If those were the changes in the amendment, why was the amendment released and not the original agreement?

A. Because it was the valid agreement. Why release something that wasn't valid anymore?

Q. I meant originally, ma'am. I agree with you. I would have released the original agreement.

A. I don't know whether both -- I think you would have to go back in the record to see whether both agreements were released. Perhaps they were.

Q. No.

A. I don't know.

Q. I'm sorry?

A. I know the amended valid agreement was released in August of 2011.

Q. I think you misunderstood my question and maybe I didn't ask it well.

What I was asking is that given that the amendments changed things that were public, I'm still confused as to why the Ministry of Energy decided to release the entire amended GEIA, but to that point had not released the GEIA itself. I don't understand, ma'am.

A. I don't understand your question.

THE CHAIR: No. The question is: Why was the GEIA, the original GEIA, not released? But that to me was in a period where you were not in charge of this file, because your question probably refers to January 2010 and you only took over in May or June 2010.

THE WITNESS: Right.

THE CHAIR: If I am correct.

BY MR. MULLINS:

Q. That's correct. But I guess even when she was in charge, when she was having discussions with the Minister, where I'm confused is that she has told us the changes were to things that were public, and so -- and then the agreement gets released.

I don't understand why, then, during the time that you were there, why the entire original agreement was not released.

THE CHAIR: Can I clarify this, because I have the same question?

When you were asked this by counsel before, why, when you took over, did you not consider releasing, and you said that was not "my prerogative" and it was the Deputy Minister or the Minister's decision.

But you added then, Well, we discussed all the time when would be the appropriate time to publish it.

And I was asking myself, Well, why would you discuss this all the time? Was this such an issue?

THE WITNESS: Well, I think the government wanted to release the agreement because there was nothing to hide.

But what was going on was that, from our perspective, there was not much in terms of the agreement. But from a commercial sensitivity for the Korean Consortium, they did not want it to be released right away, because they were still negotiating with manufacturing plants

and they were still in deliberations with -- trying to assemble partner developers to develop their projects.

THE CHAIR: And they did not want their contractual -- potential contract partners to know what their own terms were or what was the --

THE WITNESS: Yes, because I think what they didn't want to do was they wanted to -- they were worried, I guess, that others -- they were negotiating still, for instance, with First Nations in the Haldimand area, and they were concerned that if First Nations, for instance, found out what the commercial agreement was, then they would have to -- that they would have to provide a more lucrative or generous proportion to First Nations or other developers.

So there was the commercial sensitivity in it.

THE CHAIR: So it would affect their bargaining power?

THE WITNESS: Yes, it would. That is essentially what they were saying.

THE CHAIR: And you discussed this with the Koreans?

THE WITNESS: I think the working

project team and -- had discussed it all the time.

BY MR. MULLINS:

Q. I take it, then, though, when you got to the amended agreement, you decided that those concerns no longer were something you needed to concern yourself with?

A. I think what had happened was that with the evolution of time, many of their discussions and negotiations with other developers and landowners and the First Nations had progressed to a point where they were solidified and that the concerns did not exist anymore.

Q. Did the GEIA itself require you to keep certain terms confidential?

A. I don't understand your question.

Q. Did the contract itself require it to be confidential?

A. I don't know whether that was explicit within the original GEIA. It's a commercial agreement, and so even if you look at FOI, there are certain exclusions, and I think commercial sensitivity and confidentiality is one of the provisions of which something should be protected.

Q. Well, now it's public; right?
A. Because both sides allow it to be.
Q. You understand the FOIA allows private entities to decide what documents will be public?
A. You're not saying anything different than I did.
Q. I am asking you. I am asking you: You understand that the Freedom of Information policies allow a private entity to decide when a document will be public record?
A. I think the private entity makes a case with the FOI, with the Privacy Commissioner, and the Privacy Commissioner listens and makes a ruling on whether something should remain private or not.
Q. Did any of that happen here, ma'am, to your knowledge?
A. I think it did.
Q. You think it did or do you know that it did?
A. I believe that the Privacy Commissioner was involved. I don't know to what extent, so I... Maybe I best leave it alone.

Q. Thank you. Was there any ruling by the Privacy Commissioner regarding whether or not the original GEIA and the amended GEIA should be made public, to your knowledge?

A. No.

Q. Thank you. And when you became familiar with the memorandum of understanding, you made sure that you understood that you had all of the agreements between the Korean Consortium and the government, that you knew about all of them; right?

A. I don't understand your question.

Q. Well, to your knowledge, there was the original memorandum of understanding?

A. Yes.

Q. Correct? And then the only other document -- agreement was -- first was the GEIA?

A. Mm-hm.

Q. Is that correct?

A. Yes.

Q. And there were no other interim agreements between those two documents; correct?

A. It wasn't during my time, so -- I don't believe there were, though.

Q. You haven't seen anything?

A. I've been away for 18 months. I don't remember seeing anything.

Q. So there wasn't a conditional agreement?

A. I didn't take over the portfolio until May or June of 2010, so what preexisted me I don't necessarily know.

From the point at which I took over in terms of the amended agreement, I'm super familiar with the amended agreement, as well as the PPAs.

Q. Okay. So far as you know, there was no conditional agreement set forth in the MOU; correct?

A. I can't answer that. I don't know.

Q. Okay. Now, let's go to the GEIA. This is in your statement. It says in the GEIA there were gets and gives. And you say -- the first get you mention is developing generation capacity, correct, in your rejoinder statement, paragraph 4?

A. That's a "give".
Q. Well --
A. Isn't that a give?
Q. Well, let's see.
A. The government gives generation capacity. The government gets manufacturing, gets the $7 billion investment.
Q. Fair enough. I guess it depends on which side you're on.
A. I guess.
Q. It's a get to the Korean Consortium, but a give by the government; correct?
A. But I always have the government view.
Q. Oh, fair enough. And the get was the ability to -- commitment to attract manufacturing; correct?
A. Build their own or attract, yes. It had to do with jobs.
Q. Okay.
A. It didn't matter how they were -- there would be jobs in the manufacturing plants. That was the main thing.
Q. Well, but you agree with me that the Korean Consortium was not required to

actually build manufacturing plants?

A. Right. It would make sense they would not be required to build them because, if you look at who builds these manufacturing plants, what you want is state-of-the-art manufacturers who are the best in class in terms of manufacturing those products. You don't want a newbie.

Q. Yes, you do not want a newbie like Samsung; right?

A. No. No. They attracted world-class manufacturers like Siemens for the windmill blades, like CS Wind for the towers and Celestica for the modules.

Q. Well, they had an advantage, though, right, because they had a contract; right? Do you agree with me, ma'am, it was easier for Samsung to attract that world-class assistance when they already had a contract with Ontario?

A. It was required of them. That was the "get".

Q. But you didn't answer my question. Do you agree?

A. Was it easier? I don't know whether it was easier for them.

Q. Well, once you have a contract with the government where you're setting aside 2500 megawatts of capacity where you don't have to compete with anybody else, it's a lot easier to attract investors; correct? Don't you agree with that, ma'am?

A. It was -- they faced different challenges, that's all I can say. I don't know whether it was easier. That's like comparing apples and oranges.

Q. Right. They faced a different challenge. They didn't face the challenge of competition with the other FIT proponents; correct?

A. Right.

Q. Thank you. And, in addition, the Korean Consortium also is not required to operate a manufacturing facility. Not only didn't they have to build it, they didn't have to operate it either; right?

A. It was about jobs.

Q. So the answer to my question is, yes, they did not have to operate it; correct?

A. Yes.

Q. Thank you. Now, the original

agreement required the Korean Consortium to provide evidence that there were foreign manufacturing plants established, according to your statement?

A. Right, yes, by certain time lines.

Q. That is not entirely true, Ms. Lo, because isn't it a fact that for the solar inverter they were permitted to designate a company that had already been established in Ontario? Do you remember that, ma'am?

A. I think SMA was the solar inverter company and they weren't established, because I went to the Don Mills plant when it was announced. It was a partnership through Celestica, and there were new jobs being created there.

Q. Where is Celestica located, ma'am?

A. The one that -- the plant we had visited was at Don Mills, so Eglinton and Don Mills.

Q. It is Ontario; right?

A. Yes.

Q. And you don't remember that was already in existence at the time the GEIA was entered?

A. Well, Celestica was in existence, of course. It's been there for years, but this was a new venture, a new partnership. These were new jobs that were being created.

Q. But at least for purposes of the GEIA, they could rely on Celestica in terms of meeting it commitments; correct?

A. Well, they signed a commercial agreement with Celestica and I believe it was SMA.

Q. Okay, thank you. Do you agree with me, ma'am, that the FIT program also attracted jobs to Ontario; correct?

A. Yes.

Q. And, in fact, there was a local content requirement?

A. Yes.

Q. And that was the whole purpose, right, of the local content requirement, to try to attract jobs into Ontario?

A. Yes.

Q. Part of the reason?

A. Yes.

Q. And so for purposes of the GEIA and this renewable energy project, at least

you were getting the -- the statement, you said you were getting these jobs, you were getting that through the FIT program, as well; correct?

A. Well, definitely through the FIT program we would get jobs and many of them were in construction.

They weren't necessarily in the manufacturing sector, and the government was very concerned with building a green tech sector.

Q. By the way, ma'am, were you in any discussions of whether or not any of the renewable energy projects would be in violation of NAFTA?

MR. SPELLISCY: I would just caution the witness again of course she can't disclose any solicitor-client communications or anything that she may have discussed with lawyers. She can acknowledge if they occurred, but she cannot disclose any of the conversations she may have had with lawyers.

THE WITNESS: Okay. What was your question again?

BY MR. MULLINS:

Q. My question is: Were you involved in any discussions about whether or not

any portion of the renewable energy project was in violation of NAFTA?

A. No. Actually, I don't even understand your question.

Q. What part didn't you understand, ma'am?

A. Probably the entire thing.

Q. Okay. Well, let me break it down.

A. I didn't know what you were asking. Sure. Break it down, please.

Q. Do you know what NAFTA is? Do you know what NAFTA is?

A. Yes.

Q. Okay. Do you know what a violation is?

A. Yes.

Q. Did you have any discussions with anybody about violating -- that the renewable energy program violated NAFTA?

A. Probably with legal counsel, but I don't remember the exact conversations.

Q. Okay, thank you. I'm not asking for the substance, but this was back when you first got involved; correct?

A. No. No. I don't think we had any conversations about potentially violating NAFTA until this particular challenge was launched, which was a little bit surprising.

Q. Okay, thank you. Now, you talk about -- going back to the gets and gives, one of the gives was the priority transmission guarantee of economic adder, right, or two gives, actually?

A. Two things. Those are two things, yes.

Q. Okay. Those are the gives; right? I got that right this time?

A. Yes.

Q. But you agree with me that for the first 500 megawatts, the Korean Consortium was not required to meet any manufacturing commitment; correct? It may help you to -- go ahead. I didn't want to cut you off. Go ahead and answer.

A. That may have been. I think this was the way the original agreement was structured, yes.

Q. Okay, thank you. If you need to go to the agreement -- but if you're able to

answer the question, it will make things a lot faster. Thank you.

And also, and I think you alluded to this earlier, this was not just -- let me go back here.

This GEIA was not -- they weren't building 2500 megawatts all at one time, right, capacity? This was a multi-year deal; correct?

A. Five phases.

Q. Five phases. How long was that going to take, originally?

A. I think it would happen over five years.

Q. Five years. So 500 per year?

A. Right.

Q. Okay. And so it's not that -- when you talk about the size and scope of the project, right, you agree with me that there were FIT projects, at least for approximately 500 megawatts, that were being proposed in any given time?

A. I don't think there were.

Q. You don't have any memory of that?

A. No. I do have memory of it.

There wasn't -- there weren't any wind projects that were greater than -- I thought it was 100-and-something megawatts.

Q. Per project. But, for example, my client, you don't remember my client having two projects worth approximately 500 -- well, more than that. Four projects worth 500 megawatts?

A. There were lots of projects.

Q. Right. Well, my point is each investor -- some investors had more than one project. So totally they would have more -- they could have approximately 500 megawatts, for example, Mesa; correct?

A. It's not something that we paid close attention to. There were lots of investors, lots of projects, in fact, hundreds and hundreds and hundreds and thousands of projects, if you count the small and medium projects. There were thousands.

Q. My point, though, is when you compare it, when you break it down -- for example, the 500 megawatts that the Korean Consortium had in the first year is comparable to the four projects my client, for example, proposed through the FIT

program, just when you look at 500 versus 500?

A. Okay.

Q. Do you agree with that?

A. It's comparing megawatts, yes.

Q. Thank you. And so we're clear, neither this priority access or this adder that was in the agreement, none of that was ever provided to any of the FIT proponents; correct?

A. Right. It was a different program.

Q. Thank you. We talked a little bit about this, but, again, the FIT program had a local content requirement?

A. Yes.

Q. And both the FIT program and the GEIA had 20-year FIT contracts?

A. Yes.

Q. Both the FIT program and the GEIA were being paid the same amount of money per megawatt, with the exception of the adder?

A. Yes.

Q. Both the FIT program and the GEIA had foreign investors?

A. There were a variety of

investors.

Q. So the answer to my question is, yes, both the GEIA and FIT program had foreign investors?

A. They had it, but not exclusively.

Q. Both the FIT program and the GEIA had -- were renewable energy projects?

A. Yes.

Q. Thank you, ma'am. And you agree with me that there was nothing prohibiting Ontario from entering into a GEIA-like agreement with a competitor of the Korean Consortium; correct?

A. I think it was announced by the Premier that Ontario would be --

Q. All ears?

A. All ears, right.

Q. Like Dumbo, all ears?

A. I wouldn't say that of the Premier, no.

Q. Well, I'm not from here, so I can.

--- Laughter.

Q. But in fact despite being all

ears, apparently your hands were tied, because you never entered a single agreement like the GEIA with any competitor of the Korean Consortium; correct?

A. We didn't, partially because nobody came forward with another proposal to the scale and scope as the Korean Consortium did.

Q. Well, they didn't know about it until September 2009, right, because you kept it secret; correct?

A. There was lots of time after.

Q. Okay. And afterwards you kept the agreement itself confidential, correct, at least while you were there; right?

A. Keeping a commercial agreement is very different from other proponents coming forward to make a proposal to government.

What was really happening was that it was the economic environment, because in 2008/2009 there was a huge global recession and investors just were not lining up at anyone's doors to make major investments anywhere.

So you have to take a look at the economic climate. It wasn't because they couldn't see the GEIA.

What has ever stopped an investor

from coming forward to make a proposal to the government before? They do it all the time. But when you're in a financial crunch, then when Lehman Brothers even goes out of business back in that same time frame, then the investment capital is very scarce and they are not lining up at your door. That is the whole idea of the GEIA.

Q. Okay. Now, ma'am, when the FIT was announced, simultaneously the Ministry of Energy issued a directive setting forth a reserve of 240 megawatts and 260 megawatts in various counties in Ontario, and that was for the Korean Consortium; correct?

A. Correct.

Q. And so none of the FIT proponents could use that capacity that had been set aside for the Korean Consortium; correct?

A. Correct.

Q. And that was done before the GEIA was signed; correct?

A. I think at that time it was in September of 2009 and the memorandum of understanding was in place.

Q. I understand, but the GEIA wasn't signed; correct?

A. Right, correct.

Q. And so at the time this is set aside, there was no binding contract between the Korean Consortium and the Government of Ontario; correct?

A. Correct.

Q. You talk about in your statement --

MR. LANDAU: Are you moving on to another subject?

MR. MULLINS: It is kind of related, but go ahead. You can ask.

MR. LANDAU: Obviously.

MR. MULLINS: You can interrupt any time you want.

--- Laughter.

MR. LANDAU: Sorry. I'm sorry if I broke the flow. I just wanted to ask, actually. This is a question which you may not be able to answer, because it is before the time that you had responsibility, but it is something which you talk about in your first statement and that is the period of September 2009, when there was simultaneously a launch of the FIT program and, at the same time, there was the announcement of the

GEIA.

So the two tracks, then, sort of become, in a sense, on the radar at the same time.

THE WITNESS: Right.

MR. LANDAU: And you talk a little bit in your first statement about the coordination between those two, the two tracks.

One question I've got is: In September 2009 there's a public directive to the OPA to set aside approximately 500 megawatts, which is for the Korean Consortium?

THE WITNESS: Yes.

MR. LANDAU: That is, according to your testimony, in anticipation of a contract that will be concluded after, still to be finally concluded, but gets concluded in January 2010?

THE WITNESS: Right.

MR. LANDAU: Given that we're now in parallel tracks at that point, and given that there is -- for the GEIA to operate, if it is going to be concluded, it will have to operate on the basis of a reserve capacity, why was it that there is only a directive or public announcement for 500 megawatts at that point?

I mean, one might have thought

there would be a clear statement, because the FIT program is now up and running, that 2,500 are subject to be reserved.

THE WITNESS: The -- what was going on with the GEIA was that the agreement would be for 2500 megawatts in total.

MR. LANDAU: Yes.

THE WITNESS: But the way it was to be developed was in five phases.

MR. LANDAU: Yes, yes.

THE WITNESS: And the Korean Consortium weren't entitled to future priority access until they delivered on certain manufacturing commitments.

MR. LANDAU: Understood.

THE WITNESS: So if they didn't commit to it, if they didn't deliver on the manufacturing, then they wouldn't get the next phase --

MR. LANDAU: Right.

THE WITNESS: -- necessarily.

MR. LANDAU: I understand that in terms of how the GEIA operates.

But looking at it through the perspective of FIT participants, obviously for a

FIT participant it would have an impact on their overall assessment --

THE WITNESS: Right.

MR. LANDAU: -- as to how much capacity is going to be taken out and reserved for other users in some other program.

So it would have been relevant for them, wouldn't it, to know there is a first phase of 500, and that's in these particular regions, but subject to various conditions being fulfilled in the future, other capacity will be taken out from other regions?

THE WITNESS: Yes. That's exactly what was going on with the transmission folks was that they were trying to figure out how to fit the priority transmission for the Korean Consortium together with the other FIT proponents.

And it was something where it was a little bit in motion, because the Korean Consortium knew that they wanted to build the first phase in Haldimand and Chatham-Kent, but the future phases were a little bit more up in the air in terms of where they would be located.

So it wasn't decided. I don't think the Korean Consortium had negotiated with

either landowners or other developers to pursue their future phases as clearly, and so it wasn't certain how to protect capacity for their projects.

MR. LANDAU: I see.

THE WITNESS: And you will remember that the transmission capacity was also something that was dynamic in terms of it being developed. And, you know, when you look at 2009, there was certain available transmission, but then in 2010-2011, it changes again as new transmission comes on board.

MR. LANDAU: I see. Thank you. Sorry. Go ahead.

MR. BROWER: You and other witnesses on behalf of Canada have made the point that only Samsung and the Korean Consortium came forward with such a deal.

Let's assume for the sake of argument that Mesa or some other company had also come with a deal to provide 2500 megawatts and bring in something of the same magnitude as the Samsung deal.

Would the Ministry have taken on two such deals with the FIT program in progress?

THE WITNESS: That's a very

interesting question, because I think the answer -- it is hypothetical, but --

MR. BROWER: Yes.

THE WITNESS: -- it would really depend on timing. I think what was going on back in 2009 was that when the FIT program was launched, I don't think anyone had envisaged how -- how wildly successful it would be to attract so many -- so many proponents.

And so I would say that after the FIT program was launched with 10,000 megawatts of projects waiting in a queue, I think that to sign another framework agreement for that, of that magnitude, probably we would have to look carefully at, because 2500 megawatts is a lot. It is a large amount of generation to procure.

MR. BROWER: Right. I think one of the witnesses for Canada testified yesterday that the GEIA was a marquis project. I think that was the term used. And it's clear from all of the discussion in the record that this was regarded as the -- at least by the Deputy Prime Minister, Mr. Smitherman, as a "big deal", as we would call it, a big win for Ontario.

And I ask myself: Is it

counterintuitive to think there could possibly be two such deals, particularly given the fact that the FIT program was in progress for, you say, 10,000 and 2,500 disappeared potentially or it became contractually -- Ontario became contractually bound as of January 2010 to provide 2,500 to -- to take another 2,500 off the grid, as it were, and have the FIT program still operating. That's why I raise the question.

I think you answered it very well. It is an interesting question.

THE WITNESS: Yes.

BY MR. MULLINS:

Q. Thank you. Just a couple of follow-up questions, Ms. Lo.

First, you just testified that you didn't think people would know how successful the FIT program would be.

Could you go to tab 41 of your binder in front of you? If you go to the second page, I'm sorry, it is confidential, document 673.

--- Upon commencing confidential session under separate cover

--- Upon resuming public session at 10:24 a.m

MR. LANDAU: I think you're still

confidential.

BY MR. MULLINS:

Q. Thanks. Now, this is an e-mail from February 2009, If you look on the second page, Bates number 48955.

Scroll down. And you see here Mr. Yoo from Samsung is writing Pearl Ing. Do you know who Pearl Ing is, ma'am?

A. Of course.

Q. Who is that?

A. She was the director of the renewable energy facilitation office.

Q. Now, we didn't get an answer to this question. The question was: Are there any specific reasons why the MEI does not want to release the MOU?

The MOU is referring to the memorandum of understanding, right, between the Korean Consortium and Ontario; right?

A. So to be clear, this MOU is different from the previous document you showed me.

Q. I understand that. I'm moving to this document now.

A. Okay.

Q. Right. And so now it does

look like -- do you agree with me at least on February 2009 Samsung wanted to know why it was the Minister of Energy that wanted to keep the MOU confidential; right?

A. "Any reason you are planning to release when we get to conditional agreement?"

This was way before my time. It is February 2009.

Q. I understand, ma'am, but you have been talking about, you know, conditions in 2009. So I guess my question is, just so we can pinpoint this at least as of February 2009, it doesn't look like it was Samsung that was looking to keep this deal private? It was Ontario?

A. I can't comment. I really wasn't there, and if you look at the timing, it was February 2009 and that's before the GEA, the GEGEA, was proclaimed.

So this was really early days. I think in terms of the MOU, when you don't even have the GEGEA, I would say that whatever -- and I wasn't privy to the rest of the responses back and forth, so I have no context for this discussion.

Q. Well, we weren't given the answer, either.

A. Well, nor was I part of that e-mail chain, so I can't comment.

Q. So the record is clear, though, it was after the GEIA was signed that now the parties switched and it was now the Ministry of Energy that wanted to -- sorry, Samsung wanted to keep it confidential and -- right? Is that what you're saying, because that is what you told us the reason why it was --

A. No, I didn't say that.

THE CHAIR: It seems to me that what I hear from the witness, which is also my reaction when I look at this, the witness was not there at the time.

THE WITNESS: Right.

THE CHAIR: This is a question from Samsung's legal department, and we do not have the context here, because the rest is redacted. It is very difficult to give a specific meaning to this question and I don't think it is fair to ask the question to this witness, because she was not there at the time.

THE WITNESS: See, at this time Pearl Ing wasn't even the director of the renewable energy facilitation office.

MR. MULLINS: I understand, but in fairness, Madam Chair, the witness sometimes talks about -- and I think it was pointed out by Arbitrator Landau. She has comments about the period of time before she was there I had asked before.

So I think in fairness, I am allowed to ask. If she doesn't know, she can -- she has some knowledge of stuff before she got there.

THE CHAIR: You are allowed to ask, but she is allowed to answer.

MR. MULLINS: Say "I don't know".

THE CHAIR: Yes.

BY MR. MULLINS:

Q. Fair enough. I think we have covered it. That's fine. You used the term "anchor tenant" in your statement?

A. Yes.

Q. Did you come up with that term?

A. No. I believe that term was used many times well before I used it.

Q. Yes. Now, when I hear -- well, anchor tenant, we often hear that,

for example, an anchor tenant in a mall; right?

A. Yes.

Q. So an anchor tenant of a mall would be like Macy's in my country?

A. Sure.

Q. And then you have other stores that come in, correct, and they are all tenants; right?

A. Sure.

Q. And they all pay rent; right?

A. Yes.

Q. They all pay. They all have leases; correct?

A. That's one way to interpret it, yes.

Q. Okay. And the idea of an anchor tenant is that once you put in the anchor tenant, then it is supposed to attract other tenants?

A. Yes.

Q. Okay. And so but despite the fact that the -- but the memorandum of understanding was signed in December of 2008.

So why was not the Government of Ontario telling everyone about this wonderful

anchor tenant they were going to have during 2009?

A. I think the only thing that was signed was an MOU, and an MOU doesn't have any guarantees. It is very different from an actual agreement.

So, you know, it wasn't a sure thing.

Q. Thank you.

MR. SPELLISCY: Counsel, we have been going for about an hour and a half, and I had a large cup of coffee this morning, and so I was wondering if there is time for a break at some point.

MR. MULLINS: I am fine to take a break now.

THE CHAIR: I thought it was a little early, if we think about the rest of the morning, because then the rest of the morning gets very long. Is it fine if we -- can you take maybe one more topic?

MR. MULLINS: Yes, sure. I was going to go through my notes during the break. Let's see here. I am trying to make it shorter.

BY MR. MULLINS:

Q. Now, going back to this

anchor tenant, I take it you believe that Samsung, the idea was that Samsung would boost investor confidence because it is Samsung; right?

A. Yes.

Q. But you agree with me that there are other companies in the world that could have done a similar operation; correct?

Well, first of all, let me ask you: There are other companies that could have entered into the GEIA and made the same proposals?

A. I don't think there was anything stopping any other major blue-chip company to come forward.

Q. And, in fact, at the time, Samsung had no experience in renewable energy; correct?

A. They, they partnered with KEPCO.

Q. Right.

A. And KEPCO is the Korea Electric Power Corporation, and so the KEPCO I believe had very solid technical experience.

Q. But Samsung itself had no experience?

A. I don't know how much

experience they had.

Q. Okay. But there were other companies that had experience in renewable energy, for example, NextEra; right?

A. NextEra?

Q. Right. There was energy companies around the world that could have partnered with other entities and come up with the same proposal; correct?

A. But they didn't.

Q. I understand, but they could have?

A. Yes, they could have, would have, maybe should have.

Q. Okay. Now, at the time that this GEIA was signed, in fact there were a lot of criticisms of it; correct?

A. There were lots of what?

Q. Criticisms.

A. Some criticism.

Q. Well, in fact, the leader of the opposition party called it a sweetheart deal?

A. He did. That is what leaders of the opposition do.

Q. And the CanWEA also said it's

unfair and puts Samsung ahead of local producers. Do you remember that?

A. I don't know what CanWEA released publicly.

Q. Well, let me pull up -- take a look at tab 8 of your notebook. I am in Ms. Lo's binder. This is document number C-513. And if you look at two-thirds of the way down, it says:

> "The Canadian Wind Energy Association said the deal was unfair and put Samsung ahead of local producers of renewable energy."

A. It says that, but that's what they would need to say, because they represent the wind producers. So that's their memberships and they are speaking on their behalf.

Q. They were representing competitors of Samsung?

A. Of Samsung, exactly. So these statements are exactly what you would expect.

Q. Well, the other thing it says -- let me get another article. Tab 8, same article.

Now, who was the Premier at this

point?

A. McGuinty.

Q. Dalton McGuinty; right?

A. Yes.

Q. Progressive, he's progressive conservative. He's the opposition party; right? After he calls it a sweetheart deal, he says it has a bad smell to it. Do you see that?

A. Mm-hm.

Q. What he says is that:

"Dalton McGuinty once famously promised the people of Ontario that he would end sole-sourced, secretive and untendered contracts, yet this deal with Samsung is the mother of all untendered contracts."

Was Mr. Hudac correct that Mr. Premier McGuinty made that promise to the people of Ontario?

A. I couldn't confirm one way or the other. I don't have the context for what the Premier, former Premier, may have promised or not promised.

Q. Well, assuming that Mr. Hudac didn't misquote the Premier, you would agree with me that this was a sole-sourced contract, the GEIA?

A. No. I think that in a previous statement that you showed me, it's a commercial agreement.

Q. I'm sorry. Sole-sourced means that the only person -- only one entity. It wasn't set up for bid; right? That is what sole-sourced means; right?

A. Sole-sourced -- I don't know. Sole-sourced has different implications, too.

Q. Well, I understand sole-sourced to mean that you didn't -- that the Government of Ontario did not set this deal up for bid?

A. Right.

Q. So that's correct?

A. That's correct.

Q. So it would be sole-sourced. Do you also agree, up to at least September 2009, it was a secret; correct?

A. I wasn't there.

Q. But you testified --

A. It wasn't released, so in

that context, yes.

Q. Okay. And it was also untendered, meaning it as again --

A. It was untendered, yes.

Q. Okay, thank you. And tab 13, not only was the progressive party upset, but members of the Premier's own party were upset; correct? If you look at a comment from two senior McGuinty aides, he says that:

"This thing was presented as a fait accomplis."

Does this refresh your recollection it wasn't just the progressive party that was upset with this deal?

A. I don't know who the one liberal who is quoted in this actually is. So I don't have the context for the discussion at cabinet that took place.

It is also not unusual for more than 20 cabinet members to be sitting in a room and disagreeing over whatever decision the government is going to move forward with. It would be more unusual for consensus.

Q. But despite all of this criticism -- well, the criticism did start back in

2009, correct, when it became publicly released; do you remember that?

A. I don't think that's -- I don't think that's actually correct. I don't know -- Ministers talk to Ministers. I don't know when they started talking about it.

Q. Okay. Now, when the FIT program launched, it was very successful; correct?

A. Yes.

Q. In fact, you had 9,000 megawatts in applications; does that sound right?

A. I think it was closer to ten.

Q. Closer to 10,000?

A. Yes.

Q. Okay. And you got those starting when?

A. Starting when? What is your question?

Q. When did the applications start coming in?

A. I think October.

Q. Of 2009?

A. 2009.

Q. Okay. And so is the 10,000 the ultimate amount of FIT applications or is that

all at the beginning? I am trying to remember. Please explain for the Tribunal and for myself. Over what time period did you get all of these FIT applications which total close to 10,000 megawatts?

A. The FIT directive was issued in September. I think the window opened in October, in the beginning, and it closed in December. So over the period from October to December, those applications would have been made.

Q. Okay. So before the GEIA was signed?

A. The GEIA was signed in January.

Q. Of 2010?

A. Right.

Q. So the answer to my question is "yes"?

A. Right. The applications came in, not the contract awards.

Q. Right. I understand.

A. Right.

Q. Even before you got involved or during your administration, did you ever ascertain how many jobs the FIT program generated?

A. Yes.

Q. Can you tell us what that was?

A. Well, it was moving. I think the government had talked about 50,000 jobs in terms of renewables, and that was through the FIT program combined with the GEIA, combined with conservation initiatives, combined with transmission buildout, 50,000. And we were also tracking manufacturing jobs, as well.

Q. Did Ontario ever break out how many jobs you were generating for the FIT program versus the GEIA?

A. It was very -- we were. We were counting the Korean Consortium agreement jobs very carefully, too. And I think there were even some news releases where the progress of the job creation had been announced, because I seem to remember some sort of a pie chart.

Q. It's fair to say that the FIT program was more successful in generating jobs than the GEIA; correct?

A. No. I don't think that -- that wasn't -- the point was that each was not in competition with the other, but all of the elements of the GEGEA was supposed to create the

50,000 jobs.

Q. They are essentially the same program?

A. No. They are not the same program.

Q. Well, then --

A. Because the GEGEA had manufacturing targets, and so -- so the GEIA had manufacturing targets.

So you will see that we were very closely counting the jobs at the four manufacturing plants, as well.

The FIT jobs did not have elements of directly creating -- a FIT project was just a FIT project in terms of being essentially a construction project, a power purchase agreement.

Q. Well, let me follow up two questions. First, you do agree with me there were more jobs generated through the FIT program than there was through the GEIA; correct?

A. I don't know.

Q. Well, there was --

A. I don't know.

Q. Let me ask you this. There was more megawatts through the FIT program than

there was for the GEIA; correct?

A. I don't know how many more megawatts. It could have been, but they supported each other, too, because if you're in -- if you're a FIT proponent and you have your modules coming from the Celestica plant, then how are you supposed to count those jobs if you attribute it to one or the other?

Q. Fair enough. Good point. And the other question I have for you, then, just so we're clear, the Government of Ontario and the Minister of Energy never separately kept track of the number of jobs generated by the two different programs; correct?

A. I think we were counting jobs. Maybe it was broken out.

Q. You don't know?

A. I think it was. I think if you go back to the records, I haven't been there for 18 months, but we were counting all sorts of jobs. And some of the standard ways to count jobs had to do with the multiplier effect that the Ministry of Finance uses as a standard accounting in terms of how many jobs are created in design, in the engineering, in the manufacturing, in the

construction and also as a spinoff.

Q. So just so we're clear --

A. There was lots of calculations that were done.

Q. Sitting here today, you can't tell us then how many jobs were created by GEIA and how many jobs were created by the FIT program; right?

A. I think you could subtract them. I think you can figure it out, because originally 16,000 jobs were attributable to the GEIA.

Q. Okay. So if I do the math then --

A. But it wasn't -- it is complicated, because --

Q. Let's do the math. You suggested it: 50,000 minus 16; right? So that is 34,000 for the FIT and 16,000 for the GEIA?

A. No. No, because you forgot all of the other stuff, like transmission and the conservation. Those were jobs in there, as well.

So it is not just 50 is equal to 16 plus 34. That's not the math.

Q. Okay. Thank you, ma'am. Go

ahead.

MR. BROWER: Just a second. I think as the Auditor General pointed out, some jobs are more jobs than other jobs, as we all know.

Some were for construction, which I think you pointed out are generally finished in three years, and others might be longer term. It's pretty hard to -- to me it seems pretty hard to figure out actually the -- how should I say -- the quantum of employment that would have been involved in either.

THE WITNESS: Yes. It's a very complex and difficult exercise to count jobs.

MR. MULLINS: I am going to go to a new area.

THE CHAIR: Is this a good time for a break?

MR. BROWER: I want to go to a new area, too.

--- Laughter.

THE CHAIR: So once you're all back from this new area, we will resume at 11:00. I should caution you you should please, Ms. Lo, not speak to anyone about the case, about your testimony during the break.

THE WITNESS: Okay.

THE CHAIR: Thank you.

--- Recess at 10:46 a.m.

--- Upon resuming at 11:05 a.m.

THE CHAIR: Are you ready to start again? Ms. Lo, are you ready? Mr. Mullins, then you can continue.

BY MR. MULLINS:

Q. Thank you, Madam Chair. Ms. Lo, now turning to your time period, you were responsible to make sure that the Korean Consortium was meeting its obligations under the GEIA; correct?

A. I had oversight of the agreement.

Q. Okay. And that included making sure they met their obligations?

A. How so? They are responsible for meeting their obligations. We oversee what they do.

Q. Correct. Well, I'm going to get to the part -- you mentioned earlier that there were amendments made. But before I get there, you kept track of how they were meeting their obligations?

A. Right. Correct.

Q. And so you were aware that they had -- while they were meeting their obligations, they were, for example, buying projects that originally had been proposed for the FIT program; correct?

A. You know what? I didn't -- ours was an end result oversight in terms of what they had to meet. And so we weren't looking over their shoulders seeing who they were talking to or what projects they were buying up or who they entered into a partnership with.

Quite frankly, those types of arrangements were outside of what we were concerned with.

Q. Was that something the OPA would be more able to answer those questions?

A. Those are commercial arrangements that they make on their own. The OPA has certain rules around projects in terms of ownership and things like that, but --

Q. So you weren't keeping track of whether or not they were using the same type of projects that had been proposed for the FIT program?

A. Did you say "were" or "weren't"?

Q. Were. Well, either way. I am asking you: Sitting here, you personally, do you know for a fact whether or not the Korean Consortium began to purchase projects that had been ranked low in the FIT program in order to satisfy its obligations under the GEIA?

A. I think they -- so it wasn't something that we paid close attention to, but we were aware that they were in discussions with all sort of developers.

Q. Okay. And some of these -- so, in other words, you generally were aware that, for example, they were purchasing low-ranked projects that really had no realistic opportunity to become part of the FIT program in order to satisfy their obligations under the GEIA.

You are generally aware of that, aren't you?

A. It would make sense, but I'm not aware or unaware. It is something that we just didn't pay attention to. It wasn't really our business.

Q. And those low-ranked

projects, for example, would not have been shovel-ready; correct?

A. Right.

Q. Thank you. Now, you say in your statement that -- and I want to talk to you about paragraph 5 of your rejoinder statement. Now, you say:

> "By the spring and summer of 2010 the Korean Consortium was experiencing difficulties meeting the deadlines in the GEIA."

Can you explain to us what deadlines it was having trouble meeting?

A. I think the particular deadlines were the commercial operation dates. So those are the CODs, phases 1 and 2.

Q. So just to put that in layman's terms, like me, I take it what you mean is that they were given -- for example, phase 1 was the 500 megawatts that originally was set aside back in 2009; right?

A. Right.

Q. And phase 2 was the next 500 megawatts?

A. Right.
Q. And if I understand what you're saying is that despite the fact that they set aside those megawatts, they were having trouble meeting those obligations; right?
A. I think the Korean Consortium were having trouble meeting the deadlines, but also so many FIT proponents were having trouble meeting the deadlines, too.
Q. Mm-hm.
A. Everybody was having trouble meeting deadlines, because the renewable energy approval process took more time than they would have thought.
Q. Okay. So the Korean Consortium was experiencing the same kind of difficulties that the FIT proponents were doing?
A. Generally, yes. And, in addition, the Korean Consortium was even dealing with more difficulties, in that they were trying to negotiate with First Nations and they were negotiating a very complex deal with the Six Nations, and Six Nations were trying to get a larger equity share and more profit from the Korean Consortium.

And so that took a lot of negotiation back and forth in terms of what value there would be for First Nations.

Q. Well, the FIT proponents also had to deal with local native populations, as well, in order to find the land they were going to use, didn't they?

A. They didn't have to negotiate nearly to the same extent, because the Six Nations were very savvy in the way that they negotiated, because they ended up negotiating an entire solar project to own outright.

Q. In fact, we saw earlier that they were talking to the Six Nations back in 2009; right?

A. Yes. You can talk to First Nations for a long, long time and not come to any resolution.

Q. Right. Just so we're clear, because of the size of the priority access given to the Korean Consortium, it ends up being a bigger problem for them, but both the proponents in the FIT program and the GEIA members of the Korean Consortium had similar issues trying to find land for their projects; correct?

A. If your question is about locating projects, there were different complexities. Some developers already had amassed land; others had not. And so it was really --

Q. Like my client; right? My client already had land?

A. Yeah, I wouldn't know about that.

Q. Okay. Well, now going back to your statement, now, it says:

"As a result, an opportunity arose to renegotiate the deadlines and reduce the terms of the EDA prior to Ontario having to pay anything under it. We took that opportunity."

A. Yes.

Q. Okay. And so you had an opportunity to tell the Korean Consortium that: We are not going to proceed with this GEIA unless you agree to make changes; correct?

A. I don't think it was as blunt as that. It's a delicate negotiation, because we also didn't want to see the entire GEIA nullified.

Q. Mm-hm?
A. We didn't want them to leave the province.
Q. Well, you do agree with me, though, that despite that it was "delicate", if the Korean Consortium refused to make changes to the agreement, then you could have held them in breach?
A. It's debatable. I mean, there is entire teams of lawyers saying what is or what is not in breach. So I am not a lawyer myself.
Q. Were you involved in the negotiations?
A. Yes.
Q. Did you ever have any discussions with anyone about whether or not the Korean Consortium was in breach of the GEIA?
MR. SPELLISCY: I would just caution the witness not to disclose any communications with counsel, obviously, with solicitor-client privilege.
THE WITNESS: It's a legal agreement and, of course, we have access to an entire legal counsel, not only in the provincial government, but also OPA's counsel.

BY MR. MULLINS:

Q. And I'm going to cut you off.

A. So why wouldn't we?

Q. Right. And I don't want you to have to reveal attorney-client privilege.

A. I'm not going to.

Q. I agree. I don't want to mess up our record here. But just so we're clear, you did, then -- the Ministry of Energy started to investigate with its counsel, without giving us the substance, about whether or not the Korean Consortium was in breach of the GEIA in the spring, summer of 2010; correct?

MR. SPELLISCY: I'm sorry. Give me one second to look at this question.

MR. MULLINS: Sure.

MR. SPELLISCY: I think I have to object to this question. I think what they talked about with counsel, I think the question asks for what was the content of the discussions with counsel in the spring and summer of 2010 and I don't think --

THE CHAIR: Yes. I don't know exactly what the question was aiming at. I understood it more to be whether there had been

review with counsel of a possible breach.

MR. MULLINS: That's correct.

THE CHAIR: And I think you can answer, but then what you should not answer, because then it would disclose attorney-client privileged information, is what the content of this review.

So the question is: Was there a review?

THE WITNESS: Of course we looked at it, because we went into a negotiation.

BY MR. MULLINS:

Q. And you wanted to figure out your leverage?

A. Yes.

Q. And you exercised that leverage with the Korean Consortium?

A. Yes.

Q. And the Korean Consortium originally backed off its position that it wanted to keep the terms of the GEIA as originally agreed to; correct?

A. No. No. The Korean Consortium wanted extensions of their phase 1 and 2 commercial operation dates. This is something that

was provided to all FIT proponents in a -- by the OPA at the Ministry's request.

So what they wanted was the same treatment as every FIT proponent had received.

Q. That's kind of ironic, isn't it?

A. You figure out whether it is ironic. I don't...

Q. Okay. How many amendments were there, total?

A. How do you mean?

Q. Well, how many amendments to the GEIA had there been? So we have the original one. The original GEIA was September -- I don't want to cut you off.

A. You didn't.

Q. I just want to break it down chronologically.

A. The original was January.

Q. I know. I misspoke.

A. Okay, okay.

Q. I speak quickly, so I am going to slow down and make sure I get this right. I apologize. It's my fault.

The original GEIA was January

2010?

A. Yes.

Q. Okay. Now, I get ahead of myself. This is my problem.

When was the first amendment to the GEIA?

A. It was in 2011. It would have been July/August of 2011.

Q. Okay. And there was a third amendment; correct?

A. The third amendment -- yes, there has been. The third amendment is in 20 --

Q. 2013, right.

A. Right. After I left.

Q. It is in your statement, so --

A. Pardon?

Q. I think you referred to it in your statement?

A. Yes.

Q. Do you remember the month, just for the record?

A. The month? I would say around May, June.

Q. Okay.

A. Something like that.

Q. But I am confused, then. You say by spring and summer they were experiencing difficulties. So there was an extension actually given in 2010; right?

A. Yes, there was.

Q. Because you said the first amendment was in 2011, so there was actually an extension given without a formal amendment?

A. No, no, no. This says by the spring and summer of 2010 they were starting to experience difficulties in meeting deadlines.

Q. Okay.

A. And so that started a conversation. The CODs that we were talking about were in the future. They had CODs for phases 1 and 2, March of 2014 and December of 2014. And so that had not arrived yet, that time.

We were talking about something that was going to happen in the future.

Q. I'm sorry. I was confused. That's why I went through this chronology.

So what you're saying is that by summer of 2010, they are having difficulties, but this negotiation lasted a year?

A. No. No. They were experiencing difficulties. We didn't go to the table to negotiate until spring or summer of 2011.

Q. What --

A. We listened to their problems, but it is about listening to any other developer who was having trouble.

Q. So what you're saying, then, is that you knew as early as 2010 that they were having difficulties, but you didn't amend the agreement until a year later; is that correct?

A. Starting to experience difficulties is one thing. Not knowing the quantum of their difficulties as they present themselves is another thing.

We weren't ready to negotiate with them until later.

Q. Without getting --

A. Everybody was having difficulties.

Q. I understand. Without revealing the contents of your attorney-client communications, when did you start investigating whether or not they were in breach of the GEIA, starting between the summer 2010 until the

agreement was actually amended?

A. There's not a particular time that one would start investigating. It was such a busy -- a busy division and a busy office. We were thinking about everything all of the time.

Q. Okay. So during the entire year you were looking at it?

A. Peripherally. We didn't focus on it until 2011.

Q. That's when it became a critical moment; correct?

A. In 2011 we wanted to put some closure to it, yes.

Q. And that coincides, in fact, with the awarding of the contracts in the Bruce region; correct?

A. Lots of things coincided. The Bruce was in --

Q. July of --

A. July, right.

Q. The same month you amended the GEIA.

A. Right.

Q. Thank you. Now, in the first amendment, there was a reduction of the adder from

437 million to 110 million; right?

A. Correct.

Q. And I take it the Korean Consortium did not want that reduction?

A. No, of course not.

Q. But despite that, you told them that if they didn't reduce the adder, you were going to terminate the agreement; correct?

A. It was a negotiation.

Q. And so you may not have said that in so many terms, but that was essentially the message given by Ontario?

A. We were negotiating something that everybody else already got. All of the FIT proponents already got a one-year extension.

We were taking the opportunity to reduce the adder.

Q. Yes. The FIT proponents didn't get the adder. You were negotiating the adder; right?

A. So --

Q. That's what you reduced?

A. The GEIA already had the adder. We reduced the adder by 75 percent.

Q. My point is you said: We

were negotiating what the FIT proponents already had.

A. Already had in terms of contract extensions of a year.

Q. I see. Okay. Now, at this point -- your footnote says:

"To date there has been no payment of the EDA."

Has the -- let me ask you this, first. When was the adder supposed to be paid?

A. The adder is paid when they start producing electricity.

Q. Okay. So it's true, then, when the parties entered the GEIA, that they assumed that an adder would have been paid, for example, in 2010 or 2011?

A. Why would they assume that? No. No. The adder is paid when they deliver the first and second phases of the power purchase agreements. When they actually connect those particular wind and solar projects to the grid and they start generating electricity, then there's an adder on to each kilowatt-hour that -- that's the adder.

Q. When they originally

entered -- when you originally entered the GEIA, Ontario and the Korean Consortium --

A. Yes.

Q. -- when were they supposed to have phase 2 done?

A. I think phases 1 and 2, as I said previously, was March 31st of 2014 and December of 2014. So why would they be paid before that? I think it was something like that. I will go back to the agreement to check.

Q. All right. So if I take it what you're saying is, then, under the original agreement they are not supposed to be paid -- they weren't going to be paid the adder until 2014; correct?

A. The original agreement, yes.

Q. Okay. And there's been no payment as of date; correct?

A. Well, as of today, what is it? It's October.

Q. Yes.

A. I think it has started, and so this is subsequent to me leaving the post. There was supposed to be job counting for the entire year of 2013 at the four manufacturing

plants, and then if the job count on average was greater than 765 jobs at the four plants, then they would be paid the adder.

Q. Because under the original agreement, it wasn't tied to jobs, was it?

A. Well, it was tied to manufacturing plants.

Q. When you amended the agreement, you changed it to jobs?

A. Right.

Q. Fair?

A. Right. We wanted to change it to jobs because that's what the government really cared about, was job creation.

Q. You didn't go back to the FIT proponents and tell them they would be entitled to an adder if they could show how many jobs they could generate, did you?

A. They weren't required to bring in manufacturing. It was a totally different program.

Q. The answer to my question is, no, you didn't go to the FIT proponents and tell them now that you have now changed the deal with the Korean Consortium and they are entitled to an

adder based on jobs. You didn't do that, did you?

A. No, because it's a different program.

Q. All right. So let's go back to this chronology we are trying to do here. So the 2011 amendment reduced the adder from -- what was it again, from...

A. 437 to 110.

Q. To 110?

A. Right.

Q. Did it do anything else?

A. It extended commercial operation dates for phases 1 and 2, and it looked at the adder. Instead of spreading the adder over five phases, it looked at paying out the adder over the first two phases, but it was maxed out at 110.

And instead of just creating manufacturing plants, it was actually looking at counting jobs --

Q. So you --

A. -- for those four plants.

Q. I'm sorry. You did that under the first amendment in 2011?

A. The first amendment, yes.

Q. That's when you tied it to

jobs?

A. Yes.

Q. What were the jobs they were supposed to generate under the first amendment?

A. The first amendment or second? What are you -- what's your question?

Q. The first amendment.

A. The first amendment is January -- is 2011. You mean the original agreement?

Q. No. I don't want to confuse you.

A. I think you're confusing yourself.

Q. I'm not confusing myself. I'm on top of at least this part of my outline.

A. Okay, ask your question again, please.

Q. All right. I will. I think what you told us was that the original agreement was not tied to jobs. It was tied to these --

A. The four manufacturing plants, right.

Q. Okay. So I moved on from that. So let's leave that alone for now. We may

go back to it.

Now I am going to the first amendment. I want to call the first amendment the 2011, first amendment, so you understand the first amendment.

A. Okay.

Q. It reduced the adder from 437 to 110?

A. Yes.

Q. Okay. It now changed the adder to not be tied to manufacturing, but actually to jobs. Is that what you're saying?

A. Yes.

Q. Now, how many jobs was it supposed to -- were the Korean Consortium supposed to then --

A. Manufacturing jobs.

Q. Okay?

A. 765.

Q. Thank you. Manufacturing jobs?

A. Manufacturing jobs at the four plants. So the four plants were still in play, but it happened to be tied to jobs specifically.

Q. Where did you get that number? It's in the agreement, but how did you guys come up with that number?

A. I think we worked with the Ministry of Economic Development and Trade and looked at job creation in those four plants.

So they were towers, blades, solar inverters and solar modules. And to produce the megawatts that they would need to produce, we received advice in terms of how many jobs we could expect at each particular plant.

Q. And you didn't look at what manufacturing jobs were being generated by the FIT program, correct, in comparison?

A. We were tracking jobs in general. We were tracking all sort of jobs using -- using multipliers, and even calling out to companies who indicated to us that they've set up shop in Ontario.

Q. Including proponents of the FIT program?

A. Yes.

Q. Okay. So then essentially, then, I guess what you're saying is that you were looking at the entire renewable energy program and

seeing how many jobs that was creating?

A. Yes.

Q. Okay?

A. Not just renewable energy, but also everything affiliated with the Green Energy and Green Economy Act. So much of that was in transmission and conservation.

Q. Now, before we leave the first amendment, was there any other provisions of that amendment that were, you know, major changes?

A. The main thing was the adder, the COD dates, the 900 jobs.

Q. You say 900 jobs. I thought you said it was 765?

A. Eighty-five percent of 900 is 765. That was the advice we had received from our colleagues at the Ministry of Economic Development and Trade was that peak jobs is 900.

Eighty-five percent is the average that we should hold them accountable to.

Q. Okay. I may have missed the 85 percent. So you're saying they didn't actually have to do 900 jobs. All they had to do was 85 percent of that?

A. Well, there are peaks and

valleys with any manufacturing, and so 900 was the peak, and if they averaged out at 765, then they would be entitled to the full adder.

If they did not, then the adder would be decreased in a prorated way.

Q. Again, with this amendment, when they be entitled to the adder? When?

A. When?

Q. Yes.

A. Phases 1 and 2 come into commercial operation when they are actually producing electricity to the grid.

Q. In 2014?

A. Yes.

Q. Okay, got it. Perfect. Were they required to give reports about how the progress was going, or it was wait till 2014 and see what happens?

A. The job counting started in 2013.

Q. Okay.

A. And so the Ministry of Energy retained the advice of a consultant, Ernst & Young, to help us figure out how to create the reporting so that it would be clear and transparent for the

four plants, knowing that if the payout of the adder is $110 million, we wanted clear accounting and clear accountability.

Q. Right. It is important for the GEIA to be clear and transparent; right?

A. In the job counting that was related to $110 million, the government wanted to be clear.

Q. And opaque in other areas?

A. No, no.

Q. Thank you. Now, why then do we have an amendment in 2013?

A. The amendment in 2013, I was not -- I was initially involved in some of the scoping, but, again, it probably had to do with commercial operation dates of the subsequent phases, phases 3, for example, and four.

And they probably couldn't -- so in the first renegotiation in 2011, we decided only to deal with phases 1 and 2, even though the Korean Consortium wanted to talk about the future phases.

So in the second renegotiation, we, again, had good leverage in terms of negotiating something in the favour of ratepayers.

Q. That was the first time you

thought about the ratepayers?

A. We think about the ratepayers constantly.

Q. Well, what did you get for the ratepayers in 2013?

A. In 2013 -- and I should be clear that I wasn't at the conclusion of the negotiation this time, but I was involved in making recommendations to government in terms of how the renegotiation should take place.

What we did was we negotiated that phases 4 and 5 of the GEIA would be eliminated. And we negotiated that phase 3 would be reduced to -- from 500 down to, I think it was, 300 megawatts.

Q. And this is about the time that the FIT program was abolished; right?

A. It's not abolished for microFIT and the small contracts. That still runs.

For the largest of the contracts, yes, that's roughly the time.

Q. And is it just a coincidence, ma'am, that the first amendment was -- well, let me ask you this. You do remember the Bruce region was the last region to be awarded FIT contracts?

A. That's probably -- that's about right.

Q. Right. And is it just a coincidence, then, that the first amendment is the same month that the last FIT contract was awarded, and the second amendment was done when the FIT program was ended? Those are coincidences, or was there some consideration of those events when the amendments were made?

A. No, I don't -- I think it probably is a little bit -- you have to take a look again at the context of what was happening.

And so the government launched a FIT program in September of 2009. It started awarding the large contracts in April of 2010. It was wildly popular and it was driving -- electricity prices fit together with the agreement with the Korean Consortium was driving prices higher for ratepayers.

And so the cost projections were revealed very transparently through the long-term energy plan in November of 2010.

The government became very clear with Ontarians that its electricity plan would result in an increase of 7.9 percent over the first

five years, and then it would decrease, but all in all, it was a 3.5 percent increase over the next 20 years, of which 56 percent was due to renewables.

So the government became very clear and indicated that in the long-term energy plan.

Q. I am going to follow up with something you just said. I got a little confused. How was the rate prices being driven up by the Korean Consortium when they were not generating electricity? Can you explain how that works?

A. These are price projections. These are price projections.

Q. Okay.

A. In advance of prices actually -- in advance of FIT prices actually or FIT projects actually being connected, there's a whole bunch of other work in terms of the transmission system that would need to be operated and whatnot.

Q. So is it true, then, the prices are going up in anticipation of the projects coming online? Is that what you're saying, or am I wrong in that?

A. Yes, the price projections

were for 20 years.

Q. So they immediately started going up even though the electricity is not being generated, or no?

A. They ramp up. I think the original price calculations were a little bit steeper in the first five years, thinking that the FIT projects and the Korean Consortium projects would come online a lot faster than they actually did.

So the price projections didn't yield out, actually.

Q. Okay. Can I go back to the third amendment? You said you eliminated phase 3. What did that effectively mean?

A. I didn't say we eliminated phase 3.

Q. I'm sorry, you eliminated four and five?

A. Four and five.

Q. Then you reduced phase 3?

A. Right.

Q. Got it. Can you tell us what that meant in terms of the megawatts?

A. Well, the original agreement

was for 2,500 megawatts in five phases.

Q. Right.

A. So eliminating phases 4 and 5 would remove 1,000 --

Q. Right?

A. -- megawatts, and cutting down phase 3 to 300 megawatts. So 1,200 megawatts were eliminated, but phases 1 and 2 were slightly higher than 500.

Q. Okay. So can you just tell us, then, what the ultimate megawatts that they are getting now?

A. I think it was 1,300 and something; 1,300 and change.

Q. Okay. Now, at no time in any of these amendments, either amendment, was the priority access eliminated, other than reduction in the number; correct? The actual priority access given to the Korean Consortium, they got to keep that; right?

A. I think by the time they negotiated the agreement, they already knew very well phase 1 and 2 -- I mean, access is a very early planning thing.

Q. Mm-hm?

A. And that would have been handled years and years ago. That would have been handled back in --

Q. Was there any discussion, either internally at the Ministry of Energy or with the Korean Consortium, of taking back some of the capacity they had been given in 2011 and providing it to the wildly successful FIT program?

A. The priority access was for manufacturing, and so that part of the deal, that part of the give and get, was fulfilled.

So why would the government attempt to claw something back? That wouldn't be negotiating in good faith.

Q. I see. Well, you told us, though, you had taken -- you'd changed the deal from focussing on the four manufacturing plants to actually looking at jobs; correct?

A. Right.

Q. And so I am asking you -- good faith or not, I just asked you a question.

Did you talk internally that in 2011 -- let me ask you this first.

Was there any discussion

internally in 2011 of reducing the capacity given to the Korean Consortium that you eventually gave them in 2013?

A. I don't believe there was. That wasn't the direction of government at the time.

Q. Okay. Was there any discussion internally or Korean Consortium of -- well, you answered my question. So the answer is, no, you didn't think about taking back some of the capacity given to the Korean Consortium and giving it to the FIT proponents that were seeking projects; correct?

A. In 2011?

Q. Yes, ma'am.

A. We did not.

Q. Thank you.

Do you know whether or not the Korean Consortium will be on track to meet its current obligations?

A. I have left, again, as I said, for the past 18 months. So I am not sure what the progress of anybody's contracts are at this point. I think the OPA would be most familiar.

Q. Do you know if they are on track to get their adder?

A. I know that the adder for 2013, the job counting was completed and so that's one year. But the jobs are also counted for 2014 and 2015, and so that hasn't arrived yet.

Q. And do you know a guy named -- just a second -- Peter Tabuns. Ever heard of that name?

A. The MPP?

Q. No, he's an energy critic, NDP energy critic.

A. He's an MPP, yes, of course.

Q. Oh, I see, got it. Were you aware, if you could go to tab 12, in January 2010, MPP Tabuns said -- you see he is identified on the first page. If you go to the second page at the top, and this is the record R-78, it says:

> "Samsung was allowed to jump the queue ahead of everyone else with just a promise to build manufacturing plants in the future, said Tabuns. 'If they don't deliver on the promise, they will still have

jumped the queue', he said. 'I think that is a big problem for those who are interested in investing in Ontario.'"

Do you agree with me that Mr. Tabuns was right on target, wasn't he? Isn't that exactly what happened, ma'am?

A. Mr. Tabuns is an energy critic. His job is to criticize the actions of the government, and at that time it was the McGuinty government.

So whether I agree or disagree with him is irrelevant.

Q. Well, I can understand why you, at the time, might disagree, but looking back on it, it looks like he was pretty prescient, don't you think?

A. He was pretty what?

Q. He looked like he predicted pretty well about what happened, don't you agree? Isn't this exactly what happened is that Samsung was allowed to jump ahead by making promises that ultimately they weren't able to keep?

A. They delivered on those

promises, by the way, because they delivered the four manufacturing plants, and in 2013, the first year of job counting, they delivered numbers that were higher than the 765.

So I think it is misleading for you to say that they didn't deliver.

Q. Well --

A. That was the essence of the agreement.

Q. I see. Well, but we talked about the amendments that were made and the other things they didn't deliver on; right?

A. The agreement was amended. So what? Many agreements are amended. And by the way, Tabuns also said that if the NDP were in power, I believe he said something along the lines of the NDP wouldn't kill the Samsung deal. It was the Conservatives who would kill it, but the NDP were pro renewables.

Q. Let's talk about how Ontario operated the FIT program that you also talk about that in your statement. Now, originally the FIT program contemplated using an economic connection test that was going to be province-wide; correct?

A. Right.

Q. So the record is clear, sometimes it gets confusing, Ontario never did that, right, a province wide ECT?

A. Right.

Q. And the reason why --

A. Actually, you should check with the OPA, because I don't know what they did or didn't do, because the economic connection test is something that is very technical that they had purview of. So I -- sitting at my chair at the Ministry of Energy, it wouldn't be something that we would conduct. It would be something that the OPA would conduct.

Q. I understand. Well, we will show you some e-mails, but, ma'am, you do remember sitting here today that, as of the award of the contracts in the Bruce region, there had not been a province-wide ECT?

A. Right. That was more of a regional ETC.

Q. Correct. So your memory is that there had never -- up to July 2011, there was not a province-wide ECT?

A. Right.

Q. There could have been

something later, but that's fine.

A. Yes, I don't know.

Q. That's fine. At least we're on the same page.

Even during the 2010 long-term energy plan, it was still contemplated there could be a province-wide ECT?

A. Yes, it was.

Q. And pursuant to the province-wide ECT, after its run, that's when the proponents could change their connection points?

A. I think they changed their connection points before its run, because otherwise why would it make sense?

Q. Well, we will go through the OPA with the rules.

A. The window opens before ECT is run. That's what the FIT rules contemplated.

Q. Well, we will talk that with the OPA, but let me just ask you. You do recognize it was tied -- the changing of the connection points was tied to a province-wide ECT; right?

A. The FIT rules --

Q. Yes, correct.

A. -- I don't -- you would have

to ask the OPA how they expressed that particular rule.

Q. Okay. You don't remember anything in the FIT rules that ever contemplated that -- well, let me ask you this.

You do remember that prior to the regional ECT, as you call it, no entity in any of the other regions, besides Bruce and west of London, were able to change their connection points; right?

A. I don't know. I don't think so.

Q. And nothing in the FIT rules contemplated that only two regions out of the entire province would change or have the proponents change their connection points where other members were not allowed to change their connection points?

A. I should provide some context. I think there is an important point that needs to be expressed. So after the long-term energy plan was articulated in November of 2010, what came to light in 2011 from the IESO -- so that's the operator of the electricity system -- the IESO brought to the government's attention a situation of an oversupply of

electricity. It is called surplus base load.

And the IESO had created a report that talked about surplus generation, particularly in the future years, in 2015, 2016. It might have even been late 2014.

So what the government came to be concerned about was the fact that the way that we had envisaged bringing all of this renewable power to connect to the grid and closing down coal, it wasn't matching up perfectly in terms of what was happening, supply and demand that Rick probably talked about.

And so what we knew had to happen was that we would have to slow down the pace of procurement. So that is really what was going on.

So all in early 2011, I think the record will show that we were worried about all of the renewable energy coming into the grid. And it wasn't just the Korean Consortium. It was also FIT proponents, and it was causing ratepayer impacts, and also the fact that it would be surplus to Ontario's needs and that would be problematic, as well.

So I think it was the way the situation evolved --

Q. Ms. Lo --

A. -- in terms of not running a province-wide ECT, because running a province-wide ECT would mean you would just bring on unquantifiable megawatts of power.

Q. I have a limited time period, and I appreciate the witness trying to give context to her answers, but I would ask those kind of questions could be done -- you know, re-cross could -- sorry, re-direct, rather, by my colleagues on the other side of the table. I have limited time, Ms. Lo.

Now, I don't think that long answer you gave actually answered my question, which was -- well, let's break it down and make it easier.

You do remember that there was a directive that was issued that allowed proponents in two regions, west of London and Bruce, to change their connection points; correct?

A. A direction, yes.

Q. Okay. And I think you just said up to that point no proponent in any region had been allowed to change connection points; correct?

A. I don't know that for a fact. That's a question for the OPA.

Q. Okay. And I guess my question to you, then, is: Was there a specific reason that only the entities in west London and Bruce would be allowed to check -- change their connection points, and, specifically, was there any discussion about other neighbouring regions to the Bruce region to have those proponents be allowed to change their connection points?

A. I think what the government was doing was there was lots of discussion, to answer your question.

Q. Thank you.

A. The province did not want to run a province-wide ECT for fear of bringing on so many megawatts that would be surplus to our system.

The reason for running a regional ECT was that the only new power -- the only new transmission source was the Bruce-to-Milton line.

Q. And what happened in Bruce was that it turned out in September 2010 that that was the location that the Korean Consortium decided to use for phase 2; correct?

A. I don't know whether it was

clear at the time, but I think as time has unfolded, that is where some of their projects are.

Q. Well, you don't remember a directive in September of 2010 in which the Minister actually set aside the 500 megawatts in Bruce region and carved that out of the --

A. There was a directive that was issued around that time, but I don't think the Korean Consortium had solidified what those projects were, necessarily, because we went ahead and awarded the FIT contracts before settling where the Korean Consortium was going to connect.

Q. That's correct.

A. Yes.

Q. But I want to make the record clear. Go to tab 16. This may refresh your recollection, because I think it is the directive I was referring to. We will pull it up. This is C-119.

A. Yes.

Q. Can you pull it up? Go to the bottom. And if I understand your -- sorry, if I understand your testimony, I think what you're saying is that the Korean Consortium hadn't actually decided where it wanted connection into

the Bruce region, but you do remember now, reading this document, do you not, that in this directive the Minister of Energy is saying:

> "I now direct the OPA in carrying out the transmission availability tests and economic connection test under the FIT program rules, to hold in reserve 500 megawatts of transmission capacity to be made available in the Bruce area in anticipation of the completion of the Bruce-to-Milton transmission reinforcement for phase 2 projects of the Korean Consortium or its project companies." [As read]

A. Right.

Q. So now your memory is now refreshed that in September 2010, the Korean Consortium had at least narrowed down that phase 2 is going to be in the Bruce and took 500 megawatts of capacity out of that region; correct?

A. Yes.
Q. That was taken out of the FIT program, and so that reduced the amount of megawatts that could be awarded in the Bruce region in the FIT program; correct?
A. Yes.
Q. Now, meanwhile -- so this actually caused a challenge, right, because now the issue, as you said, is that you originally told everybody you were going to do an ECT test; right? And that was going to be province wide. That's what you originally said the FIT was; right?
A. That's what the OPA said.
Q. Well, that's what the Minister of Energy supported; right?
A. It was -- the program was evolving, because I don't think the specifics of ECT were even finalized at program launch.
Q. Okay. Really, let me just ask you the question again.
A. It was forging new ground.
Q. Let me just ask the question again.
A. Go ahead.
Q. The original FIT rules that

were announced to the FIT proponents told everyone that there was going to be a province-wide ECT; correct?

A. I don't know whether -- um..., I think if you read the Minister's original direction in September, I don't know whether the words "ECT" were there or not.

Q. No, ma'am, I'm talking about the FIT rules.

A. Were they?

Q. The FIT rules. The ECT and FIT rules?

A. So the Minister did not direct the OPA on ETC.

Q. Correct, ma'am. I'm sorry, I don't think I said that.

What I asked you was -- and I think you have already said this, so I am surprised that you are not going back to that. I am not asking about what the Minister said.

I'm saying you agree with me the original FIT rules contemplated a province-wide ECT?

A. Yes.

Q. Thank you. And so what

happens then is that the -- I think what you also said was the problem was you didn't want to do a province-wide ECT, because that was going to generate too much megawatts; right?

A. Potentially. We didn't know.

Q. But you were concerned about it, because you're going to have all of this -- all these megawatts. What are you going to do with this?

A. Right.

Q. So you basically were trying to work this out. Then the other challenge is, you know, the Korean Consortium now has told everybody, I want to go to Bruce; correct? Now you have to figure out what you're going to do with Bruce because of all of these challenges; right?

A. As soon as the agreement with the Korean Consortium was signed, I think the energy planners had always predicted they would have to reserve megawatts in the Bruce because, for most people, they would know that the wind regime in the Bruce area was amongst the strongest in the province.

And so that was the best area where one could have a wind contract and -- highest

wind regime and the new trunk line transmission from Bruce-to-Milton. It was a recipe for success.

Q. I see.

A. And plus there was something in the order of 1,800 megawatts of available, of which 500 was given to the Korean Consortium, because they met their manufacturing commitments.

Q. Okay, ma'am. I want to make sure the record is clear.

It wasn't until September 17th, 2010 that the Minister of Energy actually set aside 500 megawatts to the Korean Consortium in the Bruce region; correct?

A. Correct.

Q. Thank you. Now, when you're dealing with these challenges you asked -- the Ministry actually asked the OPA to do a rough simulation of just doing a DAT test in the Bruce region; right?

A. I think it was the transmission availability test. That is TAT.

Q. TAT, I'm sorry. When that was run, it turned out that my clients, for example, were ranked eight and nine; is that correct?

A. They very well could have been.

Q. You can't deny that that's true; right?

A. I can't deny it.

Q. Mm-hm. Now, you say during this process Ontario was quite concerned with trying to respect developer expectations; correct?

A. Right.

Q. And that was very important, wasn't it, ma'am?

A. It was.

Q. Now, having the FIT applicant make a connection point, that would take a lot of time, right, to change a connection point? It would take analysis to do that; right?

A. I think you would have to ask developers. I don't know how long it would take. It would take time. I think the OPA had said that it would take -- I think originally they had budgeted for three weeks.

Q. Three weeks?

A. I think that was in their early presentations.

Q. And can you tell us how long,

in fact, was provided to the FIT applicants to change their connection points?

A. It was a five-day window.

Q. Why was the three weeks reduced to five days, ma'am?

A. Because we heard from CanWEA -- that's the Canadian Wind Energy Association -- who were telling us that developers had been looking at this all along to see where it was they could connect to and were basically already in a ready position.

They didn't need to start from scratch. They already did the analysis.

Q. When was that CanWEA letter, ma'am?

A. I believe it was near the end of May of 2011.

MR. APPLETON: May 27th?

THE WITNESS: Yes, that sounds about right.

MR. MULLINS: I appreciate the help from counsel. Can you give me a tab number? 31. Thank you.

BY MR. MULLINS:

Q. Can you go to tab 31 of your

document? Is this the letter that you are referring to?

A. Yes.

Q. It is Exhibit No. R-113 -- Exhibit No. 133. She got it right. You're right, not 113, okay.

So this is the letter you're referring to, and this is why you rejected the recommendation of the OPA and decided to cut the change point window from three weeks to five days; is that correct?

A. Well, we knew it could be done in a shorter period of time, yes.

Q. Okay. And can you tell us how much notice the OPA gave to the FIT proponents that they would have five days and not the three weeks they had discussed before?

A. I think you would have to retrace the series of events.

I think by the time the Minister's direction was issued to the OPA, that would have been the first time that it became public knowledge that there was a five-day change window, so that would have been July, something, the direction.

Q. No, ma'am. It was before

the -- the window was open in June. You remember that; right? The awards were entered in July, but the window was open in June.

A. When was the Minister's direction issued? That would have been the first time.

Q. That's correct. Let's pull that. What's the document number?

MS. HERRERA: C-46, tab 32.

BY MR. MULLINS:

Q. Let's go to tab 32. Hold that. We'll go back to that. This is a directive of June 3rd, 2011; right?

A. Right.

Q. It is C-46.

A. Right.

Q. If you go to the top of page 3, five-day window; right?

A. Right. So this would have been the first time that the five-day change window would have been made available.

MR. APPLETON: Top of page 2, point number 3.

BY MR. MULLINS:

Q. You do remember, ma'am, that

this was issued on a Friday and the window opened on a Monday? You remember that; right?

A. I don't know that June 3rd was a Friday, no. I don't remember that.

Q. We will come back to that. I think the record is pretty clear that it was announced on a Friday and it started that Monday. You don't remember that?

A. I don't remember the particular day it was issued, no.

Q. Okay. Now, you said that the reason why then that you made it such a short period was because of the CanWEA letter; right? That was R-133.

A. Do you want me to refer to something?

Q. Let me go on and we will come back to that.

Ms. Lo, in fact, though, the decision to do the process, as ultimately decided, was decided on May 12, wasn't it?

A. I don't think it was concluded. I don't think it was fully concluded.

I think if you check the e-mail trail, there would be a back and forth in terms of

what might be best.

Q. Well --

A. Because the directive is very specific.

Q. If you go to tab D of your notebook, "D", as in dog, of that notebook, yes. The notebook you have open. There is letters at the beginning.

A. Oh, okay.

Q. And this is a witness statement by Mr. Cronkwright. Can you tell us who that is?

A. He's the director in the OPA.

Q. He says that:

"Ultimately, as I understand it, the government heard all of the possibilities and decided at a high-level meeting held May 12, 2011 to adopt a process that we eventually used to allocate the capacity on the Bruce-to-Milton line a procurement of a specific amount of capacity in the

Bruce and west London region simultaneously which would occur after a connection-point change window and would allow for generator paid upgrades."
[As read]

Do you see that testimony, ma'am?

A. Which number were you referring to?

Q. I was reading 21.

A. Oh, 21.

Q. I apologize. Do you see that testimony now?

A. Yes, I see it.

Q. Okay. So if the decision had been made on May 12, 2011, why was that not announced to the FIT proponents so they could be closer to the three weeks that the OPA originally recommended they be given the notice of a change point window?

A. Well, this is someone in the OPA's understanding of government decisions. I would say that having worked in the government for 30 years, you just don't necessarily have a final

decision until that Minister's direction is issued.

And so there is often time for revisiting and revisiting. And so whereas the OPA may have understood that the decision was made, that's not necessarily when a decision might have been made.

Q. Why was it not -- you're saying his testimony is false?

A. No. That's his understanding, which is perfectly in line with the way that we would be quite close vested in government policy decisions.

They are not always shared with staff at the OPA.

Q. This was actually one of the first times the Minister of Energy was actually interfering with the FIT process; right?

A. Interfering? I don't think so. I think the Ministry is well within its right to make policy decisions and issue them in the form of directions to the OPA.

Q. It's a policy decision to decide how long a window is going to be for a change in connection?

A. Whether or not there is a

change point window would be a policy decision. What the government was really looking at was trying to maintain something that very closely resembled a provincial ECT, because there are so many expectations of developers out there.

And so the process that we created was one that gave what they had expected. They expected a certain number of megawatts. They got that.

We expected not to have more than the number of megawatts that we could pay for by ratepayers. That's why we kept it. We created room for small proponents. That's why we did that. So...

Q. Can you just tell us, though, ma'am, do you agree with me it was ultimately the Minister of Energy's decision to only allow a five-day change in connection point window; correct?

A. Yes.

Q. And it was also the Minister of Energy's decision to provide whatever notice, the short notice that was given. That was the Minister of Energy's decision when to release the directive and give notice to the FIT proponents of

when that window would start?

A. I don't think the Minister knew exactly all of the details, but I think the main details, in terms of the direction, he was certainly accountable for.

Q. And well --

A. And had the right to make.

Q. Okay. And it was -- why did not either the OPA or Minister of Energy tell proponents as of May 12, 2011 that at least the government was leaning toward allowing a change of connection point window? Wouldn't that have made the process more transparent and fair?

A. That is not what a government does, whether it is leaning one way or the other. That would just -- and why wouldn't a proponent look at change point windows if they were in the FIT rules and contemplated since the FIT rules were published in 2009?

They had years to look at it.

Q. Ma'am --

A. In fact, proponents did look at it.

Q. Well --

A. If your proponent didn't,

then they weren't doing their homework.

Q. Well, my proponent didn't need to change their change point window, because they understood that if they were in line to get a FIT project, maybe they would look at it; right? Correct?

A. I am not aware of the specific circumstances of your proponents.

I, however, know that they weren't ranked very high on the provincial scheme of things. So in the provincial ranking, they were way, way, way, way down.

Q. But in the Bruce region they were ranked eight and nine; right?

A. Those are artificial rankings where the OPA sometimes just put -- if someone didn't declare where they were going to connect, they just assigned one to them.

Q. In all of the other regions, the contracts were awarded by region, correct, based on the rankings in the region; isn't that right?

A. I don't know. This is something that you would have to visit with the OPA.

Q. I will. I am just --
A. I don't know.
Q. You did tell us Bruce was the last region to be awarded; right?
A. It didn't have to do with the region. It had to do with the transmission line.
Q. I understand, ma'am.
A. I think they are very different.
Q. I understand the reason. I am just trying to get the facts straight.
Bruce was the last region to be awarded; correct?
A. Bruce -- so that's one electricity region. The other one is London. They were awarded at the same time. So --
Q. All of the other regions were awarded; right?
A. In the first instance.
Q. Right.
A. Whatever could be connected went ahead with the FIT contract.
Q. Okay. And they were done so based upon the rankings in those regions; right?
A. Yeah, I don't know. I didn't

do any -- in the Ministry of Energy, I think I told you this, we didn't -- we weren't interested in all of the detail. We weren't picking winners and losers.

Q. ,Well don't you think then that was a detail you might have looked into before you started issuing directives of changing that process?

A. What? To look at every detail of every proponent and how they would be impacted?

Q. No?

A. I don't think so. That's not what we're supposed to do.

Q. No, ma'am, just look at how contracts were awarded in other regions. Don't you think that would be something that might be important for you to look at before you started changing the rules on my client?

A. You are comparing apples with oranges.

Q. Mm-hm.

A. And whether -- whether your proponent could connect or not connect under one option or the other, we weren't -- we were devising

a system that was much along the lines of the original ECT, the way it was contemplated.

So even if there were provincial ECT that was run, if your clients are in that Bruce area and they were bumped out by a higher-ranking proponent, that's what would have happened.

Q. Right. Let me just ask you this. I don't want to argue with you. I just want to understand what you're saying.

You told us before the developer expectations were important; correct?

A. Right.

Q. I am asking you, before -- first of all, let me ask you this. Were you involved in drafting the directive?

A. This directive?

Q. The one, yeah, the June directive, 2011. Were you involved in drafting that?

A. We have lawyers who draft these. We provide input.

Q. But you were involved in the May 12th meeting; correct?

A. There was one May 12th meeting that I was involved with that I know of.

Q. That is the one Mr. Cronkwright is referring to?

A. It could be.

Q. Okay. But when you became involved and the Ministry of Energy became involved in this process, did you make sure that you understood what had happened in other regions to see how FIT contracts were awarded before you started getting involved in how you were going to develop with a specific region, these two specific regions, west of London and Bruce?

A. I have a good familiarity with the FIT program and the FIT rules and... But did I pay attention to who got contracts? The answer is no.

Q. I didn't ask you that, ma'am. I asked you --

A. And I didn't devise the provincial ranking system or the regional ranging system, so that is something that the OPA looks after.

Q. I am using a lot of my time. This is the third time I asked this. So listen to my question, because I don't think you are hearing my question.

A. I didn't understand your question right.

Q. That's fair. That's why I wanted to make sure you understand it.

I am asking you that when the Minister of Energy, including yourself -- Ministry of Energy, including yourself, got involved in this directive and deciding how the capacity was going to be awarded in these two regions, did you make sure you understood how the capacity had been awarded in all of the other regions when deciding this issue?

A. I have a general understanding, but I can't tell you how a particular group within the OPA evaluated the proponents one against the other.

THE CHAIR: I think the question was not exactly that. The question is: When you gave the input for the June 3rd, 2011 directions, were you considering how the capacity was awarded in other regions, or you were just writing this direction with respect to this region?

THE WITNESS: Oh, no, no. The way that we were looking at this direction in June, we were looking at the pros and the cons and the risks

and the industry expectations, balancing off surplus base load, balancing off ratepayer costs, trying to slow down the pace of procurement. So we were looking at a whole bunch of things.

In the original FIT rules, the FIT rules contemplated a change window, and that's in the end what we wanted to provide for.

Providing a change window also allows the highest-ranked projects in the province, the most shovel-ready projects, the best projects, to be able -- a higher likelihood to get contracts.

And so boundaries are --

THE CHAIR: There is no connection where they are, because if they are highly-ranked and they have a connection and there is sufficient capacity for them, there's no need for them to change the connection points.

THE WITNESS: Right.

THE CHAIR: Do I understand --

THE WITNESS: But you have a project that sits on one side of a boundary and if that connection point is on the other side, why wouldn't you allow them to connect to it? Why did you assign them to one region and not the other?

Sometimes these wind projects and

the solar projects are massive geographically, and they cross boundaries, they cross regions. And it doesn't make sense to put them in either -- so they have multiple opportunities to connect.

And so it is important to see, when they see -- because all of the priority rankings are posted publicly on the OPA's website. So they could see where there is best opportunity to connect to a connection point and get a contract.

THE CHAIR: But they do not know where the others connect?

THE WITNESS: Well, they see the others, as well. So all of the hundreds and hundreds of projects are listed --

THE CHAIR: Yes.

THE WITNESS: -- on the OPA's website at a static point in time. So if you open the window, then they could all decide to move to different places if they wanted to.

THE CHAIR: Yes.

THE WITNESS: You wouldn't know what they were doing at the moment, but you could know that in your location you had no possibility, perhaps. And, hence, it would be advantageous for

you to want to change your connection point.

THE CHAIR: Thank you.

BY MR. MULLINS:

Q. Ms. Lo --

THE CHAIR: That was on the Tribunal's time.

BY MR. MULLINS:

Q. Thank you, yes. Ms. Lo, in followup on the questioning from the Chair, why was only the neighbouring west of London region, then, allowed to connect into the Bruce region and not other neighbouring regions to Bruce?

A. I think that was the advice we had received, was that that was the only area where the Bruce-to-Milton transmission line would allow certain proponents who were essentially right beside it to be able to change and connect to it.

But if you were in, let's say, northern Ontario, why would you allow someone in northern Ontario to connect to the Bruce line?

And I just want to say one more thing. In February --

Q. Mm-hm.

A. -- we had an experience where the OPA told us that we had to award a further 900

megawatts through an IPA. It was an individual project assessment where those projects that we awarded, three of them, were so far from their connection -- the projects were so far from the points that they were connecting to, but the FIT rules didn't contemplate stopping that.

So in one instance there was a project that was almost 100 kilometres away, and they were allowed to move forward with a FIT contract, to our strong objection.

And that's how impractical it becomes. That's why it wasn't opened up to province-wide, because some developers, what they would like to do is to get a contract, and then to argue with government to say that, you know, they need more time. They need more payment, because their project is 100 kilometres away from their connection point and they would need to build an entire extension cord to plug it in somewhere.

It was just unreal.

Q. There are other neighbouring regions to the Bruce other than west of London, "yes" or "no"?

A. Of course there are.

Q. And you did not, then, decide

to allow any of the proponents in those regions to change their connection point to be allowed to participate in the award of contracts in the Bruce region; correct?

A. Because they were too far away.

Q. And whose advice were you relying on, ma'am?

A. I believe it was probably folks in our energy supply and because of what had happened in February.

Q. And if you were trying to meet developer expectations, why was not a comment period provided to the FIT proponents to make comments about the change in the rules done by the directive?

A. Essentially, CanWEA spoke on behalf of the wind association -- of the wind proponents, and essentially they were consulted and they commented, and their comments would, as they indicate, represent the majority view of their stakeholders.

Q. But we had already seen that at least as of May 12th, prior to the CanWEA letter, you'd already made a decision to go forward

with the process that was decided based upon --

A. We had discussions. I didn't say that the decision had been made. In fact, what I said was that until the Minister's direction is issued, a decision wasn't firm.

Q. And fair enough. But up to that point, neither the OPA or the Minister of Energy had ever made its decisions based solely upon the representation of the CanWEA organization; correct?

A. It was one -- it was one piece of advice to be contemplated in the overall mix, yes, one piece of advice, one input. For this matter, it was an important input.

Q. Okay. We're kind of all over the place, ma'am. I really wish you would listen to my question.

A. I am trying my best to listen to your questions, but your questions are all over the place.

Q. They are not, ma'am. They are on target.

A. Yes?

Q. Yes.

A. Okay.

Q. So here's the question. I asked you why you didn't provide a comment period, and your answer to that was: Because we got a letter from CanWEA.

A. No. I said -- that's not what I said. I said that CanWEA's input was very important to us, because they are essentially an industry -- an industry organization that represents the majority of wind proponents in the province.

THE CHAIR: I understood you earlier on to refer to the CanWEA letter in May to say that this justified, in your assessment, a very short window, because the operators had been or the developers had been working on connection points for some time and, therefore, could do this exercise in a short time.

THE WITNESS: Yes.

THE CHAIR: And now there is another question, if I understand it correctly, which is: Why did you not give the developers or the proponents an opportunity to comment on the change of the FIT rules before issuing this direction on June 3rd? Am I not --

MR. MULLINS: Right. I thought

her answer was: Because we were relying on the CanWEA letter.

THE WITNESS: No. CanWEA is only one input.

THE CHAIR: I am not sure. So why did you not give an opportunity to comment to the proponents?

THE WITNESS: I think at that time, going back to the summer of 2011, what was also happening was that the government really wanted to have those contract awards as soon as possible, and to provide a comment period would have slowed down the awarding of contracts.

So the government was poising itself to award the contracts, and in fact they did get awarded in July/August.

THE CHAIR: But then if you're very much in a rush, why do you then wait between May 12 when you have the meeting and June 3rd, because there you lost three weeks?

THE WITNESS: Because --

THE CHAIR: And that could have been used for --

THE WITNESS: I was saying that on May 12th, I don't believe that the decision had

been finalized.

THE CHAIR: I understand that's what -- that is what your answer --

THE WITNESS: There was no directive that was written.

THE CHAIR: No, but they could have been written in a shorter time than three weeks, no?

THE WITNESS: And I think if you -- there were so many issues going on at the time that it was a really busy place and lots of issues to be dealt with.

Governments sometimes aren't the quickest in terms of decision making and acting on those. There needed to be entire communications plans ready, because if the government were going to go ahead and see a bunch of contracts awarded, this was something that people waited four years for, and so it wanted to take the time to have, you know, whether it was the public events and the communications messages, the Qs and As, to make sure everybody was ready.

THE CHAIR: So essentially your answer to the fact that you did not seek comments from proponents was because of the -- because it

would have delayed the process, when you wanted to award contracts as soon as possible. Is that a fair summary?

THE WITNESS: Right. Yes. We wanted to award contracts as soon as possible, and you would know that when things are posted for comment, you will get comments that are pro and you will get comments that are against.

THE CHAIR: Of course.

THE WITNESS: It doesn't really add so much more value, because my office in the renewable energy facilitation office were already us listening to the myriad of: Do this. Don't do that. Do this. Don't do that.

And then when the Wind Energy Association comes forward and provides a more comprehensive view, not a self-interested view, then that's the one -- that's the opinion that you rely on more.

THE CHAIR: Thank you.

BY MR. MULLINS:

Q. Thank you. Now, I have one short document for some reason with restricted access, but then I will go back -- I think we can go back on the record. So just one document I want

to show you.

--- Upon commencing confidential session at 12:30 p.m.

--- Upon resuming public session at 12:31 p.m.

MR. APPLETON: We're back on the air.

BY MR. MULLINS:

Q. Because this document is not confidential, and this is C-90 and this has your name on it.

If you go to the second page, May 11th, does this refresh your recollection that you had a meeting with Al Wiley and Bob Lopinski to discuss their meeting with Andrew Mitchell?

A. It wasn't -- I have lots of meetings with proponents. That was my job.

Q. And is it not true, ma'am, that in that meeting that you had, they discussed -- is it fair to say they discussed if they were not allowed to change their connection point window to the Bruce region, they would not be able to get a contract in the FIT program?

Do you remember that, ma'am?

A. I think that the discussion was around: Was the government contemplating a connection change point window, in which case we couldn't -- we didn't know, and so even if we did

know, we wouldn't tell them.

And of course I would expect for them to come forward with their position to say that they really wanted a connection change point window, but that wouldn't sway us one way or the other.

Q. Well, you do remember that they told you in this meeting that if there was not going to be an interconnection adjustment window, they would be shut out of the FIT program?

A. I don't remember that. I actually -- I had so many meetings with developers, and each developer was always trying to get glimpses into what we were thinking or going to do.

But it doesn't -- it didn't factor into the decisions that would be finally made.

Q. Okay. And were you also aware at the time that NextEra's projects were 100 kilometres away from the connection points it eventually made into the Bruce?

A. No, no.

Q. There was no discussion about how far away that was?

A. No. We weren't -- as I told you before, we did not dwell into the details of

specific projects, because there were so many projects and we knew that whatever we awarded, there would be more losers than winners.

Q. Now, if you look at the time of this e-mail, it is May 11th, 9:55; correct?

A. Yes.

Q. And then you respond in the afternoon on May 12th, 6:27. Was your response before or after that meeting that Mr. Cronkwright told us about?

A. I don't know. I don't know what meeting Mr. Cronkwright was referring to.

Q. You don't remember a meeting with the OPA where you made at least a preliminary decision that you talked about earlier about what the plans are? I understand it wasn't finalized. But that meeting was likely before 6:30 in the afternoon; correct?

A. Likely.

Q. And in fact you continued to correspond with NextEra individuals all the way to 8:20 at night; correct? Do you see at the top,your last e-mail is dated - - time stamped 8:20?

A. Okay. That's good customer

service.

Q. Yes, ma'am. During this time period, you weren't -- do you consider NextEra a customer, ma'am?

A. Well, I was the renewable energy facilitator, and so it was our job to talk to proponents, farmers, wind energy associations solar, biogas, just about anyone out there.

Q. Can you tell us by the way, for the record, who Bob Lopinski is who is mentioned? He's cc'd in the e-mail.

A. He's a GR firm. So he's -- on the flip side, it says he is with counsel.

Q. Were you -- sorry. Correct. He was -- sorry? Was he previously, ma'am; do you know?

A. No.

Q. Wasn't he a member of the Premier's office?

A. I don't know.

Q. And he went into --

A. Every person in a GR firm is a former something.

Q. What is a GR firm, just for

the record?

A. Government relations.

Q. So he's a public relations person that met with you after the preliminary decision was made on May 12th?

A. I may have had a conversation with him. I think, in terms of "speaking with you at 9:30", it was probably via just a short teleconference.

Q. Oh, because he had the call-in number?

A. Yes.

Q. Isn't it a fact, ma'am, during this telephone conference you told NextEra that the Premier's office was considering changing the FIT rules to allow a connection-point window?

A. I would never say that. That's ridiculous. The farthest I could go is probably no decision has been made and we can't -- we can't tell you even if a decision has been made.

Q. And did you then -- after you gave that information to NextEra, did you then put out a notice to all FIT proponents in the Bruce region and the west of London region to tell them

that no decision had been made; however, that a May 12th meeting had been conducted and that at least a preliminary decision was looked at?

A. If anyone called, they would have gotten the same message. If anyone e-mailed, they would have gotten the same message.

It wasn't up to us to actively publicize these conversations, because we weren't divulging confidential information.

Q. Was there a script prepared for all calls?

A. I don't think in this instance.

Q. Were you given all of the calls, or could it have been anybody in the Ministry of Energy could get a call?

A. They wouldn't want to speak to just anyone. Usually they would want to speak to one of the directors or the OPA.

There were multiple channels that they could have come through.

Q. It is possible, then, that the proponents calling the Minister of Energy could have talked to many people, not just you?

A. If they talked to my staff,

my staff would have told me about it.

Q. I understand, ma'am. I am asking you --

A. Anyone can call anybody. So...

Q. Correct. You don't know, sitting here today, whether or not proponents of the FIT program called the Minister of Energy or the OPA about any decisions that the Ministry of Energy was contemplating regarding a connection change point window; correct?

A. Proponents most certainly did call. I can be confident of that, because our phones were always ringing off the hook.

Q. And without a strict script, you can't tell us that everyone got the same message; correct?

A. My staff are pretty good. I think that --

Q. They are not perfect; right? They could have said something slightly different to one person than they told to someone else; correct?

A. I don't control the actions of all of my staff or the exact words of all of my

staff, but I know that my staff are savvy enough to be able not to divulge confidential information. And so --

Q. I'm sorry, you can't tell us today that only your staff are the ones that got calls; right?

A. Right. That's what I said in the first place, is that they could have called the OPA, they could have called -- but I think the answer, you know, unless you can prove otherwise, I don't think that anyone said anything that was out of what the expected answer should be, in that everyone knew that until that Minister's direction went out, there was no decision.

And, anyway, these decisions were very tightly closed. So in terms of writing the directions, in terms of who we talked to, there's a small circle. Not everyone is in the tent.

Q. Yes. So there was no meeting of the people in the tent to make sure you got your story straight; right?

A. There were lots of e-mails.

Q. We haven't been provided all of those e-mails, ma'am. Are you telling me there is an e-mail we don't have where there was a script

put down, so if anybody called --

A. There wasn't a script.

Q. Just let me finish my question. There was not a script; right?

A. There was not a script.

Q. And there is not an e-mail somewhere sent forth to anybody who might get a call about this to make sure everybody got the same message; isn't that right? Does that e-mail exist?

A. There wasn't a script.

Q. Okay. And there wasn't a meeting where everybody got together, in case somebody gets a phone call, we want to make sure we get the story straight; correct?

A. The phone calls were happening all the time on multiple issues, and so if we needed to huddle together just on this issue, we would have -- and other issues, we would have been huddling together all the time.

Q. Was there any discussion, ma'am, of: Maybe it would be a good idea to put out a notice that everybody could read that says the same message? Was that discussion ever had with anybody internally at the Minister of Energy?

A. Until the direction was

issued, nobody knew -- staff did not know the direction we were taking.

Q. And whatever you told the NextEra people, there was no public announcement in a written form to all of the FIT proponents of what you told NextEra people; correct?

A. Well, anyone that would have called in and been told the same message, that the government hadn't made a decision, that we were considering. That is generally -- there's a -- wind proponents talk to each other, and obviously they were also talking to CanWEA and so it prompted CanWEA to write to us.

So there must have been lots of dialogue in industry amongst GR firms and everyone who was paying attention.

Q. In fact, you got other letters from other people saying that CanWEA was not representing the position of all of its members, didn't you?

A. One can never represent the views of every, everybody. But CanWEA did represent the majority, the vast majority, of the wind developers out there.

Q. Your obligation is not just

to represent -- not just to meet the expectations of the majority, but to meet the fair representations of all proponents. Don't you agree, Ms. Lo?

A. We were being fair. We were -- we devised a Minister's direction that contemplated ratepayers', developers' expectations. We capped the megawatts to ward off the uncertainty.

We allowed a certain number of megawatts of connection at each connection point to protect the very -- the smallest of the generators, and it was as close to an ECT as the FIT rules possibly contemplated. And so I think in my estimation, we -- we were fair.

Q. You agree that due process and fairness is not just given to the majority, but given to all; right?

A. As a principle, I would agree with that. Where there is someone says that they needed to award contracts by a certain time, then you do what you can.

Q. And can you turn to – this is confidential. We will go on confidential. This is C-629.

--- Upon commencing restricted confidential session at 12:44 p.m.
now deemed public

BY MR. MULLINS:

Q. C-29. This is tab 27. This is an e-mail from you to Andrew Mitchell; right?

A. I don't know what I am looking at.

Q. I'm sorry.

A. C?

Q. Tab 27, ma'am.

A. Oh, I thought you said "C".

Q. The "C" is the document number. I get in trouble when I don't mention that. So the doc number is C-629, but it was under tab 27 in your notebook.

A. Okay.

Q. Do you recognize this document?

A. Yes.

Q. Can you tell us what this document is? It's an e-mail; right?

A. It is an e-mail to Andrew Mitchell. Andrew Mitchell was the director of policy in the Minister's office.

Q. What does "B club" mean in

the "re" line?

A. That was just a name we used for the highest-level meetings with --

Q. Breakfast club or something?

A. Yes. It was the breakfast club.

Q. Good movie, okay.

--- Laughter.

THE WITNESS: But there was a breakfast club, but there was not any breakfast served.

--- Laughter.

BY MR. MULLINS:

Q. Well, it is the government. Who was at the breakfast club?

A. Usually it was the -- the secretary of the Cabinet was Shelly Jamieson. There was also the Premier's chief of staff. There was our deputy.

There would be the cabinet office deputy, sometimes the Finance Ministry's deputy, and whoever was making the presentations.

Q. Now, this was, again, after the meeting that Mr. Cronkwright mentions in his witness statement, right, because it is pretty late

at night? It is at again 8:20.

This is -- meanwhile you are still -- this is also a time you are communicating by e-mail to NextEra. Remember that? This is all of the May 12th late night -- early evening, rather; right? Do you see the time, 8:20?

A. That was pretty common.

--- Upon commencing confidential session now deemed public

THE CHAIR: Fine. I would suggest that we take the break now, because it has been quite a long stretch for you, Ms. Lo. Can we defer the re-direct until after lunch?

MR. SPELLISCY: Give us a minute here, because I am conscious of course of Ms. Lo's time, and if we don't have many questions at all, then we can do it, but we may do it quickly.

If the Tribunal plans on having a number of questions, though, then I would say we take our lunch break.

THE CHAIR: I don't think we have many questions, because a lot of ground has been covered, and I don't think so. So why don't you check how many you have, and then maybe we can conclude now?

MR. SPELLISCY: Just give us two

minutes.

THE CHAIR: Yes.

MR. SPELLISCY: Professor Kaufmann-Kohler and members of the Tribunal, we do not have any re-direct questions, so we won't ask Ms. Lo any questions.

THE CHAIR: Thank you, sir. Then let me see whether we still have questions. Judge Brower?

QUESTIONS BY THE TRIBUNAL:

MR. BROWER: Since I was taken to tab 27, which we have just been discussing, I looked at tab 28, which I turned to by mistake at the beginning. Obviously the point is being made by the claimant that the period of May 12, this meeting, and May 13th was critical in some way or very busy with respect to decisions made or contemplated with respect to the five-day window.

Here at tab 28, which is Exhibit C-0674, the F.A. Wiley, vice president development Canada, NextEra Energy Resources, Juno Beach, Florida, addresses an e-mail to you May 13, 2011, 10:12 a.m., addresses you as "Sue":

"Per our discussion this morning, please find attached

a list of NextEra's six projects remaining in the FIT queue. Thanks."

Could you tell us what the discussion was in the morning and why he was -- if you know why he was sending you a list of NextEra's six projects remaining in the FIT queue, and do you know why he used the expression "remaining in the FIT queue", which suggests, just facially on a reading, that some had been taken out of the FIT queue?

THE WITNESS: Mm-hm. So let me try to answer the question this way. I think what Al Wiley was doing was sending me projects that were in the FIT queue because others had probably received a contract. NextEra probably received contracts during the initial award of FIT contracts in April of 2010.

So these were the ones that remained in a queue to be decided upon when transmission became available.

The reason he was sending me the contracts is out of self-interest, just as any other proponent that would have reached out to us. They would have wanted us to understand why they

wanted something, that they wanted -- so NextEra would have wanted me and my staff to understand that they definitely favour a connection change point window.

In terms of receiving the details, I would have -- upon receiving his e-mail, what I would have done is I would have instantly forwarded that to my staff to say, you know: Here's some information about NextEra's projects.

MR. BROWER: Mm-hm. But what was the discussion that morning?

THE WITNESS: Oh, the discussion I believe was over the telephone, and it would have been a short discussion where he would have probably espoused the merits of why Ontario should include a connection change point window. That's probably what it was.

I don't even remember the exact sentences that he would have said, but I would know that we had similar conversations with other proponents who reached out to us, and all of them wanted contracts should be awarded as soon as possible, and certainly before the government would go into an election mode, because 2011 in the fall, that was the set time for another provincial

election.

MR. BROWER: And why would that affect the timing of awarding contracts?

THE WITNESS: Because the --

MR. BROWER: Why do they want to get in before the election?

THE WITNESS: Yes. Because the government would want to award the contracts before, well before, the writ was dropped, because a writ period is a period of time before the actual election itself, where the Ministers are no longer really holding their portfolios, but they have gone to seek re-election, if they so choose.

So the business of the government goes just into a caretaker mode during the writ period. And so the election was going to be in October or before, and they wanted -- because the opposition was saying that they were going to cancel the FIT program, that's where I think there was a lot of lobbying on government to award these contracts so that another government couldn't come in and not award them.

MR. BROWER: And I think maybe you have answered my next question, which was at tab 27 that we've been looking at, Exhibit C-0629, the

e-mail at the bottom in which you are addressing Andrew, Andrew Mitchell of the -- is that the Ministry of Environment and Energy --

THE WITNESS: Energy and Infrastructure.

MR. BROWER: Energy and Infrastructure, right, thank you.

You say "that", referring to the idea of setting aside the entire London/London east for KC, Korean Consortium. You say:

"That would help to pace the contract awards a bit better."

Do I correctly understand that is, meaning it might get to award contracts faster?

THE WITNESS: I think what I was trying to say was that if we set aside London and London east, all 350 megawatts, then that means that we wouldn't -- because the Korean Consortium were slow in terms of figuring out where they could connect in that entire region.

And so by holding the London and London East and just not awarding FIT contracts in that area, what it would do would be to slow down the pace of contract awards.

And as I said previously, we wanted to slow down the pace of contract awards, because this particular set of contract awards were being done at the prices for FIT that were set in 2009.

So they were still fairly attractive FIT prices, and I think one of our main considerations was that we really wanted to slow down the pace of procurement. So it would be fewer megawatts to be awarded, and that would slow it down, because once we entered into the two-year FIT review, which happened almost immediately after the contract awards for Bruce-to-Milton, we could look at making tweaks, substantial tweaks, to the program to lower the prices of the technologies.

MR. BROWER: Do I understand from what you say that the then-Ontario government --

THE WITNESS: Yes.

MR. BROWER: -- was interested in as many contracts as possible being signed, as they were up for re-election?

THE WITNESS: Well, I think the landscape changes. The Ontario government was certainly interested in making a splash in terms of awarding contracts.

MR. BROWER: Right.

THE WITNESS: Because awarding contracts, as you know, it is like ribbon cutting.

MR. BROWER: Right.

THE WITNESS: All sorts of good news, and government could talk about its millions and millions of dollars in investment that it would attract.

But, you know, did it matter whether we awarded 1,000 megawatts or 800? I think there would be very little difference in terms of the splashiness of the news. It was still really good news to be awarding contracts.

MR. BROWER: Right. Did that government get re-elected?

THE WITNESS: Yes, they did, and they are still in power. They got re-elected twice since then.

MR. BROWER: Okay, that's it.

THE CHAIR: I am a little confused, and maybe I have misunderstood you, but you will clarify it for me.

When I asked you why you didn't ask for comments of the proponents to the FIT rule changes with respect to the connection window, you

said that this would have taken too much time and therefore -- and you were eager to award the contracts as soon as possible.

Now, in answer to Judge Brower's questions about the e-mail in tab 27, C-629, where you said that would help to pace the contract awards a bit better, you say: That is because we wanted to slow down the contract awards.

So now I don't know if you want to accelerate or did you want to slow it down, or one has nothing to do with the other?

THE WITNESS: So it is competing; right? So what we were trying to do, we had made proposals to the government at the time to do the FIT review earlier, and the government did not want to do that before the reelection.

So there were opposing forces. In terms of getting these contracts out, for the government it was imperative that we award these contracts before the election, before the writ drops.

In terms of exactly how many megawatts would be procured, there was a desire not to award all of the contracts that could connect, and that's why we capped the number of megawatts in

the Minister's direction. I think it was 750 and 300 megawatts, because if more projects could have connected, we didn't want to pay for the additional megawatts that would come on stream, because they were surplus to what Ontario's energy needs were in the future, the projections.

THE CHAIR: Thank you.

MR. BROWER: Excuse me. I can't help saying that reminds me of the story told about old Joe Kennedy, the father of Jack Kennedy, when he was running for president of the United States. He said: I will pay everything to get elected, but not a nickel for a landslide.

--- Laughter.

THE WITNESS: Yes. Exactly right.

MR. BROWER: So it seems to me --

THE WITNESS: It's kind of like that.

MR. BROWER: -- it is a bit of an example of -- you're in the civil service.

THE WITNESS: Yes, I am.

MR. BROWER: Right, of the civil service trying to deal sensibly with what government wants.

THE WITNESS: Right.

MR. BROWER: Okay.

THE CHAIR: Follow-up question?

MR. MULLINS: I do.

MR. SPELLISCY: There was no re-direct and now I am wondering about re-cross.

THE CHAIR: I usually would allow a follow-up question, provided it is specifically linked to a question by the Tribunal. Both parties have that right.

I think the Tribunal is done with its questions, although I have not checked my own notes to make sure by covered everything. Let me just check. We have covered all of my questions, so if you have follow-up, please go ahead.

FURTHER CROSS-EXAMINATION BY MR. MULLINS:

Q. Just one follow-up question from the questions of Judge Brower.

Ms. Lo, talking about this critical time period in May of 2011 and to June 2011, did you have other e-mail communications with other FIT proponents or was it only with NextEra?

A. It would have been -- to answer your question simply, we would have had lots of contact with many proponents, I think.

Q. Specifically, though, ma'am,

e-mails exchanged back and forth like we have seen with the NextEra.

A. No, I don't know. I don't know what was provided. I don't know what was pulled. I think we provided you everything that was in our record.

Q. Well, that is where I am headed, ma'am, because we don't have any other e-mails other than the ones produced with respect to NextEra.

And what I am asking is, for the record, do you have any knowledge that there would be other e-mails around the same time period with FIT proponents during this time period that we have not been provided? So I am asking you if those documents exist.

A. I think we provided all of the documents that we had in our possession. There would always be ongoing conversations. My staff and I were always at regular forum with the industry and having regular meetings with stakeholder groups. So --

Q. Did you look for e-mails with other FIT proponents, ma'am?

A. I think in a normal search

process, an independent third person looks at all of my e-mail and creates the package for you.

So they didn't want me to look for my own e-mails, because it is better to have a third party look at all of my e-mails and transmit the entire set to you.

MR. MULLINS: Thank you very much.

THE CHAIR: Any follow-up questions on Canada's side?

MR. SPELLISCY: No. I did just want to clarify for the public record on Exhibit C-0681, because the claimant's counsel expressed confusion at it being identified as confidential, and of course that is the claimant's confidentiality designation, not Canada. So I just wanted to be clear on that.

THE CHAIR: Thank you. That's clear. Fine. So this completes your examination, Mrs. Lo. Thank you very much. It was a long morning, but we got to the end of it. Thank you.

THE WITNESS: Thank you.

THE CHAIR: We will now take a one-hour break. Is that fine? And we will resume at 2:15, or would you prefer resuming at 2:00? We will then go over to Mr. MacDougall; is that

right? What is the preference?

MR. APPLETON: Full hour. It has been a very full morning.

THE CHAIR: You want a full hour?

MR. MULLINS: Whatever is good for the Panel.

MR. APPLETON: What would you like?

THE CHAIR: Well, we're here at your disposal.

--- Laughter.

MR. SPELLISCY: Sort of.

THE CHAIR: Sort of? Don't say that. Let's say 2:15, then.

--- Luncheon recess at 1:15 p.m.

--- Upon resuming at 2:19 p.m.

--- Upon resuming public session

THE CHAIR: Are we ready to start again? Good afternoon, sir.

THE WITNESS: Good afternoon.

THE CHAIR: Are we ready or not?

MR. MULLINS: We're ready.

MR. SPELLISCY: We're ready.

THE CHAIR: Good. For the record, can you please confirm to us, sir, that you are Jim

MacDougall.

THE WITNESS: Yes, my name is Jim MacDougall.

THE CHAIR: Your current position is president of Compass Renewable Energy Consulting?

THE WITNESS: Yes, that's correct.

THE CHAIR: During the time that we're interested in here, you were manager of the Feed-in Tariff at the OPA?

THE WITNESS: Yes, that's correct.

THE CHAIR: You have filed one witness statement in this arbitration dated 27th of February 2014?

THE WITNESS: Yes.

THE CHAIR: And as you know, you are heard as a witness in this arbitration. As a witness you are under the duty to tell us the truth. Can you please confirm that this is what you intend to do?

THE WITNESS: Yes, it is what I intend to do.

AFFIRMED: JIM MACDOUGALL

THE CHAIR: Thank you. Now you know how we will proceed? You will first be asked

questions, introductory questions, by Canada's counsel, and then we will turn to Mesa's counsel.

THE WITNESS: Yes.

THE CHAIR: To who do I give the floor?

MS. MARQUIS: Myself.

EXAMINATION IN-CHIEF BY MS. MARQUIS:

Q. Good afternoon. Good afternoon. I am Laurence Marquis, counsel for Canada. Mr. MacDougall, I have just one question for you. You have your witness statement in front of you. Are there any corrections that you need to bring?

A. No, there are not.

MS. MARQUIS: Thank you. I turn the floor to you.

THE CHAIR: Mr. Mullins, your turn.

CROSS-EXAMINATION BY MR. MULLINS: AT 2:21 P.M.

Q. Good afternoon, Mr. MacDougall.

A. Good afternoon.

Q. I will have more than one question. I am going to be referring to your witness statement, February 27th, 2014, and you

have confirmed it is accurate and complete and no biases, as well as it can be; correct?

A. That's right, yes.

Q. We have a number of witnesses to go through, including experts, so it will be really helpful to me if you could listen to my question and try to answer it. If you need to follow up on an answer, that's fine. If you want to go to a different area, I would ask you to wait to your counsel, or Canada's counsel will ask you questions, because they are entitled to do so on re-direct.

But I really have a limited amount of time and we have a number more witnesses to go through, including experts. Is that fair?

A. Yes.

Q. Thank you. Now, you currently are the president of Compass Renewable Energy?

A. Yes, that's right.

Q. And what is that, sir?

A. So I act as a consultant primarily to assist developers of renewable energy projects to advance their projects through the Feed-in Tariff contracts, to bring them to

operation primarily in the Province of Ontario.

Q. Okay. You answered my question. Is it only Canada or...

A. We do consulting work outside of Canada. We have worked with US clients, European clients, but the majority of the work that Compass Renewable Energy Consulting is involved in is with Ontario clients.

Q. Well, Ontario clients or clients doing work in Ontario?

A. Both. The majority of the work is done in Ontario.

Q. Okay. When you say "majority", 80 percent?

A. Probably 90.

Q. Ninety percent, okay. Before you started your consulting program, you were manager of the Feed-In Tariff program in the OPA?

A. Yes.

Q. And you in fact are the only employee of Compass Renewable Energy; right?

A. No. There are three employees of Compass Renewable Energy.

Q. And they help you with consulting?

A. That's correct, yes.
Q. And have you done work for NextEra?
A. I have not.
Q. Or the Korean Consortium?
A. No, I have not.
Q. And do you consult with the government?
A. I have secured a consulting contract with the Ontario Power Authority, but as of yet I have not done any consulting work through that contract.
Q. When was that contract entered, sir?
A. The contract was entered into in June of -- approximately June of 2014.
Q. That was after you did your witness statement?
A. That's correct, yes.
Q. And how are you going to consult with the government and also act as a consultant for people doing work with the government?
A. So I'm not working for the government.

Q. Okay?
A. That contract is with the Ontario Power Authority.
Q. Okay.
A. And the capacity in which the work would be delivered through the Ontario Power Authority has provisions to ensure that there are no conflicts of interest --
Q. Right.
A. -- in the event that the work I was doing for the Ontario Power Authority overlapped with work I would be doing with a client.
Q. How do you avoid the conflict of interest?
A. So I only have -- well there are hundreds of feed-in tariff developers in Ontario.
Q. Right.
A. Developing all sizes of projects.
Q. Right.
A. I don't represent all of them.
Q. Right.

A. I represent maybe a dozen. So to the extent that I don't represent a client, doing work for them as a consultant, then there wouldn't be a conflict with me doing work with the government in assessing that client's project.

It might help to describe the nature of the consulting work that I may be doing for the Ontario Power Authority.

Q. Okay, sure.

A. So the work that Compass bid on was reviewing projects to ensure that the project was primarily compliant with the domestic content provisions of the feed-in tariff contracts.

So in that capacity, Compass would review the documentation submitted by a supplier to confirm that the documentation was compliant with the contractual requirements of the feed-in tariff contract.

Q. That's the work you bid on for the government; right?

A. That's the work that I bid on for the Ontario Power Authority.

Q. And so you --

A. In 2014. So it doesn't show up anywhere on my witness statement.

Q. I understand. Well, your witness statement was dated February 2014. When did you do the bid?

A. Probably March or April.

Q. So pretty soon after you did your witness statement, you bid for a project with the OPA?

A. Yes.

Q. And I am confused, though. You say your work, you haven't started that work yet?

A. No, I haven't.

Q. But the plan is that you are going to consult with the OPA to help them make sure that the domestic content requirements are complied with?

A. That's the majority of the scope of the work.

Q. Okay. Otherwise, the work you're doing with FIT project people, your clients, that's not going to be dealing with the issue about the content requirements?

A. No. The work that I would be doing with, as I said, the dozen or so clients would be -- part of it could be assisting them with

their domestic content documentation. That's quite possible.

Q. So there would be an overlap, then, through what you're working on with the OPA and what you are going to be doing for your clients?

THE CHAIR: I'm sorry, but I think he just answered that he would not act for these clients, on mandates for the OPA or vice versa, to avoid conflicts of interest.

THE WITNESS: That's right. I would declare a conflict of interest if I was asked to review documentation --

BY MR. MULLINS:

Q. Oh, I see.

A. -- from one of my clients.

Q. I apologize. I understand now. You're saying the subject area could overlap, but for a specific client you wouldn't do it. I apologize.

A. Right.

Q. I understand, yes. Thank you.

Now, when you were with the Feed-in Tariff program, your department was

responsible for coordinating and administering the Ontario FIT program?

A. That's correct.

Q. And it was your responsibility to conduct those assessments of applications made by the renewable energy power purchase agreement proponents in an open, transparent, accountable and effective way?

A. Yes.

Q. And that would be true for all parties involved in the FIT process; correct?

A. Yes, that's correct.

Q. Including FIT proponents who didn't get a contract?

A. Yes, that's correct.

Q. And you believe, do you not, that all OPA employees have a duty and an obligation to make their decisions fairly?

A. Yes.

Q. Objectively, honestly and high ethical standards?

A. Yes.

Q. Openness and transparency?

A. Yes.

Q. Without -- with impartiality?

A. Yes.
Q. And transparency means to you being open and forthright?
A. Yes.
Q. And giving all information possible?
A. Yes, within the context of the FIT program administration.
Q. And you would expect in fact that the people you work with in the Ministry of Energy would also have these exact same duties and obligations as we just described them?
A. They wouldn't be involved in the administration of FIT applications, but otherwise the principles --
Q. The principles we talked about would apply to the Ministry of Energy?
A. Yes.
Q. Okay. Now, in your initial statement, paragraph 15, you say that:

> "... the Ministry of Energy's main goal was to allow 'shovel-ready' projects to 'float to the top'. 'Quick wins' for the program meaning

immediate investment in development, were seen as crucial for the government's strategy of creating jobs in the renewable energy sector..."

Correct?

A. Yes, that's correct.

Q. And you agree that' not only the main goal for the Minister of Energy, but that was also a goal for the OPA?

A. Yes. In designing the rules, yes.

Q. And, in addition, another proponent or component of the FIT program was to make sure that participants would bind themselves to immediate instruction activity; correct?

A. Yes, as quickly as possible.

Q. As quickly as possible. So despite that it may be years before the energy actually gets generated, they wanted immediately to go out and buy land and start working on the project; correct?

A. Yes.

Q. Or leasing land?

A. Yes.
Q. Buy it. So the OPA and the Ministry of Energy knew during this process that FIT proponents were doing this; right?
A. Yes.
Q. In fact -- and so it was not lost on the OPA or the Ministry of Energy that proponents were spending substantial sums in preparation of participating in the FIT program, was it?
A. Yes. They were continuing their prior investments and making new investments.
Q. And making new investments, so it was costing a lot of money. It would; correct?
A. Yes.
Q. Thank you. Thank you. And that's frankly what "shovel-ready" meant; right? So the idea was you're ready to start building?
A. Yes.
Q. So it was important for the OPA and the Ministry of Energy to make sure they didn't make special arrangements with competitors, because there were substantial rights being affected by decisions made by the OPA and the

Ministry of Energy, don't you agree?

A. Yes. They wanted short-term investment. They wanted to stimulate job creation.

Q. Both in respect to, for example, the Korean Consortium and the FIT proponents?

A. I am not as familiar with the time lines for the Korean Consortium projects, but certainly within the FIT program, yes.

Q. And you were involved somewhat, though, with the Korean Consortium projects or...

A. Very little.

Q. Okay.

A. Early, early on.

Q. Were you involved at all in how the FIT -- sorry, the GEIA -- I am going to call it the GEIA. Are you okay with that?

A. Yes.

Q. Okay, good. So are you familiar at all with how the participants in the Korean Consortium were able to obtain projects to fulfil their obligations on the GEIA?

A. Sorry, the GEIA being the Green Energy and Economy Act or the Green Energy

Investment Act.

Q. That's why people have a problem with "GEIA".

The green energy investment agreement with the Korean Consortium.

A. Right.

Q. I can call it the Korean Consortium agreement, if you like.

MR. APPLETON: No, no.

BY MR. MULLINS:

Q. Can I use GEIA?

A. That's fine, yes.

Q. Are you familiar, generally, with how the members of the Korean Consortium were able to attain projects to fulfil their obligations under the GEIA?

A. I am not at all familiar with that.

Q. You are not aware of them buying FIT projects in the program -- sorry, FIT projects ranked lower in order to satisfy their obligations?

A. I heard something, that that was their approach, but...

Q. Do you remember who told you

that?

A. Sorry?

Q. You said you heard it. Do you remember how you heard it?

A. Probably wind industry stakeholders.

Q. They were complaining about this or they were commenting?

A. Noting that that was the kind of target market for the Korean Consortium group, to seek projects that were lower on the list.

Q. The idea was these projects were not ever going to realistically get a FIT contract. So these were sort of the target market for the Korean Consortium to buy out their projects in order to basically satisfy the GEIA?

A. Yes, that's how I heard that they were in the market looking for site acquisition.

Q. And many of those projects were low ranked, because they weren't shovel ready; isn't that right?

A. Very likely that that's why they were lower ranked, yes.

Q. So the irony of this is that

while it was very important to the government and the OPA to have shovel-ready projects, it turns out, though, that non-shovel-ready projects were getting -- essentially participating in the renewable energy because they were being bought out by the Korean Consortium; is that correct?

A. Yes. So, you're right, the FIT was are focussed on shovel ready and the GEIA had other criteria, I suppose. I wasn't...I wasn't involved in the GEIA, so I wasn't sure what the mechanics of that were going to end up looking like.

Q. I appreciate your explanation there.

Now, going back to the comments you said about the participants, if you go to your statement, paragraph 5, you say:

> "After I left the OPA and formed Compass Renewable Energy Consulting Inc. I was contacted by a number of industry participants that had questions about the OPA FIT Contract award process as it related to capacity

recently made available for the new Bruce to Milton transmission project."

Can you remind us when you left the OPA?

A. It was June of 2011.

Q. Okay. So you left right about when the Bruce awards were made?

A. Correct.

Q. Okay. And you say here there were concerns expressed about the process and whether it was fair and transparent. Do you see that?

A. Yes.

Q. Okay.

A. Yes.

Q. So can you tell us what those concerns were and who made them?

A. Well, the questions were around how, you know, decisions were ultimately made around the contract award for the Bruce-to-Milton allocation and whether there was any, you know, untoward discussions within government and within the Ontario Power Authority about how that allocation process went.

And I responded that I was unaware of any untoward dealings. It was simply a matter of decisions around the process, and then the execution of the process and the resulting megawatts of capacity to be contracted under that process.

Q. How soon after you left did these conversations begin?

A. So my first day out of the OPA was, I believe, June 17th.

Q. Yes?

A. Of 2011.

Q. Mm-hm.

A. And the process was being administered in early June of 2011. So certainly in the month of June, people were -- that was a timely topic of discussion. So people were asking what was going on and how did this play itself out.

Q. The phone was ringing off the hook?

A. No, I wouldn't say that, but probably two or three calls in the month of June.

Q. Two or three?

A. Yes, from different parties.

Q. What parties?

A. Companies --

MR. SPELLISCY: Well, sorry. Hold on here. I don't know if this isn't something that has been addressed. I am not sure if Mr. MacDougall would like to go in a confidential session to discuss who his clients are.

It is not something that has been addressed or dealt with before. It is up to Mr. MacDougall, but I do recognize who his clients -- who might have reached him might be confidential business information to Compass Renewable.

MR. MULLINS: Referring to a statement he made was not marked "confidential". I was specifically asking who was calling and what they said, so...

THE WITNESS: Well, there is one that I can recall that was immediate, which was Leader Resources.

BY MR. MULLINS:

Q. Mm-hm?

A. A gentleman named Chuck Edey called me and asked me, in the context of working with another consultant, how the process played itself out.

Q. But he wasn't the only one to complain; right?

A. Frankly, his was the only company who I recall offhand. The majority of my clients ended up being solar developers, and still are solar developers. So I frankly don't work with a lot of wind developers. And the majority of the capacity that was awarded in the Bruce-to-Milton area were from wind developers.

But there were questions, again, about both the process and also, you know, the establishment of the megawatt caps associated with the allocation and where those numbers came from and why.

Q. And what did you tell them?

A. Well, frankly, I told them that the primary driver, as I saw it, was that the FIT program that I had been working on was an open procurement under the rules. Yet the previous energy policy of the province, the long-term energy plan, placed a specific cap on the renewable procurement targets, and that for months I had recognized that the program and the long-term energy plan themselves were incompatible; they were inconsistent.

So my comments were more along the lines, in that regard -- especially to the solar developers, were in the lines of: The megawatt caps associated with the Bruce-to-Milton allocation were deliberate to ensure that the province's liability and obligations, as a result of contract awards, would be capped.

Q. Well, the other challenge was that there was capacity that was set aside for the Korean Consortium; correct?

A. That certainly played into where those numbers were set.

Q. Because had the Korean Consortium agreement never been entered into, there would have been more capacity available for FIT proponents in the Bruce region; correct?

A. I would suggest throughout the province, yes.

Q. But specifically in the Bruce?

A. Yes, I believe there was an allocation for the Korean Consortium in the Bruce area.

Q. You remember in September 2010 that is exactly what happened. There was a

directive that set aside 500 megawatts in the Bruce region?

A. Right.

Q. Thank you. Now, why did you leave the OPA, Mr. MacDougall?

A. A number of reasons. I had been at the Ontario Power Authority for almost six years and so I had -- well, I hadn't kept a job for more than six years in my career prior to that.

But part of it was to use my expertise in understanding how the FIT program operated to assist clients to navigate the FIT, program from a contractual perspective or from a program, kind of next steps perspective.

So it was an opportunity to venture out in my career and work in the industry, but from a different capacity.

Q. It was just a coincidence that it was around the same time period that the FIT program was going through this process in this Bruce-to-Milton region?

A. Yes, very much so.

Q. Okay. But you did leave before the awards actually were entered; correct?

A. Yes. I believe the awards

were in July, and, as I said, my last day was around the 14th of June at the OPA, yes.

Q. So contrary to your statement, you can't know for a fact whether or not the entire process was completed in a fair manner, because you left before it was over; right?

A. Yes, that's true.

Q. Thank you. Now, you talk about in your witness statement that the concept of offering a connection point change window in advance of running the ECT had been a part of the FIT rules; right?

A. Yes.

Q. Just so we're all on the same page, the ECT you're referring to had been a province-wide ECT?

A. Yes, that's correct.

Q. That never was run; right?

A. Yes, that's correct.

Q. There never was an idea there would be a connection change point window just for limited regions; right?

A. No.

Q. Okay. And so what happens then is we sort of have a congruence -- confluence,

thank you, of events. So you have the Bruce-to-Milton line coming online. You have the capacity set aside for the Korean Consortium into Milton. You have the long-term energy plan coming on.

This issue, I think you talked a little bit about this. So there was a challenge of what to do with the west of London and the Bruce area; right?

A. Yes.

Q. And is it not correct that up to this point -- we're now into 2011 -- all of the other regions had contracts awarded?

A. Yes, that's correct.

Q. And the way those were awarded is that -- were these TAT and DAT tests. Why don't you explain what those are?

A. Sure. So those are grid connection capacity tests, first the transmission level, to ensure that there was adequate transmission capacity to connect a project to the grid.

And then for projects that connected at the distribution level, the lower voltage distribution system, then projects also had

to be able to physically connect onto the distribution system.

Q. And so what happens is, under the FIT rules, what could happen is that you could obtain a FIT contract -- well, obviously you can get it without an ECT, because many projects did; correct?

A. Correct.

Q. So what happens is these tests were run and you felt satisfied to award contracts in the other regions; correct?

A. Yes. The only one I am thinking might have been restricted would be the northwest of Ontario, but, generally, yes.

Q. So had you followed the same process in the other regions that was happening in the Bruce region, then under a normal process you would have awarded contracts in the Bruce region on the same process you did the other regions; right?

A. Well, the other regions of the province had contracts awarded outside of the ECT process. It wasn't an ECT process. There was capacity available and so contracts were awarded.

Q. Right.

A. The Bruce region was the

first part of the province that had connection constraints that were subsequently alleviated by new transmission. So it was the first part of the province that had an allocation process that was triggered by new connection capability being available.

Q. You do remember, though, in December of 2010, there was a ranking of the proponents in the Bruce project; remember that?

A. December 2010 or December 2009?

Q. 2010, because the awards were entered in July. It is the December time period. You remember there was a ranking that was published?

A. Right. So the ranking probably took place in December 2009, and was made public in 2010.

Q. Oh, I'm sorry. Fair enough. Got it.

And so those were all published to the FIT proponents, right, in December 2010?

A. That's correct.

Q. And had you followed the process in the other regions, you would simply have

awarded the contracts at that point?

A. Understood, yes, that's correct.

Q. Okay. But the problem was that you had an issue, as we're talking about what to do with the Bruce area, and we also had this issue with the Korean Consortium, right, because they had been promised 500 megawatts in the Bruce?

A. Yes, that's right.

Q. That was kind of bad luck for the people that picked Bruce; right?

A. Yes.

Q. I mean, because if you'd happened to pick some other area, you probably would have had a contract. But if you're on the short end of that stick and hit the Bruce region, you were shut out. Now you have to deal with this new process; right?

A. Yes, amongst the other -- I guess it was 1,500 megawatts in total --

Q. Yes?

A. -- of Bruce -- sorry, of Korean Consortium capacity reserve, so 500 in the Bruce and 1,000 elsewhere.

Q. Right. I think it was 500

and 1,200. Does that sound more accurate?

A. I don't know exact numbers, but I'm saying there were 1,500 megawatts of capacity reserved for the Korean Consortium, which had, to your point, 500 megawatts of impact on the Bruce and 1,000 megawatts of impact elsewhere.

Q. Your department or the OPA's recommendation of how to solve this was to do a modified TAT, DAT, right, and you were asked by the Minister of Energy to do a rough estimate? Do you remember that?

A. Yes.

Q. Can you tell us a little bit about what that was?

A. So the Ministry was asking us to ensure that any contract award in the Bruce area would be megawatt limited. That was the -- it seemed to be the highest priority, that the overall contract awards should not exceed or should not be excessive.

There was a more recent concern, within Energy around the total cost of the Feed-in Tariff program, and so the primary driver of concern from the Ministry of Energy was, Let's make sure we know what we're going to get out of this

once we execute an offer, a series of contracts, because of the Bruce-to-Milton transmission capacity.

Q. And you do remember, do you not, sir, that there were a number of e-mail correspondence between the OPA and the Minister of Energy in which the Minister -- sorry, the OPA, rather, was recommending that this modified test that you ran would be followed, but that was not accepted by the Ministry of Energy; correct?

A. Yes. There was a -- yes, a negotiation around that.

Q. And who made the decision at the Ministry of Energy to reject the recommendation of the OPA?

A. I honestly don't know. I believe a conduit to our group was through Sue Lo, but I don't know whether it was Sue's decision or her Deputy Minister's decision.

Q. Was the OPA ever notified by Ms. Lo or anyone why the recommendation of the OPA was rejected?

A. I'm not aware of what the detailed rationale was for that.

Q. The answer is to your

knowledge --

A. I don't know.

Q. Fair enough. Now, the other thing, once you learned -- you learned on May 12 what the decision was; right?

A. There was continued e-mail exchange after May 12th, but in and around May 12th. May 20th, in there, there was still --

Q. The decision was made?

A. -- back and forth. Okay. Yeah. Approximately May 12th the decision was made.

Q. Thank you. And around that time period, there also was talk about how much notice to give; right?

A. Yes.

Q. And you do remember that, frankly, the proponents were given three days' notice? Do you remember that?

A. I don't remember that explicitly, but I do know it was a short period of time, and the window itself was a short period of time.

Q. And that was both -- that was contrary to the recommendation of the OPA, as well;

right?

A. I recall that the original or some of the original discussions around the extent of the connection point change window was proposed to be 15 or 20 days. I don't actually know the specific number of days right now.

Q. Well, can you go to tab 17 of your notebook? This is C-78. I want to give you a calendar. This is just for demonstrative aid. I will reflect this is an accurate representation. We got it off the Internet what the dates are.

Okay. So what I have given you is first I have given you a calendar just so you can look at it. So this is a June 2011 calendar, so we can get the dates straight. Can you identify what we see at tab 17, C-78?

A. Yes.

Q. Can you tell us what it is, sir?

A. It's an OPA web posting of the details of the methodology that was being implemented for the allocation of the Bruce-to-Milton capacity.

Q. Can you tell us the date this was issued?

A. It is dated June 3rd, 2011.
Q. Can you look on the calendar and tell us what date June 3rd, 2011 was?
A. June 3rd was a Friday.
Q. Can you tell us the timing when the window was going to start?
A. So the window opened on June 6th and closed on June 10th.
Q. Five days?
A. Yes.
Q. So we can't tell when this was posted, right, what time of day on June 3rd, can we? I don't see it.
A. I don't think so.
Q. Do you remember?
A. I don't.
Q. Okay. And when that was posted, this was the first -- first and only official announcement of when there was going to be a five-day change window?
A. To my knowledge, this is the -- was the announcement.
Q. And, again, this was contrary to the OPA's recommendation about how long the window should be and how much notice should be

given?

A. I would think so. As I said, I don't recall what we suggested or what we recommended.

Q. So just so the record is clear, the OPA did not have any criticisms of the fact that the proponents were being told on a Friday that a change point window was going to start on Monday?

A. I imagine that there would have been criticism that that's inadequate notice.

Q. You think it is adequate notice, sir?

A. There had been a lot of discussion about the possibility, but it is fairly short.

Q. It is not adequate notice, is it, sir? It is a weekend?

A. It is not very adequate.

Q. It is not very adequate. Now, the Ministry of Energy is the one that controlled this decision, right, about how much notice to give and how long the period is going to be; right?

A. Yes, we had exchanged

proposed schedules with the Ministry, and the Ministry ultimately decided on this schedule process.

Q. And you remember that it actually -- the OPA had originally recommended two to three weeks for a change window?

A. Yes.

Q. Now, in fact, you also remember that -- Mr. Cronkwright, he's your boss; right?

A. He was, yes.

Q. And you remember he notified or stated that the schedule was extremely aggressive. Do you remember that?

A. Yes. This, as well as all the other process steps that were required in support of this whole process.

Q. Were you ever given a reason why the OPA's recommendation regarding this specific timing was rejected?

A. No. The main rationale was we want contract offered in June. The main rationale I heard through Shawn was that they, the government, wanted to see contracts offered in June.

Q. Were you ever told why, if the decision such was made in May, why they waited to June and give a weekend's notice regarding the change in connection window?

A. No, not for this particular decision.

Q. Were you ever given an explanation why only two areas in the province were allowed to change windows and no other area in the province was allowed to do that?

A. Yes. The main reason was that the province wanted to limit the -- any further contract award beyond what was going to be allocated in the Bruce-to-Milton area.

Q. Well, just help me on Ontario geography.

A. Sure.

Q. The west of London area is not the only area that borders Bruce; right?

A. No, it's not.

Q. So there are other areas that theoretically could have changed or connection windows to join onto this Bruce line; correct?

A. I think so. I'm not -- yes, I don't know geographically whether --

Q. Were you ever given an explanation as to why it was that only the west of London FIT proponents were allowed to change their connection points and people in other neighbouring areas around the Bruce region were not allowed to do that?

I understand the limits of the province wide. I just wondered other neighbours.

A. Again, it's my understanding that based on the operation of the transmission network, that the Bruce-to-Milton line actually enables capacity in both the Bruce area and the west of London area.

Q. Where is Milton?

A. Where is Milton?

Q. Yes, sir.

A. It is the -- well, northwestern Ontario. Sorry, northwest of Toronto.

Q. So it is neither in the Bruce nor the west of London region; correct?

A. I don't believe so.

Q. Let's put a map up of Ontario.

Q. Just give me a moment. We call this an ELMO. Here we go.

--- Map given to the witness.

Q. So just going back to my question. So the west of London region is south of Bruce; right?

A. Sorry, the west of London region is, yes, southwest.

Q. So Milton would that be in the Niagara region or the central region?

A. I would assume it's in the central region.

Q. Okay. Do you know why it was that FIT proponents in the central region and the Niagara region were not allowed to switch their connection points?

A. I do not.

Q. You never were told?

A. No.

Q. Did you ever ask?

A. No.

Q. Never concern you?

A. No. It wasn't a concern.

Q. Don't you think it would have been more fair for the people, the proponents in the central and Niagara region, to have the same opportunity that was given to the proponents in the

west of London region?

A. I assume it is more to do with the dynamics of the transmission upgrade associated with the Bruce-to-Milton line, but I don't know.

Q. As far as you know, there was no analysis done of that; correct?

A. It wouldn't have been done by our group. It would have been done by the power system planning group around the impacts of the Bruce-to-Milton line.

Q. You were never given analysis by the power -- what do you call it?

A. Power system planning group.

Q. They never gave you anything that explained to you why it only had to be the west of London compared to these other areas; correct?

A. That's correct.

Q. No one from the Ministry of Energy told you why it had to be; right?

A. That's correct.

Q. Isn't it a fact, sir, that you were told one of the reasons that the west of London was attractive was that there were some

high-powered proponents in that area; right?

A. That certainly wasn't a part of any discussion about why the Bruce-to-Milton was allocated the way it was.

Q. You never heard the reason they did it was because NextEra had lobbied for that?

A. I heard that after the fact, after I left the OPA.

Q. What did you hear, sir?

A. That they secured a number of contracts all in the same geographic area and that they were able to bundle them together to make the connection economic, to make the, you know, case for investing in the connection, that the aggregation of the number of contracts that they were awarded enabled that connection onto the grid, into the Bruce-to-Milton connection point.

Q. And when had they done that?

A. I assume it would have been through the Bruce-to-Milton allocation process.

Q. All right. So during this May period --

A. Sorry?

Q. -- or before? You were

telling us how you heard what -- I'm trying to figure out when -- not when you heard it. When did you hear they had done what they did, if that makes sense?

A. I assumed it was through this Bruce-to-Milton allocation process that they bundled their projects together and proposed them to be eligible on the Bruce-to-Milton connection.

Q. Who did you hear that they had proposed that to?

A. Again, probably other wind developers. I don't know any --

Q. They were complaining about --

A. I can guess at individuals' names, but I don't know --

Q. They were complaining about what NextEra had done?

A. Frankly, one of them that I heard about and learned a little bit about the technical -- well, one of the parties was actually working with NextEra, but honestly at this point I'm not sure if those projects were part of the projects enabled by the Bruce-to-Milton line.

Q. And what did this party tell

you?

A. Well, they were asking questions about how they could or how likely it was that their subsequent projects could be eligible to connect in a future FIT ground. So they had one project that they had partnered with NextEra on, and they had one project they were exploring the viability of into a future FIT procurement for this period.

Q. Right. For the projects in Bruce that were awarded in July of 2011, you had heard, after you left, that the NextEra had somehow bundled its projects so it could be part of that allocation; right?

A. Yes.

Q. And you understood that they had talked to people in the government about that or...

A. No. Just that I think it was referred to as, like, the NextEra six-pack or something like that.

Q. The NextEra -- what is the NextEra six-pack?

A. This is, again, you know, in a conference talking to someone, you hear people

talking, you know, They did really well with -- but they did this six-pack approach. And I interpreted that that meant there were six projects they bundled together to share a common connection, whose connection would be relatively expensive, but shared across six projects would make a connection economically viable.

Q. And you had heard that they had bundled these projects earlier on because they knew this change window was coming; right?

A. I didn't -- I didn't know when it happened. I don't know if they were planning to do so.

Q. It would take a long time to plan something like that; right? You can't do that over a weekend; right?

A. Correct.

Q. Now, you talk in your statement -- well, first off, this change in the FIT rules for this Bruce-to-Milton line, that required a directive from the Ministry of Energy or a direction? I always get them backwards.

A. It required a D-word from the Ministry of Energy.

Q. Yes. So what does that mean?

A. So without being a lawyer, my understanding that -- well, the OPA had to or it was authorized to procure electricity as a result of directives from the Ministry -- sorry, the Minister of Energy.

And material changes to the FIT program that we were either contemplating or making were largely driven by directives from the Minister.

Q. Well, in fact this was the only time that the Ministry of Energy actually, up to this point, had issued a directive that required a change in the FIT rules; right?

A. I believe so. Up until then --

Q. And you go through your statement in quite a number of detail the process of how rule changes were made generally in the FIT process; right?

A. Mostly I'm -- I think I am describing the development of the first draft of the FIT rules as opposed to rule amendments that took place subsequent to the launch.

So most of what I described is how we got to the first set of FIT rules.

Q. You talk about how lawyers drafted them?
A. Yes.
Q. And you talk about how there was substantial comment period?
A. Yes.
Q. And you talk about how the proposals were put on websites?
A. Yes.
Q. And so all of these stakeholders could provide comments?
A. Yes.
Q. And then when you got the comments, you could consider them?
A. Yes.
Q. And you did consider them?
A. Yes.
Q. And this went on for months?
A. Yes, it did.
Q. Okay. And there were other changes made to the rules before June 2011?
A. There were I believe some minor changes. I don't recall exactly what was changed when.
Q. You gave comment period even

for the minor changes; correct?

A. Sometimes, yes.

Q. And so stakeholders would have a chance to comment on those; right?

A. Sorry. I don't believe that there was any rule changes between September 30th, 2009 and July -- sorry, 2011.

Q. You don't remember a change in October 29th of 2010? There's a 1.3.2 version of the FIT rules. I could show you tab 7 --

A. Sure.

Q. -- to refresh your recollection?

A. Sure, sure.

Q. If you look at tab 7. Sorry, it is C-242, tab 7 of your notebook.

A. Yes.

Q. Just look at the first page, sir. Can you tell us the date?

A. Yes, October 29th, 2010.

Q. You do now remember there was a change in the FIT rules?

A. Yes, yes.

Q. There was a comment period for those FIT rules?

A. I don't believe so. If this rule change that is highlighted on the cover was the major or the only rule change that was being implemented, then there would not have been much discussion about what was changing.

Q. You do remember that there was a five-month advance notice of changes, though, don't you?

A. Okay. Sorry.

Q. Go ahead?

A. This is the rule change where we prohibited behind-the-meter connections? I can't recall which rule change this was.

Q. There was discussion of hub casings.

A. Oh, sorry. So the domestic content amendments, right.

Q. Right. So there was a comment period for that, wasn't there?

A. Sorry. Yes. So it would have been the FIT contract rather than the FIT rules.

Q. Okay.

A. But the FIT contract provisions relating to domestic content did evolve

regularly to allow for the refinement of the domestic content requirements.

Q. And there was a comment period provided for that; right?

A. Yes, definitely.

Q. A substantial comment period?

A. That's very possible. For domestic content changes, they were slow to implement.

Q. Because at the end of the day, something like that was a major change in the program; right?

A. There was a major change in the kind of impacts on manufacturers who had set up investments in Ontario to meet the domestic content requirements.

Q. And you agree with me that the June 3rd change was a major change in the FIT process, don't you think?

A. June 3rd, 2011.

Q. Right. I mean, especially for people that are proponents of the Bruce region?

A. Yes.

Q. That was a major change?

A. Yes.

Q. So was there any discussion at the OPA about whether or not there should be a comment period for that change?

A. I don't recall it specifically, but in general we -- where possible, we liked to post drafts of evolving changes for stakeholder comment, even if it's a two-week period, and allow us the opportunity to review comment before instituting the change.

Q. And you like to do that because that would give stakeholders the opportunity to react. That would be a fair process; correct?

A. Yes.

Q. But that didn't happen with the June 2011 change, did it?

A. No. The changes were implemented --

Q. Immediately?

A. -- immediately.

Q. And so were you ever given a reason why the OPA did not follow its normal process of posting the changes before they were implemented?

A. No, other than there was a

desire to offer the contracts kind of shortly after the capacity became available as possible.

Q. And you would agree with me that the OPA notified stakeholders of changes much less significant than this one and gave notice; correct?

A. Yes, in other cases there was much more notice offered.

Q. On matters of much less significance than this one; right?

A. Yes.

Q. Now, can we go to tab 14 of your notebook?

MR. APPLETON: This could be confidential. Let's just look at the document 270.

MR. MULLINS: Just hold for a moment. Some documents are confidential, sir. Just give us a moment to make sure.

MR. APPLETON: This is a public document obtained by Freedom of Information.

MR. MULLINS: Tab 14?

MR. APPLETON: Tab 14. The public can see this.

MR. MULLINS: Tab 17.4

MR. APPLETON: Tab 17. It is not

the same.

MR. MULLINS: I'm sorry. Tab 14. 14 is fine?

MR. APPLETON: I don't know. I think to be safe, we should go to restricted access just...

MR. SPELLISCY: I'm sorry, the document is not confidential.

MR. MULLINS: I am looking at tab 14, 270. I actually had the wrong binder.

MS. MARQUIS: It is 270?

MR. MULLINS: C-270.

MS. MARQUIS: It is not confidential.

MR. APPLETON: It is marked in one way, so the document is restricted, as highly confidential, attorney's eyes only, a document coming from -- is that from NextEra? And so unless it has been ruled by the Tribunal to be public, and since I am not sure, I would rather just not go there for a moment, rather just go off the record, close off for this one page.

If you would rather that we take a short hiatus and check, we can do that, too.

THE CHAIR: Should we go off the

public for this document or do we need -- otherwise we will simply postpone the question.

MR. MULLINS: What is confusing is there is a discussion about this conversation in the witness's statement, and so it is actually quoted out in his statement. That is why I am trying to make sure --

MR. APPLETON: It has been ruled on by the Tribunal and they have decided it is no longer a highly restricted document and, therefore, is now public.

MR. MULLINS: Got it.

MR. APPLETON: Okay, sorry it is a little confusing.

MR. MULLINS: That makes sense, because it is in his statement, okay, got it.

BY MR. MULLINS:

Q. Mr. MacDougall, can you tell us who Nicole Geneau -- do you know her?

A. Yes.

Q. Can you tell us who she is, and tell me how to pronounce her name?

A. Nicole Geneau. She was an employee of Florida Power & Light when I first met her, later NextEra.

Q. How did you meet her?
A. I think I met her at her employer before NextEra, Florida Power & Light. I believe she worked for the Ontario Centres of Excellence, but I am speculating. I don't recall what her previous employment was.
Q. If you look at tab 14, C-270, there is an e-mail chain here where you try to set up or she is trying to set up a meeting with you.
A. Yes.
Q. And you were going to do that at a coffee shop?
A. Yes.
Q. Then you ended up moving it to your office?
A. Yes.
Q. What she wanted to talk to you about was NextEra's ability to change its connection points line; right?
A. No. The meeting was to discuss the assignment of a series of FIT applications from one legal entity to another.
Q. Well, if you look at your witness statement on May 31st, 2011, and I think it -- I have a copy of the full e-mail.

You quote out an e-mail to her, and she writes you --

MR. BROWER: Where is this?

MR. MULLINS: Paragraph 43 of Mr. MacDougall's statement.

MR. SPELLISCY: I think this is confidential actually, now.

MR. MULLINS: Oh, this part is confidential? I was pointing -- yes, actually, I was pointing to his witness statement. Is this part to be marked confidential?

THE CHAIR: Yes.

MR. MULLINS: Okay.

MR. APPLETON: Okay. Yes. So we have to go into a confidential record.

--- Upon resuming the confidential session

--- Upon resuming public session at 3:25 p.m.

RE-EXAMINATION BY MR. SPELLISCY:

Q. Good afternoon, Mr. MacDougall.

A. Good afternoon.

Q. Are we out of confidential session or are we still on?

I just have been told to lean forward so they can hear me. I have a couple of

questions for you.

At one point -- actually, at several points you were asked about the connection point change window and the notice of it, and they took you to an e-mail right at the very end.

Can you explain for the Tribunal what had been told to developers since the beginning on how the Bruce-to-Milton capacity would be allocated and whether it would have allowed for a change window in that allocation.

A. So the details around how the capacity allocation process would have evolved were not ironclad at the launch of the FIT program. It was a process that evolved over time.

The power system planning group that I mentioned earlier were the group that were spending substantial amounts of time designing, you know, the detailed mechanics of how the capacity allocation processes would roll out, would advance, whether that was through an ECT or through another capacity allocation process.

But throughout the discussions around allocating new capacity, the expectation was that there would be an opportunity for applicants within the FIT program to propose to connect on to

a different part of the grid to reflect -- or to reflect their preferences and to allow them to specify connection points to the grid where new capacity might be available or where capacity may be available as a result of other projects dropping away, but that in advance of a capacity allocation process, the ECT or other, there was an expectation that the process would be preceded by an opportunity for an applicant to modify their proposed connection point, that primarily being driven by new information about the grid, new information about other generators connecting onto the grid and grid availability.

So instead of connecting on the east-west road, I am going to connect on the north-south road, because I know there is already projects on the east-west road.

So in going through a capacity allocation process, the OPA messaging and the industry expectation was that projects would be able to specify different connection points than those contained in their original application.

This is further reinforced by an option for an applicant in the FIT program to not specify a connection point when they wish to

connect onto the grid.

They could choose to not pick any particular point and say, I wish to be connected if and when new capacity becomes available in that area, at which point I would specify the connection point that would make the most sense at that time in the future.

So throughout the principles baked into the FIT program, there was always this notion of you can apply. You can demonstrate your interest, and then as time went by and grid resources became available for connection capacity, you could, in future, specify where on the grid you wanted to connect or where on the grid you wanted to change your proposed connection to.

So that was definitely one of the principles around future expansion of the grid and optimizing grid connection amongst developers.

Q. All right, thank you. And specifically were developers told that the Bruce-to-Milton line coming in would be one of those capacity expansions you were talking about that would allow for a change in connection points?

A. Yes. The process for the Bruce-to-Milton was expected to be like one of

those future capacity-enabled areas where projects could propose to connect or change their connection points.

Q. How long or do you know approximately when developers would have been aware of the Bruce-to-Milton line?

A. Sorry, the Bruce-to-Milton?

Q. The Bruce-to-Milton, in general, was coming?

A. Oh, it was discussed in early 2009 when we were essentially kind of designing the FIT program and forecasting for developers what we thought the total grid capacity was.

We were saying that we believe that there are approximately 2,400 megawatts of capacity available now for projects to connect onto the grid, but that the Bruce-to-Milton would enable an additional 1,500 megawatts to be connected onto the grid.

So it was before the FIT program was even launched there was a signal that, well, while the FIT program didn't have a formal capacity cap, there was this expectation of 2,400 megawatts at launch, and then 1,500 megawatts upon Bruce-to-Milton capacity becoming available to the

province.

Q. So knowing of the connection point change window that was being contemplated and knowing the Bruce-to-Milton line, in your experience of the OPA, were developers preparing their connection point changes for when that line came into service?

A. Some were, for sure. There was discussion of -- I didn't look at any specific applications, but there was discussion of people who strategically proposed to connect out of the Bruce area, because the Bruce area was known to be constrained, but they had a project site that perhaps was near the boundary of the Bruce and other areas, and that they would propose a connection point not in the Bruce area at launch, because they knew they would not be successful because the Bruce area was constrained at launch, but there was an intention to then, upon the Bruce capacity being made available, to modify their connection point and to connect into the Bruce where this new capacity would enable generation projects to connect onto the grid.

Q. So I think at one point you were asked, and then pressed, about whether or not

having a connection window announced on a Friday, and then going to a Monday, was adequate notice and I think you said it didn't seem adequate.

But you would agree that developers could have been preparing for this for a long time; correct?

A. Definitely, yes.

Q. Now, I want to come back to some of your other testimony, which was with respect to what you heard at conferences, and that, about NextEra.

I just want to be clear. While you were at the OPA, while you were actually employed at the OPA, you never heard anyone discussing or deciding or anybody talking about favouring NextEra?

A. That's absolutely correct.

Q. So what you heard was actually other developers and rumours and talking at conferences, but nobody actually even connected with government decision-making saying that?

A. No.

Q. And in fact at the time you had already left the OPA.

Now, for -- and just let me ask

another thing. The counsel for the claimant kept asking you whether or not you were given a reason for certain things on the June 3rd direction.

You noted that the June 3rd -- I think you said you left on June 14th of 2011.

A. That's right.

Q. Can you explain for the Tribunal whether you had carriage of the June 3rd direction, whether that was your responsibility or was it somebody else's?

A. So in part because of my prior notice of departure from the OPA, there was a desire to have me less involved in the finalization of some of the elements of this particular exercise, because it was going to continue beyond my departure.

But the lead on the discussions with government around the Bruce-to-Milton process, the timing, you know, the documentation requirements, the communication materials, was all being led by my boss, Shawn Cronkwright.

Q. And one more question on sort of roles and responsibilities at the OPA, because you were also asked the technical connection -- question of why the Bruce-to-Milton

line only was allowed -- or the Bruce-to-Milton allocation only considered the Bruce and the west of London areas.

And I think you referred to the power system planning group. Who is the head of that group?

A. That is Bob Chow.

Q. In fact, he would be the one to be able to answer questions about whether or not what capacity was freed up; correct?

A. Yes.

Q. That wouldn't have been something that you would have been involved in?

A. No.

Q. Just give me one second and see if my counsel have anything else to add. That is all that I have. Thank you.

MR. MULLINS: Madam Chair, I know how you feel about re-cross. I do have to clarify something for the record based on a question asked by Canada's counsel.

THE CHAIR: Yes, please do.

FURTHER CROSS-EXAMINATION BY MR. MULLINS:

Q. Thank you. Mr. MacDougall, I thought I was done. I want to follow up just on

the sort set of questions posed by Canada's counsel.

You were asked about the -- it was known that there was a Bruce-to-Milton line coming and people could change their connection points, but just so the record is clear, what the stakeholders originally were told was that there would be a change in connection point window as part of the province-wide ECT; right?

A. Yes. The original design anticipated a province-wide allocation.

Q. I'm sorry, I didn't mean to cut you off. That is what I thought you said during the cross-examination.

And so then the actual -- if I remember, I thought you had testified that the only official notice about the change that was set forth in the directive of June 3rd, 2011, C-77, which is tab 16, by the OPA was found at tab 17, C-78, which was the same day; right?

A. That's the directive, you're saying?

Q. Yes. The notice on the Ontario Power Authority is June 3rd, and that's the same date of the directive. You can look at it.

A. Right. Yes, I think you used the word "formal", but that was the official or the kind of putting it into firm effect on the June 3rd OPA notice. And there had been developer expectations, is what I think I was answering, developer expectation was that an allocation would be preceded by a connection point change window.

But the kind of final decision and process and details was spelled out in that OPA notice that came out on June 3rd.

Q. The only official or unofficial notice given by the OPA to stakeholders that there would be a connection point change window for the Bruce-to-Milton line came on June 3rd, 2011; isn't that true?

A. Yeah, for that particular exercise, that was the trigger.

Q. And in fact -- I'm sorry. In fact, it required a directive by the Ministry of Energy to change the rules; isn't that correct?

A. There was often a lot of discussion around what required a directive and what didn't, and I don't want to speculate as to whether it was absolutely necessary, but...

Q. Ultimately somebody made the

decision that in order to do what wanted to be accomplished, there had to be a directive from the Minister of Energy; correct?

A. Often.

Q. That's what happened?

A. No. If it -- if changes to program procurements are accompanied by a directive, then what that, in part, accomplishes is it reduces backlash for political lobbying back to government.

So I don't want to say that a rule -- the rule change that was effected for the purposes of the Bruce-to-Milton allocation required a directive. I'm not sure if it legally required a directive.

Q. You mean to say it --

MR. SPELLISCY: Can the witness finish his answer?

MR. MULLINS: I'm sorry. I thought he was done.

THE WITNESS: I don't know if it legally required a directive, but the main impetus of accompanying changes like this with a Ministerial directive was to try to mitigate against political lobbying back to government,

say: The OPA's you know, out of control. The OPA needs to be told what to do. You should tell them what to do.

So often changes like this were accompanied by directives to manage stakeholder reactions.

BY MR. MULLINS:

Q. So this is the last question. So you're saying the debate was whether or not you needed to do a directive versus the OPA just changing the rules on their own?

A. Yes. There was discussions around to what extent rule changes could be made on our own, which ones would be better accompanied by a directive.

Q. Well, to accomplish what was accomplished on June 3rd, 2011 would require either a rule change or directive?

A. It would require the rule change, for sure.

Q. Yes. And then the question is whether or not, in addition to a rule change, we need a directive, and the directive essentially accomplished the rule change?

A. It provided political cover

for a rule change, right.

Q. And the directive required the OPA to change its rules?

A. I believe so. That's my understanding of how the directives have force in law. That's my understanding.

MR. MULLINS: Thank you very much, sir.

THE CHAIR: Okay. Do you --

MR. SPELLISCY: I am not sure how you feel about re-re-direct, but I am not sure the record got a lot clearer there.

THE CHAIR: No, but that was my point yesterday about re-direct.

MR. SPELLISCY: I think we muddied things a little.

THE CHAIR: I should say I am not attaching much weight to these answers about the need for a rule change or a need for a directive, because Mr. MacDougall is an engineer. So these are legal issues.

But if you want to -- if you feel that you need to clarify something, then of course I should let you do it.

MR. SPELLISCY: Give me one

second. Hold on.

RE-RE-EXAMINATION BY MR. SPELLISCY:

Q. The only reason -- and I apologize for getting up again, I just -- because there was a question asked, and the question was phrased: The only official or unofficial notice given to stakeholders that there would be a connection point change window in advance of the Bruce-to-Milton directive was this June 3rd.

And I think the answer said, Well, for this specific exercise. But I would just like to ask Mr. MacDougall to look at a document to see if it reflects his recollection on unofficial notice, if that is what this is.

If we could pull up and put C-0073 on the screen, it is our favourite document, because it is the one in about two-point font.

If we could blow up the first part there, and if we could look at -- if you look at the third note there, it says -- can you read that out, Mr. MacDougall?

A. Sure. So:

"FIT applicants will have the opportunity to request a change of connection point

prior to the ECT. Connection point changes could impact the ECT outcome for other applicants requesting a nearby connection point."

Q. If you could read out the head note on the Bruce region right there starting with 1,200 megawatts?

A. "1,200 megawatts of additional capability will be made available by the Bruce-to-Milton transmission line will be allocated during the ECT."

Q. Right. So you would agree that this is the December 21st or December 2009 ranking that actually claimant's counsel took you to, and you would agree this is actually notice from the OPA that there would be a change in connection point for the Bruce-to-Milton allocation?

A. Yes. And if I can --

Q. Sure.

A. I heard the question being that the June 3rd was the only official notice. I

didn't hear the unofficial or official.

Q. That is why I stood up.

A. And so I answered in the context of it was the only "official" notice that came out on that day for that Bruce-to-Milton process.

MR. SPELLISCY: Thank you.

THE CHAIR: Thank you. That's clear. No questions on Judge Brower's side. You have questions, yes, please.

QUESTIONS BY THE TRIBUNAL:

MR. LANDAU: Just to follow up on the same issue, I would like you to have a look at document R-113, which I don't think is in the binder in front of you. It is tab 31 of the binder for Ms. Lo. Is there a way that that can be put up?

MR. SPELLISCY: I can pull it up on the screen.

MR. APPLETON: Tab 31.

MR. LANDAU: Can it be shown so that the header is also there? Now, I don't know if you can read that document or not.

THE WITNESS: That's a little better.

MR. MULLINS: I can give a copy to the witness.

MR. LANDAU: Thanks.

--- Mr. Mullins distributes copy of document to the witness.

THE WITNESS: Thank you.

MR. LANDAU: Just take a moment to look at that document.

THE WITNESS: Sure.

MR. LANDAU: Okay? Have you ever seen this before?

THE WITNESS: I have, yes.

MR. LANDAU: Would you have seen it at the time?

THE WITNESS: I don't recall reading it, but I recall hearing that CanWEA was advocating for a connection point change window.

MR. LANDAU: This is a letter written on 27th of May, and it's asking for a process to be put in place so that contracts can be offered in June.

THE WITNESS: Yes.

MR. LANDAU: If I can just turn your attention to the third paragraph. So it says:

"Over the past several months

our members have collectively invested significant time and money to prepare their respective interconnection strategies. Once the updated Transmission Availability Tables are made available, our members can be ready to act quickly and respond within the window of time communicated to our members of the OPA. For these reasons, a majority of our members believe the window only needs to be open for a short period of time."

Are you able to give some meaning to that in terms of what the time scales are that are being contemplated?

THE WITNESS: I recall that in various presentations, again, from Bob Chow's group, the power system planning group, there were, again, proposed processes that would be followed in the context of the ECT, the Economic Connection Test.

And my recollection is that we were advocating or proposing that an ECT would be preceded by -- and this is where I'm going to estimate -- like a 15-business-day connection point change window, so that the ECT would be run subsequent to participants in the ECT being notified that they would have an opportunity to modify their proposed connection points for their projects, but they would have to do so within I believe it was about a 15-business-day window.

So it was on the basis of – I believe that this message from this paragraph is on the basis of how wind developers in this case understood the OPA's prior communication vis-à-vis the priority ranking tables that were just shown on the overhead, but as well as presentations that were publicly made by Bob Chow's group to the FIT stakeholders around how they would operationalize the ECT; and that, again, our signalling was that the ECT would take place, but prior to its running we would offer, again, approximately a 15-business-day window in which to change connection points.

MR. LANDAU: Right. We have heard testimony from Ms. Lo about the significance that

was taken as far as the Ministry was concerned, significance that was drawn from this presentation, this letter from CanWEA, in particular, the point that it was being stated that over a period of time -- it is described here as "past several months" -- significant time and money had been already expended to prepare strategies on interconnection points.

From your recollection, would it be reasonable in all of the circumstances, given that, to think that five days actually would be sufficient?

THE WITNESS: So as I have stated earlier, there was knowledge of a pending allocation of Bruce-to-Milton capacity in particular, because the transmission line was nearing completion in as early as mid-2009.

So the regulatory processes and final hurdles took significant time. It took until May of 2011 to get final environmental approval from all of the regulatory bodies.

So stakeholders who were involved in the FIT would have anticipated that there would be capacity coming available in the Bruce area as early as mid -- well, even prior to 2009, 2006,

2007, 2008. But certainly once the FIT program was formalized in 2009, they would have known that the Bruce capacity would be coming available soon, just a matter of when. That soon ended up almost two years, but it was coming.

So I would interpret that this letter is suggesting our members have been waiting years for an opportunity to bid their projects into the Bruce allocation, and that in order to have assessed options around viability and optimization of connection points, whether it is a five-day window or 15-day window is irrelevant.

It would take months to optimize a connection point change. So, again, whether a five-day window was afforded or a 15-day window was afforded, if you hadn't done the preparatory work leading up to that window, there was no way you were going to get it done in that short time frame, given the complexities of the power system and transmission network, which, again I think Bob Chow can speak more definitively to.

MR. LANDAU: Yes. Then I want to ask you a more general question which you may or may not be able to answer.

THE WITNESS: Okay.

MR. LANDAU: You describe in your witness statement, in the first part of it, your involvement in the design and implementation of the FIT program.

THE WITNESS: Yes.

MR. LANDAU: When did you first hear about the contract with the Korean Consortium, the GEIA, if you can remember?

THE WITNESS: I believe it would be -- would have been summer of 2009.

MR. LANDAU: And –

THE WITNESS: Well in advance of the FIT program launch.

MR. LANDAU: So that the time frame, speaking very roughly, you're describing a period of, for example, public consultation March to June 2009?

THE WITNESS: Yes.

MR. LANDAU: And your consulting stakeholders, you're consulting with the Ministry, as I understand your evidence?

THE WITNESS: Yes.

MR. LANDAU: You're working towards the launch and the launch is, by directive, September 2009?

THE WITNESS: Yes, sir.
MR. LANDAU: In that period, you're designing the structure?
THE WITNESS: Yes.
MR. LANDAU: Basically the mechanism for the FIT program. So you hear about the Korean Consortium contract, and do you remember before September 2009 the kinds of detail you might have heard? Did you know -- what did you know about it?
THE WITNESS: About the Korean Consortium contract?
MR. LANDAU: Yes, yes.
THE WITNESS: Well, I was aware that it was a framework. So it was a commitment to 2,500 megawatts to be developed over five phases.
And I was aware that it would necessarily compete with connection capacity for the broader FIT program and the FIT programs contract award capacity.
So I was aware that the two would be running in parallel, and, you know, as one of the lead spokespeople for the FIT program, I wasn't terribly pleased by the competing development opportunities that were running in parallel.

MR. LANDAU: Can you explain that? Why not? Why were you not pleased? What I am driving at is, as somebody who is involved in designing the FIT program, what kind of impact did you see from the existence of a contract with the Korean Consortium?

THE WITNESS: Well, certainly leading into the FIT program design, we knew that there were thousands and thousands of megawatts of interest of project development in Ontario, as witnessed by some of the prior renewable energy procurement activities.

So I knew that there would be more demand for FIT contracts than there would be supply of contract capacity.

So my professional reaction was this just creates less supply of FIT contracts availability, because a portion of the available grid capacity will necessarily need to be allocated to the Korean Consortium.

In discussions at the time, I recall that the planners didn't know where 2,500 megawatts were going to fit on the grid, on the existing grid, and of course nor whether the Korean Consortium had projects that, you know, were

readily available to be developed onto the grid.

But certainly the existence of the Korean Consortium commitment through the framework agreement created greater pressure on the FIT program and less capacity available through the FIT program to offer contracts.

MR. LANDAU: Prior to its launch in September 2009, was there any -- was it perceived there was any need to restructure or change the FIT program in order to accommodate the existence of the Korean Consortium contract?

THE WITNESS: So what I recall was that -- again, I think Bob Chow can probably answer better, but that there was a belief that, you know, the first two phases of the Korean Consortium commitment could be accommodated while still allowing for that, you know, approximately 2,400 megawatts of FIT capacity to be procured.

And maybe you can help me. I am trying to recall the timing of the KC, Korean Consortium, announcement vis-à-vis the FIT launch, but in any event, the --

MR. LANDAU: I am focussed on September 2009.

THE WITNESS: I just don't recall

when was the Korean Consortium commitment made public, and was that well in advance? Was it in advance of when I would have been exposed, you know, and had discussions around it?

I do recall, though, that at FIT launch applicants were aware that there was a commitment to the Korean Consortium and the 2,500 megawatts.

And so, I mean, this is getting into my judgment, but -- so there should have been an acknowledgement or a knowledge of the existence of these parallel procurement activities, and certainly there was knowledge of it by the development community, many of whom who were not pleased that this commitment was being made outside of the FIT construct.

But, again, if I am recalling the dates correctly, there should have been industry knowledge of the Korean Consortium commitment prior to a September finalization of the rules and contracts under the FIT program and the October/November launch period.

MR. LANDAU: Yes. Thank you. I have no other questions.

THE CHAIR: All of my questions

have just been asked, so I have no questions either. Do you have any follow-up?

MR. BROWER: Yes. I think you said in words or substance that as the person basically in charge of the FIT program, you were I think you said not best pleased by -- the record might knowing smile just resulted from the witness -- by the arrival or the existence of your knowledge of the Korean Consortium.

Could you explain that a little bit further why you were not best pleased?

THE WITNESS: Sure. So we had been designing and developing a FIT program of course in response to government policy, that the prior renewable procurement exercises should be expanded and should be made much more aggressive.

The accompanying domestic content provisions to the FIT program were something of a question mark, and so we would hear within the OPA that solar module manufacturers would arrive, blade manufacturing would arrive, wind turbine manufacturing would arrive in the province.

And the FIT program had contractual obligations that many of those components would have to be machined and

manufactured in Ontario in order for the supplier to be in compliance with their FIT contracts and to be eligible, et cetera.

So what I'm getting at is the main or one of the main reasons that we were given as to why we're bringing the Korean Consortium to Ontario is to ensure that we have a customer for that large volume of procurement of wind and solar equipment.

So the challenge, you know, as one of the lead spokespeople and one of the designers of the FIT program, was designing the FIT procurement with all of the prioritization mechanisms and knowing that there would be a significant amount of competition for the capacity available under the FIT -- under the FIT program, that this new effort, this parallel initiative, was going to displace some of that capacity that was to be made available.

As I said, the reason we were given was that well these guys will ensure that the domestic content provisions will be satisfied, because we have a significant customer who will be able to lock down that equipment manufacturing commitment by the solar module manufacturers or the wind equipment manufacturers.

So there was this, again, parallel effort being undertaken. We felt like we were driving the FIT program, and then the Korean Consortium arrangement was handed to us and said, Okay, well, it has to fit within this -- with this larger envelope, so find a way to see the two co-exist.

So it was a surprise. It was a bit of a disappointment, partly because we just didn't see it coming, or certainly I didn't see it coming from my capacity and my role. But we adapted to it. We, again, tried to advise stakeholders, and the government obviously did, as well, that there were these two parallel procurement efforts that would be executed in that same window, both for renewable contracts, for wind and solar capacity.

MR. BROWER: I want to go to the five-day window for a moment, because when you were being cross-examined, you made it clear that you said precisely 15 to 20 days were recommended by OPA.

This was discussed with the Ministry, and the reason that Mr. Spelliscy asked to re-direct you is because in response to

cross-examination, you had said that five days was not adequate, and he brought that up to you and you said, I think, in response to him, Well, five days, 15 days, it didn't make any difference.

If it didn't make any difference, why was OPA arguing for 15 or 20 days to the Ministry in the discussions that went on?

THE WITNESS: Well, again, two things I was trying to respond to there. One, lead time in advance of a window, as well as the window itself.

MR. BROWER: Right.

THE WITNESS: And for other changes, such as changes to the domestic content requirements and refinements to those contractual obligations, we would spend more time giving advance notice of upcoming change, and then post a draft change, and then welcome comments on the change.

Those changes were typically, at least from our side, perceived to be less urgent. There were refinements requested to accommodate the manufacturing capabilities that were planning to come into the province of the wind blade manufacturers or the nacelle assembly operations.

So there was a greater opportunity to -- or less urgency with getting an amendment in place and in effect.

So we would provide and afford greater lead time, and then greater comment period, and then ultimately an implementation period.

So, yes, there was a significant amount of complexity associated with a connection point change strategy which could have been assessed and reviewed months or, you know, years ahead of an ultimate connection point change window.

But it is just I'd say it wasn't our normal practice to post something on Friday, indicate it starts on Monday and closes the following Friday, again, out of really professional courtesy to an industry who may have been waiting for two years or a year and a half for the Bruce-to-Milton capacity to be made available.

It doesn't mean that the ten -- five-day or ten-day or 15-day window would have resulted in a different outcome or a different -- or an opportunity, an adequate opportunity, for an applicant to actually do the analysis and get studies completed and identify

different connection points than they would have if they had a five-day window, but it is just more from an optics perspective, from a perception perspective, we preferred to have a greater notice period, and then a greater opportunity to act.

As I said, under this scenario there was an urgency on the government, an urgency on the government side, as is common with many government decisions, to execute once a decision is made. But often it takes far longer than is needed or seems warranted to actually make the decision.

So in this scenario we were -- you know, had draft schedules looking at starting things in April, starting things in May. It got pushed out to June. But the end date was regularly reaffirmed as being: It can't go past June 30th. It has to be done in June.

So there was always, as with many -- again, many government decisions, there's no pressure to make the decision, but once it is made, it has to be executed overnight. So that was, I would suggest, the scenario that we ran up against is we wanted to provide and afford a greater period of time in which to administer our program, but ultimately decisions were made to move

quickly, and it appears to be, you know, reinforced by the CanWEA message that the wind industry itself was advocating for -- I forget the words.

MR. BROWER: The majority of its members. It is repeated twice in that indication.

THE WITNESS: Right.

MR. BROWER: Had you not received a directive from the Ministry for this five-day window, do I understand from your testimony that ordinarily it would have been the case that the OPA would have put a rule change out for comment and received -- solicited comments on the rule change from the stakeholders?

THE WITNESS: Depending on the rule change.

MR. BROWER: Right.

THE WITNESS: There were some where we were trying to close loopholes, in which case it was impossible to put a notice out.

MR. BROWER: Sure. Of course.

THE WITNESS: Otherwise, it draws attention to the loophole.

MR. BROWER: Right.

THE WITNESS: So there were circumstances where we would just announce, you

know, effective this minute, this rule is in effect.

MR. BROWER: Right.

THE WITNESS: But certainly in making decisions around FIT rules or FIT contract language that was not time-sensitive or urgent, we preferred to post a draft and seek comment, and then implement 20 days, 20 days, 20 business days each.

MR. BROWER: Is my understanding correct that while the FIT rules in some form originally foresaw the possibility of a change of connection point, what was foreseen in those rules was a change in connection point potentially within the district, like Bruce or west of London, for example, or the others?

THE WITNESS: I don't believe that there was ever any deliberate restriction on connection point changes. Transmission and zones are -- again, this is Bob's area of expertise, but they are kind of electrical constructs as opposed to hard and fast geographic boundaries often times.

So, no, there was -- to my recollection, there was no explicit limitation on how the economic connection test and the connection

point change window would be operationalized.

As I mentioned, applicants were entitled to submit an application with no connection point specified. So in that scenario, if we were to have had such a restriction, the OPA would have to make a judgment and say, Well, your project site is here, so we deem that your connection point would have been in this region, which we didn't want to do.

So I don't believe that there was any -- well, definition around how the details of the economic connection test would be administered in regards to limitations on connection point changes.

MR. BROWER: Well, eventually we all have to be sure on that, because a point has been made by the -- by Mesa throughout these proceedings that the FIT rules, as I recall the presentation, and everything that was involved in applying them up until much later, was that interconnection -- change of connections were anticipated or limited to being within the -- you call it region or district, such as Bruce and northwest and so forth.

And, therefore, when there was

some indication that the Bruce-to-Milton line would be available for connection, nothing said that it would be possible to connect from out of the Bruce region to the Bruce-to-Milton line.

And what was shown here before in the minuscule type that was blown up did talk about, you know, connections to the Bruce-to-Milton line, but it didn't indicate from where.

So as the designer of the program, you don't recall that there was any express or implied restriction in the FIT rules limiting potential future interconnections to within the region?

THE WITNESS: Yes. The entire ECT process that was anticipated, you know, in the rules only constitutes three or four paragraphs, but it is an incredibly -- was to be an incredibly complex and detailed administrative process that was going to be developed subsequent.

MR. BROWER: Well, it got to be more than a few paragraphs when you look at what was required for the people to submit an application.

THE WITNESS: Yes. And that was just, you know, for the purposes of the

application, and then for the purposes of operationalizing the economic connection test, there would have been or there were continued discussions internally, again mainly led by the power system planning group, around how to optimize the grid to accommodate the vision of the Minister at the time for as much renewable energy as possible.

So that process was anticipated to evolve post first draft of the rules, and again Bob Chow's group did a number of public presentations around what that detailed process would look like, as stakeholder outreach post-launch, but how the OPA would administer the ECT in, you know, subsequent months or years.

So that part of it wasn't fully developed. As I said, there was no -- to my knowledge, there was no explicit restriction on how connection point changes could be permitted or prohibited or limited. But, in general, with the FIT rules and the FIT contract, if it's -- if it is not prohibited, then people can do it.

So until -- unless and until there's, you know, specifically a rationale and a reason and, you know, here is how the process will

play out and likely, you know, a rule amendment to accompany that, then we were, you know, working to evolve all of those processes post-launch and pre first ECT or next round of capacity allocation.

MR. BROWER: Okay, thank you very much.

THE CHAIR: I have just one follow-up question. When you answered a question from one of my colleagues about the fact that you learned about the existence of what you called framework agreement with the Korean Consortium in the fall of 2009 before the launch of the FIT program, you said you were surprised and disappointed.

You also said that you tried to advise stakeholders of these two parallel procurement efforts.

How did you advise stakeholders of these two parallel procurement approaches?

THE WITNESS: So the primary communication around the existence of the framework agreement was delivered by government. It was at that point a government framework agreement between Ontario government and the Korean government and its agents or its organizations.

And so primarily in presenting how the FIT program was going to be administered and how it was going to be executed, there were many questions about: How will FIT accommodate this competing procurement exercise?

And we I believe through some of the stakeholder discussions indicated, and through in fact some of the directives there were specific capacity allocations dedicated to the Korean Consortium in order to reserve capacity for them.

So our main means and vehicle for communication was through the connection capacity tables that we would update that would account for the electrical capacity that was being made unavailable for FIT applicants through the updated capacity tables.

So we would indicate that as commitments are made to the Korean Consortium, the capacity of those projects will be reflected in upgraded -- updated connection capacity tables, and, as these projects materialize, stakeholders will be informed of their impact on grid availability.

So it was indicating that not all of the projects were defined in terms of their

geographic locations, but, as they were, we would update the tables to reflect that capacity so as to advise stakeholders that that capacity would not be available for FIT contracts if it was going to be made available for KC projects.

THE CHAIR: I understand the point easily about the reduction of capacity on the grid in general, but geographically you did not know where the impact would be felt, is that right, at least not at the beginning in September or October 2009?

THE WITNESS: That's correct. The projects -- my recollection is that the projects that were to be developed by the Korean Consortium were specifically identified subsequent to the FIT program launch.

THE CHAIR: Do you remember when that was?

THE WITNESS: I do not.

THE CHAIR: Yes. We will check it then.

THE WITNESS: There were leads in -- Shawn was -- anyway, they were more knowledgeable about the KC, on discussions.

THE CHAIR: Thank you very much.

If there is nothing further, then we can --

MR. MULLINS: Madam Chair, I apologize. I do have one follow-up question based on questions from the Tribunal.

THE CHAIR: Yes.

MR. MULLINS: I will do it from here to make it quick. If the witness could turn to tab 16, which is document C-77. This is the June 3rd directive. We can put it up. I am interested in the second page, paragraph 3.

Tab -- I'm sorry, tab 16.

MR. LANDAU: Sixteen?

MR. MULLINS: Document number C-77.

MR. BROWER: In his volume?

THE CHAIR: Sixteen.

MR. MULLINS: Sixteen in Mr. MacDougall's volume.

MR. BROWER: Fifteen?

MR. MULLINS: Sixteen; one-six.

MR. BROWER: Sixteen.

MR. MULLINS: I misspoke earlier, I apologize.

FURTHER CROSS-EXAMINATION BY MR. MULLINS:

Q. This is the June 3rd, 2011

directive, number C-0077, for the record. Now I'm specifically looking at paragraph 3 on page 2.

And I would like to follow up on Arbitrator Brower's question about the rule changes and whether or not they were there. It indicates that there was a directive here indicating that only where the proponent wishes to change a connection point to a connection point in one of these two areas.

I was wondering why, if the idea was always that you could change different areas, why it was necessary to have a directive make that explicit.

THE CHAIR: I don't think the witness has said that it was necessary to have a directive; right? That is a whole question that we had and I would leave open for the time being.

Now, once I have said that, what is the question that remains?

BY MR. MULLINS:

Q. I guess the question is: If it had always been contemplated there would be a switch between regions, why was a directive -- I'm not saying it had to be a directive, but why was there a directive written that made it explicit a

connection point could be done through one of these two areas?

A. So one part of the answer is that the government did want to limit the total contract awards to a finite quantum, as we see in parts 4 and 5.

So certainly there was a desire to limit contract award results to show up in the Bruce -- for projects to end up in the Bruce transmission area or the west of London transmission area. I'm not sure if that is your question, but...

Q. I guess that answers why it was only those two areas, but I guess the question is: Does the witness remember any discussion about making explicit that you could change your connection point to one of those two areas? That is the language I was focussing on as opposed to saying just change your connection point.

A. So the only part of the discussion that I would have been involved in was really the outcome has to be finite. The outcome of the allocation process has to be finite and, as prescribed here, shall not exceed, you know, 1,050 megawatts in aggregate between the two areas.

So I believe that is part -- forms part of the rationale for why there is an explicit reference to the Bruce and west of London transmission areas.

MR. MULLINS: No further questions. Thank you.

THE CHAIR: Thank you. Fine. So that completes your examination, Mr. MacDougall. Thank you very much for your explanations.

THE WITNESS: Thank you.

THE CHAIR: We will now take a 15-minute break and resume to hear Mr. Chow, who is the next witness; is that right?

MR. SPELLISCY: I guess I have a question on the rest of the afternoon. It is 4:30. We have both Mr. Chow and Mr. Cronkwright here. Perhaps the claimant -- can we send Mr. Cronkwright home, or do we think we are going to get to both of them this evening?

THE CHAIR: I very much doubt it, but let's try and do some estimates.

What is the estimate on the cross-examination of Mr. Chow?

MR. MULLINS: Recognizing we have been using our time --

THE CHAIR: There are a few things that sometimes you could keep for submissions, because remember you have three hours of closing on Saturday, and then you have to post-hearing briefs. So sometimes I feel that you could save time by doing that.

I am of course saying this to both parties.

MR. APPLETON: Could the secretary perhaps give us a little time update? That might help us.

MR. DONDE: I would need a minute to get that.

THE CHAIR: He will give it to you.

MR. APPLETON: I think that would affect our decision as to how long we would go.

THE CHAIR: Fine. Now, does it make sense that we consider starting with Mr. Cronkwright tonight? My answer, thinking out loud, is no.

MR. SPELLISCY: I am being advised Mr. Cronkwright might need to leave by 5:00 for child care reasons today. So it is 4:30 now. He might be able to stretch it a little, but if we're

going to have Mr. Chow now --

THE CHAIR: So I can only support the purpose of his leaving, and so obviously that -- we would then hear him tomorrow morning first thing. Is that acceptable to the claimants, as well?

MR. MULLINS: Yes. The next witness is Mr. Chow, of course.

THE CHAIR: Yes, yes. We were just thinking ahead.

MR. MULLINS: That's fine. The answer is that by some miracle we end up finishing earlier than we expected, we will set the limit. I can't -- I am pretty confident we will not finish Mr. Chow by five o'clock. So I think Mr. Cronkwright could leave.

THE CHAIR: Mr. Cronkwright can go home, yes. Yes.

MR. MULLINS: Yes.

THE CHAIR: And he should come back tomorrow morning at 9:00, yes.

MR. DONDE: The claimants have used about eight hours and 57 minutes. And --

THE CHAIR: I think that is all we need for now. We will check on the respondents

afterwards. That gives you -- I mean, if Mr. Cronkwright is not heard today, I don't need your estimate now. You can think about it over the break.

So let's resume at a quarter to 5:00.

MR. MULLINS: Sure.

--- Recess at 4:26 p.m.

--- Upon resuming at 4:51 p.m.

THE CHAIR: Fine. Are we ready again? Yes. On the claimant's side, as well?

So, Mr. Chow, thank you for being with us. For the record, can you please confirm that you are Bob Chow?

THE WITNESS: Yes, I confirm I am Bob Chow.

THE CHAIR: You're director of transmission integration at the OPA?

THE WITNESS: Yes, ma'am.

THE CHAIR: You have produced two witness statements in this arbitration dated February 27 of this year and June 27 of this year?

THE WITNESS: I did.

THE CHAIR: Yes. You are here as a witness. As a witness, you are under a duty to

tell us the truth. Can you please confirm this is what you intend to do?

THE WITNESS: I will.

AFFIRMED: BOB CHOW

THE CHAIR: Thank you. So you know how we proceed. Ms. Squires will first ask you questions in direct on behalf of Canada and then we will turn to the investor's counsel, please.

EXAMINATION IN-CHIEF BY MS. SQUIRES:

Q. Good afternoon, Mr. Chow. I just have one question for you and that is whether you have any corrections to make to your witness statements.

A. I don't have any corrections.

MS. SQUIRES: Thank you.

THE CHAIR: Mr. Mullins.

CROSS-EXAMINATION BY MR. MULLINS 4:53 P.M.:

Q. Good afternoon, Mr. Chow.

A. Good afternoon, sir.

Q. What you don't know is we have limited time here to ask questions, and you are witness number 3 or 4 today. I lost count. So you are number 4, and we have limited time. So I would ask you to listen to my questions and try to

answer them, and if there is some followup, you can do so, but if you could listen to my question and try to answer it; is that fair?

A. Yes.

Q. If there is any clarification, your counsel will have a chance to do so on re-direct, okay?

A. Sure.

Q. It may very well be the Tribunal will ask you questions, as well, and you will be able to answer those.

So you have your two witness statements in front of you, and then there is a notebook on the corner, if you would pull it in front of you. Oops, the other one. That notebook has exhibits that we may or may not -- likely not going to a lot of those. I may go to those, and so having that it in front of you will be helpful.

Can you just remind us for the record what your role was at the OPA during the relevant time period? And the relevant time period for us essentially is from September 2009 to July 2011.

A. At that time, I was still the director of transmission integration at the OPA. I

have not changed the job since then.

Part of my job is to do transmission planning and also the regional planning, and in support of the procurement, of which the FIT program is one, as related to the connection availability and also the expansion of the system.

Q. Mr. Chow, did you work both dealing with the FIT program and the Korean Consortium agreement, as well, in terms of the implementation of that?

A. My responsibility was to look after the connection part both for that program and any other procurement.

Q. So, in other words, not only did you work with the connection points for the FIT program. You were also working with connection points for the Korean Consortium, as well?

A. Yes.

Q. Got it. And there's been some discussion about the ECT and connection points. We have had testimony, so we are on the same page and make sure you agree, that there originally was going to be a province-wide ECT; right?

A. Yes.
Q. That never was run; right?
A. Sorry?
Q. That never was run, the province-wide ECT?
A. There was never a province-wide ETC.
Q. Do you remember, specifically with respect to the province-wide ECT, whether or not that the OPA ever made an explicit statement to stakeholders that a stakeholder would be able to switch from one region to another region, an explicit statement?
A. Well, we have always said that there's ability to change connection point. It's not related to region, because region in terms of connection point is really electrical definition.
When there is a connection to the part of the system, then they define what the region is. The region isn't defined by itself without relation to the connection to the network.
Q. Well, for example, sir, you do remember -- if you could look at tab 1 of the notebook in front of you, and this is for the

record C-258. If I could point you to the 5.4(a) of the FIT rules, you do remember that -- this talks about the economic connection test. That is the ECT; right?

A. Yes.

Q. It says it will be run for each region of the province at least every six months?

A. Region in that sense is we define certain electrical region across Ontario. It depends on the characteristic of the transmission system. It is much easier administratively to look at different parts of the system where then the project connected to that part have -- you could, say, have similarity and opportunity among them that's similar.

Q. The contract -- do you remember that the west of London and the Bruce area contracts were the last FIT projects to be awarded; right?

A. They are the last after the Bruce-to-Milton allocation, yes.

Q. Correct.

A. Yes.

Q. In fact, the other regions

were awarded before that?

A. Well, all the regions gone through TAT/DAT across Ontario, so we don't make distinction about which region undergo TAT/DAT. We do a TAT/DAT for the whole system as part of the launch period.

Q. And at each one of those contract awards, they were ranked per region, weren't they?

A. They are still based on provincial ranking. For the purpose of showing them to be helpful to participants, we group them into regions. And there are certain projects that do not have connection points, which is the enabler class. We put them where they are physically located. Again, a lot of it is just for information purpose.

Ultimately, the ranking is based on provincial ranking.

Q. I understand, sir, but I am just trying to understand your answer. It is true that the proponents were ranked in regions, correct, as well as the province wide?

A. Well, again, as I said, I mean for information purposes we group the

one -- the different projects under regions. The ranking would be in the order of which they are provincial ranking in the region.

Q. And in those particular regions, prior to the Bruce-to-Milton and the -- sorry, scratch that.

Prior to the Bruce and west London regions, then awards were entered based on the rankings in the particular region; correct?

A. I don't quite understand the question. Award was?

Q. Sure. I will rephrase it.

Prior to the awards in the west London and Bruce regions, the awards of the contracts were awarded in the other regions based on the rankings in the regions?

A. I still don't fully understand the question. If I could put it this way, after the provincial-wide TAT and DAT we did for the launch period, the project that did not receive the contract after that group were placed in different regions of which then, for purpose of being helpful with the information, we grouped them in those regions.

Those regions obviously have

project that currently cannot be connected.

Q. Okay. But essentially those that were not awarded contracts, the ones that were awarded contracts had ranked higher in the region; correct?

A. They would be the one that actually passed TAT/DAT. They were high on provincial ranking and they have the contract.

Q. They were also higher in the region; correct?

A. That is somewhat evolving, because they are highest ranking in the sequence of which the provincial ranking was provided to us.

Q. The answer to my question --

A. We did not do the TAT/DAT based on regional ranking. We did it across Ontario wide based on provincial ranking.

Q. Okay. But you did rank them, as well, and award them in the areas where they were highly ranked in the area; correct?

A. But, again, they win the contract because they have the ability to connect and they are high on provincial ranking. After those contracts are identified, they are shown as part of a certain region for information purposes.

But it is nothing in the region ranking that were contributing for rewarding of the contract.

Q. Now, you mentioned earlier that the -- let me make sure I understand. There never was an explicit statement that a FIT proprietorship from one region could connect to another region; right?

A. There is no explicit statement that you say you could or you cannot. Our assumption is, where it is possible and there is allowance for change of connection point, and people connect to wherever electrically it makes the most sense to connect.

It is not on a region basis. It is where on the transmission system you could connect.

Q. That would then mean someone in a region, for example, bordering the Bruce could connect into Bruce; is that what you're saying?

A. Well, if someone have the capability to go from one region to another because the connection point is easy to access, then they certainly have the ability to do so.

The change in connection point, the basis of it is to allow a greater opportunity

to connect to where the spaces are. I mean, this is why that was provided.

Q. I guess what I'm asking is that -- but that was all, again, originally told to stakeholders as part of a province-wide ECT?

A. The ECT process, it is intended to be applied province wide.

Q. Right. So that never happened, but you're saying when we told about the ECT we thought was going to happen, we were going to allow people to change their connection points?

A. As part of the ECT process, one of the provisions allowed a change of connection point.

So we run ETC. There would have been allowance as part of that process for anybody in Ontario to change connection point.

Q. Okay. And as part of the ECT?

A. As part of the ETC.

Q. So I guess, then, that would mean that somebody in, for example, the Niagara region then could connect to the Bruce region; is that what you're saying?

A. It could, but it would not be

practical. Why would somebody in Niagara connect to the Bruce?

I mean, you know, you could. You could have northern Ontario connecting to the Bruce, but --

Q. So when the change was made in June of 2011, the OPA, pursuant to the direction by the Minister of Energy, only limited the ability for proponents in the Bruce and London region to change their connection points; correct?

A. I believe that's contained in the directive.

Q. And so there was no ability for other proponents in other regions that neighboured the Bruce region to connect into Bruce; correct?

A. Not in accordance to the directive.

Q. Was there any discussion at the OPA whether or not it would be fair to allow other proponents in neighbouring regions to also connect into the Bruce region?

A. Not with myself.

Q. Okay. Well, you're one that was in charge of the connection points, weren't

you?

A. In what sense? I design the process. I discussed the implication of the process. Many of the policy matters I am not involved in. I am more concerned about the operationalizing of the process.

Q. Now, do you remember, at the time that NextEra was allowed to connect to the Bruce region, how far away it was from the Bruce region, this project?

A. Sorry, I didn't get that question.

Q. Do you remember how far away NextEra was from the Bruce region where it was allowed to connect for the connection points?

A. NextEra had a number of projects. I am not sure which one do you -- are you focussing on?

Q. Do you know what the NextEra six-pack is, sir? Have you ever heard that term?

A. Sorry, I've never --

Q. Never heard that term, NextEra six-pack?

A. No.

Q. Okay, thank you. Weren't you

aware that NextEra was 100 kilometres away from the connection points that it eventually got in June 2011?

A. Again, it is up to NextEra. It is not for me to comment on how NextEra connects to the project.

Q. Now, you also were aware or involved with the ability of the Korean Consortium to connect; correct?

A. In accordance with the agreement, the GEIA.

Q. And were you aware of how the Korean Consortium was purchasing projects in Ontario in order to comply with its agreement with Ontario?

A. No, sir, I am not aware of that.

Q. You're not aware that they were buying low-ranked projects in the area to satisfy its obligations under the GEIA?

A. No, I am not aware of that.

Q. Okay. Now, you participated in the GEIA working group, did you not?

A. Yes. I participate in the assessing whether potential connection points are

capable of connecting the project.

Q. What was the GEIA working group, sir?

A. It is a working group that consists of people that look at the various proposals of the project from the Korean Consortium and agree on connection points that they propose.

Q. What people?

A. Sorry, can you repeat?

Q. You said it consists of people that will look at various proposals. What people?

A. The Korean Consortium.

Q. Well, who was part of the working group, besides yourself and the Korean Consortium people?

A. Again, I don't know the people's name in the Korean Consortium side.

Q. Well, would you tell us essentially what their roles were?

A. No, I don't.

Q. What about the government side? Were you the only government person involved in the group?

A. I'm not a government person

I'm from the OPA. Shawn my colleague is also one.

Q. Okay.

A. Beyond that, I don't really remember the rest.

Q. So from the OPA side, it was just you and Mr. Cronkwright, and then some members of the Korean Consortium.

And you were helping them figure out where they could connect to the grid. This was not something that you did for FIT proponents, did you?

A. Well, as per the agreement, the Korean Consortium has a priority access on the grid. The system we provide is they have a number of potential connection points which we would look at, whether it is capable of connecting the project or not. We do not propose any particular location for them.

Q. So this was a benefit given to the Korean Consortium pursuant to the agreement and not shared with the FIT proponents; right?

A. And that is not for me to comment. I carry out the work of looking at the connection points.

Q. Okay. So far as you know,

only the Korean Consortium got the benefit of the working group and not members of the FIT program; right?

A. Under that agreement, yes, we have been helpful on that.

Q. Can you pull out tab 8 of your notebook, sir?

MR. SPELLISCY: The exhibit number for the record?

MR. MULLINS: I'm sorry, C-73.

BY MR. MULLINS:

Q. Can you tell us what this document is?

A. I believe it is a listing of the projects in the Bruce area.

Q. And you see that it is, actually, the number -- they are all here listed by area; correct? Do you see there's a number of --

A. Yes, the first page I was looking at is the Bruce area, and then after that central and so on.

Q. And so these other areas were awarded contracts in the rankings pursuant to these areas; correct?

A. Again, I don't understand the

question about awarding the contract.

Q. Well, when you looked at these various areas, for example, the Niagara area, when these contracts were awarded, one of the things you looked at is how they ranked within this area, for example, right, if you look, for example at page 6?

A. I have to apologize. The font is very small. That is why I'm having difficulty reading this.

Q. I apologize. We will try to expand it here on the page.

THE CHAIR: If you can look at it on the screen, we will try to enlarge it.

MR. APPLETON: We will try to enlarge it with the computer.

BY MR. MULLINS:

Q. So what I am asking you, I don't know if -- can you see it better there on the screen?

A. Yes.

Q. So, for example, there is an area ranking, isn't there, on the side, in addition to the province-wide ranking?

A. Yes. I believe I answered

that question earlier. The provincial-wide ranking is the ranking that we actually use in priority in terms of looking at the project.

The area ranking is for the purpose of -- for listing purposes to indicate the well -- the priority of a group of project in that area.

Q. In that area. So, for example, those with their higher rank in the Niagara area, for example, were more likely to get the contracts than those lower ranked; correct?

A. But, again, the true ranking that we used for assessment is the provincial-wide ranking.

So we could have a project that is highly ranked in one region, but it is low in provincial ranking. It is really still on the basis of provincial ranking that we look at this.

And obviously the grouping of a project, a certain group of projects in an area, won't get order based on the provincial ranking.

Q. Where does it say that in the FIT rules, sir?

A. With the FIT rule, it is always in terms of the -- in the launch period, the

ranking is based on the criteria shovel readiness criteria. After the launch period, it would be in the order of the time stamp. So that would be the provincial ranking.

Q. Where does it say in the FIT rules that a province-wide ranking might overcome a region-wide ranking or area ranking?

A. Again, the regional ranking is for the purpose of information presentation. It is not used for any purpose in terms of ranking on a regional basis. It is still a provincial ranking that matters.

Q. So the answer is there is nothing in the FIT rules that specifically says what you just told us; correct?

A. I think the FIT rules still look at in terms of where the project comes in, either in the launch period because of shovel readiness, or after that based on time stamp. And that gives the provincial ranking.

So when we execute the actual testing, it will be in the sequence given to us by our electricity resources department in the order of provincial ranking.

Q. You are aware, though, that,

for example, the Korean Consortium taking priority access in the Bruce area affected the ability of projects in the Bruce region to obtain FIT contracts; correct?

A. Yes. I mean, all projects compete for connection across Ontario. Obviously a project given priority will have an impact on other projects.

Q. And so -- thank you. So let's talk a little bit about the Bruce region. In fact, in September 2010 there was a directive limiting the amount of capacity specifically in the Bruce region; correct? Do you remember that?

A. Say that again.

Q. Tab 5 of your notebook. For the record, it is C-119.

A. That is in 2011, I believe.

Q. No, I'm sorry. Tab 5 is September 17th, 2010. Do I read that wrong?

A. Sorry. This is Korean Consortium, sorry.

Q. There is a later one.

A. There is a later one.

Q. I was asking about the September one, exactly.

So in this letter, then, you see where they reserve 500 megawatts in the Bruce area?

A. Yes.

Q. And so that affected the ability of the projects in the Bruce region to obtain contracts; right?

A. Well, of the total capacity, then 500 megawatts would be held in priority for the Korean Consortium.

Q. So had that not happened, more projects that were located in the Bruce region would have been able to obtain contracts; right?

A. That's probably true.

Q. Okay, and so what I want to talk to you about, then, sir, is about the capacity in the Bruce region.

Now, first, if you go -- now we are going into confidential.

--- Upon resuming confidential session at 5:16 p.m.

--- Upon resuming public session at 5:26 p.m.

BY MR. MULLINS:

Q. If you go to tab 13.

A. Yes.

Q. You mentioned the reactor switching. So if I am reading this chart

correctly, isn't it correct that there was 140 megawatts that would have been available in the Bruce region had the OPA decided to do the reactor switching; correct? Is that what this says?

A. Again, the page is showing the potential that one can get if one apply all of those measures that is listed in this page.

MR. SPELLISCY: I'm sorry, are we in confidential session, because there is confidential information on this page as shown by the boxes.

MR. APPLETON: So take it off the slide for a minute. Thank you. Now, are we in confidential?

MR. SPELLISCY: No, we came out.

MR. APPLETON: Are we showing confidential documents? So perhaps we might switch to confidential.

--- Upon resuming confidential session at 5:27 p.m.

--- Upon resuming public session at 5:35 p.m.

THE WITNESS: The static VAR compensator is one of the measures as part of the 2010 long-term energy plan priority project for us to take a look at in order to increase the Bruce capacity.

We did take a look at it. It increases roughly the numbers by 200 megawatts, depending how hard we push the system. The cost is in the order of about $100 million.

The decision of whether to do it or not wasn't made, because it all depends on the value you get out from that.

So, again, a lot of this whole series of options was to get -- to explore, to look at the numbers that you can get out of it, in some cases what is the cost of it.

In this particular case, it would have been cost $100 million for 200 megawatts of increase in the Bruce.

BY MR. MULLINS:

Q. Or 230 megawatts; right?

A. 230, depending on how it is pushed.

Q. Okay. So fair enough. So then if I understand, then, while it chose not to do so... Just a second.

Can you also turn to tab 20? This is confidential.

--- Upon resuming confidential session at 5:37 p.m.

--- Upon resuming public session at 5:40 p.m.

MR. MULLINS: Now, actually --
THE CHAIR: We are back in public now.
MR. LANDAU: But you haven't announced it.
THE CHAIR: We should be back in public. Technicians in public?
MR. LANDAU: Yes.
MR. MULLINS: Right. This is not confidential?
MR. LANDAU: Right.
BY MR. MULLINS:
Q. Are you ready?
A. Yes.
Q. All right. Actually, I want you to go to page 6 of this document. And, again, can you identify that this is the running of the TAT data; correct? Is that what this is?
A. Again, I believe this is a listing -- again, you have to correct me, because I can't read it.
Q. I was hoping you could read it on the screen.
A. My belief is this is a list that have failed -- all of those projects failed

the original TAT/DAT during the launch period. So they are all projects that are waiting for additional capacity to connect or ECT.

Q. Perfect. So if you go to the first, this is in the west of London area where it says International Power Canada; right?

A. Okay, yes.

Q. Can you tell us what the province ranking is for that project?

A. That's --

Q. You have to scroll down. Can you scroll down?

A. That would be on the second column.

Q. Yes. What is the province ranking for that project?

A. Second and third.

Q. Okay. But it wasn't awarded a contract, right, at this time?

A. Yes.

Q. And the reason why it wasn't awarded a contract is because in the west of London area, there wasn't any transmission capacity; right?

A. Right.

Q. Okay, thank you. I want to check with my colleagues and see if I have any additional questions. I will turn over the witness.

THE CHAIR: We're waiting to see whether there are other questions.

MR. SPELLISCY: Give us just one minute. I'm looking to see if there are any questions.

THE CHAIR: I'm letting the witness know so he knows what is going on.

RE-EXAMINATION BY MR. SPELLISCY AT 5:44 P.M.:

Q. Thank you. Just a few questions. The skies are darkening already, so I will try to get you out of here soon, Mr. Chow. I just wanted to clarify on the record the document we were looking at there just now, the one with the tiny, tiny font, this is the ranking of the projects that failed the TAT and the DAT originally; correct?

A. I believe so.

Q. Now, you had been asked some questions earlier about how contracts were awarded, prior to this ranking. I think you had explained that the TAT/DAT was run for the entire province.

Could you just walk us through how that would have happened? In which order would you have considered projects for contracts and how would that have related, if at all, to the areas in which they were eventually put?

A. I am happy to do so. The ranking that are given to us, us in terms of this transmission group, to look at whether the system is capable of connecting the project. We see that list from the electricity resources folks.

So they do the ranging based on shovel-readiness, time stamp, many other factors they would decide.

So once the ranking come to us, which is provincial ranking from one to as many projects there is, we would execute in the sequence of which the project is ranked.

So you have to do project one before we do project two. We don't go to region A and region B. So the way it is done is because sometimes project can affect each other, so we do it in a sequence of when the project come in to us.

So that's why provincial ranking is very important, because we do do it in that sequence.

Now, obviously there are places in Ontario where there is absolutely no relationship to each other, northern Ontario and southern Ontario. One can, through processing, speed up the process, if time is an issue, to do some of the projects kind of in mutually exclusive way, but it always come back to is the provincial ranking that matters.

MR. SPELLISCY: Thank you. I don't have any other questions.

THE CHAIR: Okay. Any questions from my co-arbitrators?

MR. LANDAU: Just one.

THE CHAIR: Let me just check.

MR. LANDAU: Just one.

QUESTIONS BY THE TRIBUNAL AT 5:47 P.M.:

MR. LANDAU: I just have one question in terms of internal organization within OPA. What was your relationship with Jim MacDougall? Can you just explain who was doing what and how you're related to each other?

THE WITNESS: Jim or Shawn, which you will be listening to next day, they are in a division called electricity resources. They are the people that does the actual procurement. They

are responsible for the procurement. So they have the rules, the qualification of applicants, and so on.

Now, as part of any procurement, you have to have the ability, even if they meet all the criteria and the priorities, to see if they can connect, because there is not much point getting a project contracted in an area where there is no capacity to transmit it.

So that is our job, to do that screening before they let the contract, to see if that project is in the right location in order to allow it to freely deliver the energy to the system.

Now, so that process, once they have done all of the checking and ranking, they come to us. We do the assessment as part of TAT/DAT, and then we send the result back to them, which then they go and do the process for the contracting.

MR. LANDAU: Thank you.

THE CHAIR: You have explained that you would receive the applications according to their provincial ranking and that is how you would treat them.

I am not clear. You said that the regional ranking was for information purposes. I am not sure I understand this, because if only the provincial ranking was relevant, then you could have stopped there and not have a regional ranking.

So you had a regional ranking. What was the purpose?

THE WITNESS: I think the purpose is to help people see themself, and most people see themself, because the capability is organized on regional basis, to see who around them and who is a different priority to them are remaining looking for capacity.

It is an exercise where people could do it themselves. They could go to the provincial ranking and draw their own grouping.

For purpose of being helpful, we organize them into the different regions where we believe the project would be connecting to.

Now, in some cases, because they are enabler projects that have not decided connection point, we would just artificially put them in the location of the project even though they may change the connection point later on and go to a different region.

So it again is for display purposes to allow people quickly to look at who is in the region that they are competing for and in what order.

As you notice in all of those columns, there is an indexing of the regional list, one to end, but the provincial ranking numbers is always there.

You could be very high on the region ranking and you could be very low in provincial ranking. Again, that information is always kept. So we don't suddenly decide that only this group of projects have a priority among themselves. It is still based on provincial ranking.

THE CHAIR: And the information that you give has value for the proponents in respect of connection point change, or why would they be interested in knowing who is around them and what ranking?

THE WITNESS: And there is many reasons why people want to have information. Some people may want a decision to stay on. They know capacity is coming. They want to know how many people is ahead of them, how big they are within

that grouping.

Of course it is never a sure thing, because people can drop out, too. So it is as much information we provide that everybody have the same information.

As you know, there is always limitation how much information can we have, what is useful, what is not useful. So in our judgment, it is useful to do the provincial ranking, at the same time group them into regional rankings, so people have a better view of who is actually competing with them, because a lot of them are there still looking for future capacity to allow them to connect as in the case of the Bruce.

And for change in connection point, again, it is quite useful, but it is -- none of the information we provide on, let's say, just a continuous listing of provincial level, that they couldn't themselves get that information out, extracting that information out.

THE CHAIR: I am looking for something that struck me in your witness statement. Let me see whether I have it. You very much insist on the location of the circuit as opposed to the physical location, and that is why you say the

region is not that important, because you could connect to another region.

Yet it has a bearing, because you cannot connect -- I mean, you can connect to another region provided you are close to the border, or not?

THE WITNESS: Yes. It is absolutely critical that the connection point determine the ultimate region to be tested.

So until there is a connection point, a project is -- it is not really in a region. I mean, you have to know where it connects.

It matters very much whether it is on this side of the station or that side of the station that determine the region.

Now, we happen to be in the Bruce area and the west of London area where projects can go back and forth. In many areas that is not a possibility. So, you know, it is somewhat impractical sometimes to say project move between region.

It is only in the rare instances, which this case in the Bruce happened to be one, of which there is a choice. And that choice has to be

made in respect of a connection point, because I cannot -- I say just because you are located physically in the Bruce that you actually then are connected electrically in that particular Bruce. It could be connected elsewhere.

THE CHAIR: Elsewhere close to where you are?

THE WITNESS: But could be a different region electrically.

THE CHAIR: It could be a different region, yes.

THE WITNESS: That's why we want to make it really, really clear it is really the connection point that matters at the end of the day, not where they are physically located, because there is many reasons why a developer may want to connect at different points on the system.

THE CHAIR: Thank you, Mr. Chow. That is all.

MR. BROWER: I have a question. When the applications are rated on a provincial basis or a regional basis -- when applications are rated by OPA on a province-wide basis or on a regional basis under the FIT rule criteria, there is no element in that rating of proximity to or

access to a connection point?

THE WITNESS: No, sir. What the FIT rule have is if you are rated on a provincial-wide basis, let's say on a launch period based on shovel readiness, there would be a rank based on that, and that is on the whole Ontario.

There is no connection to what region you are, where you are connected. Those are just a provincial ranking based on the rule that you have.

MR. BROWER: Right, okay.

THE WITNESS: So if is it based on time stamp, exactly same thing apply. You could be could be a project in any region.

So provincial level, the notion of a region do not apply.

MR. BROWER: Right.

THE WITNESS: It's only for purpose of allocating them on a listing, on looking at regional capability, that we start looking at it when we start testing them.

Now, the regional capability require you to know where they're connected to define the region they are in.

For listing purposes, we make a

certain assumption what grouping makes sense to people looking at the listing. So where they are connecting, of course where we find the region they are in, and also for project that do not have a connection point, we allocate them to the area where they are physically located, okay? There would be no other better way of doing that.

So that's why there is a distinction of putting them in region for information display purposes. There are requirements to test them on the regional capability, but we need to know the exact connection point, and then there is the provincial-wide ranking that determines how the project are ranked in sequence.

MR. BROWER: Now, with all respect, I am more confused than I was before.

The province-wide ranking is done without respect to proximity to a connection point?

THE WITNESS: Yes.

MR. BROWER: To the connection point?

THE WITNESS: Yes, sir.

MR. BROWER: But the regional ranking is done with some consideration of

proximity to a connection point?

THE WITNESS: Again, for the purpose of information display, there is no regional ranking, per se. There is only a provincial ranking.

The testing is in the sequence of provincial ranking. Regional ranking is for information purposes.

MR. BROWER: Right.

THE WITNESS: So, therefore, it is there to -- for illustration purpose of grouping the provincial project into different regions.

MR. BROWER: But your provincial ranking does not equate to your regional ranking, does it?

THE WITNESS: They do in a sense that the regional ranking, it just order projects from the provincial ranking that happen to be residing in this region.

So you could have a project that provincial ranking is 100, 101, 102, but they are only three projects in a region. They would be ranked in a region 1, 2 and 3, but provincial-wide they are still 100, 101, 102.

MR. BROWER: But the regional

ranking is determined simply by the number of projects in that area? How do you get to one, two, three?

THE WITNESS: I think what it is is that if you have a provincial ranking, you know where the project is connected or you assume to be placed in certain region. You can take that group of projects. Then you look at provincial ranking and you say: Here's the sequence.

But the sequence itself is based on the original provincial ranking.

MR. BROWER: So if you only had three projects in your region notionally, it will be ranked one, two, three in the region because there are only three, but they will be ranked in the order of their provincial rankings?

THE WITNESS: Yes.

MR. BROWER: Thanks, okay.

THE WITNESS: Yes.

MR. MULLINS: Madam Chair, if the Panel is done asking questions, I have one follow-up based on Judge Brower's questions, but I don't want to interrupt if there is no questions.

THE CHAIR: No. Why don't you ask it now?

FURTHER CROSS-EXAMINATION BY MR. MULLINS:

Q. Thank you. Unfortunately, I don't have a copy of this document, so I am going to put it up on the screen, the first page. Hopefully you will be able to read it Mr. Chow.

For the record, this is C-617, and the title is "FIT - Application Review Test and Standard Responses."

Do you recognize this document, sir?

A. I don't, sir.

Q. Well, it is an OPA document; right? This is a document that talks about the standard response from the FIT team. Do you remember that?

A. Sorry, sir, there are a lot of documents in the OPA. I am not familiar with this one.

Q. Okay. Well, let me turn to page 33.

MR. BROWER: Of?

MR. MULLINS: Of this document. Unfortunately it is not in the notebook. It is C-617. If we can make that bigger?

BY MR. MULLINS:

Q. And you see at the bottom it is signed the FIT team. This is from the OPA, and it says: Priority rankings, provincial rank versus transmission area rank. And it says:

"In both the provincial rank and the transmission area rank, launch projects were ranked based on their shovel readiness at the time of the application." [As read]

That's correct; right? Can you read that?

A. Which paragraph? Sorry, sir.

Q. It is right under the heading "Priority Rankings":

"In both the provincial rank and the transmission area rank, launch projects were ranked based on their shovel readiness at the time of application."

Do you see that?

A. Yes. Again, it is in the context -- I don't know the context. I presume this must be the launch period projects.

Q. It says:
"However, different transmission areas have different capabilities to incorporate new generation based on transmission and distribution limits and existing load demands."
You agree with that; right?
A. Yes.
Q. It says:
"This means that the transmission area rank is a better indicator of whether or not a particular project will be offered a FIT contract as it is specific to the area in which the project is located and would be built."
Do you see that, sir?
A. Yes.
Q. Now, you agree with that; right?
A. I don't agree with it. I'm

just saying there is the impression that's the case. I said many times already today it is provincial ranking that we do the testing on --

Q. Uh-huh.

A. -- for a lot of the display purposes we use in the area.

There is an area limit that matters once we know where the project is connected.

Q. Well, let's see what the FIT team continue to say. It says:

"For example, a 5-megawatt project located in the Niagara region that is awaiting ECT might have a transmission area rank of 25 and a provincial rank of 200. The viability of the 5-megawatt project, though, will be based on the need for and the ability to connect the 5 megawatts in the Niagara region.

"The provincial rank is based upon the application date of

the particular project in relation to all other projects awaiting ECT in the province as a whole - but the assessment of whether the project will pass ECT and receive a contract will be based on the regional requirements and limitations only."

Do you see that, sir?

A. Yes. And there is nothing said there that is different than what I said. If you were competing in that region, yes, the people that are in that region is what you are competing against.

The testing, the priority is still based on provincial-wide ranking.

Q. Okay. Thank you. I'm sorry, I didn't want to cut you off. So you agree this is an accurate statement, those few paragraphs?

A. Based on the comment I made --

Q. Yes.

A. -- referred to today.

Q. Sorry. I didn't mean to cut you off. Thank you.

FURTHER QUESTIONS BY THE TRIBUNAL:

THE CHAIR: Last question at least on my part. We had a discussion with Mr. MacDougall before about the five-day connection point change window from June 5th -- 6th to June 10, 2011 that was announced on the 3rd of June.

And the question was: Was it a sufficient notice time on the one hand and was it a sufficient length for the window itself?

Some say it is. Some say it isn't. What would you say from your perspective?

THE WITNESS: From my perspective, obviously people would want a longer time to evaluate the change connection point, but we did receive 30 -- I think more than 30 requests for change of connection point, including Mesa.

I think it is -- for people that understand the system and have major projects, they would be for sure looking at that possibility before this five days. I don't think it is reasonable to do the kind of study required in five days.

So a lot of the time, I think

number of major players and people that is knowledgeable would have been doing a lot of study in preparation for that, knowing that version of ECT which allows change of connection point as part of this process, they would be ready for it.

And because of the indication of more than 30 requests for change of connection point, many people is aware of that and did -- had done their homework.

So the five-day becomes more of a processing time.

THE CHAIR: What was the reason for them doing their homework before the notice?

THE WITNESS: I think a lot of it, everybody understand the change of connection points allow people to have a better ability when information is available to connect to the circuit that in fact have the capacity.

The initial application is based on, I will say, a blind understanding of where the connection capacity is. So after the first round, people now know where the capacity might be. There is no guarantee, but a better understanding.

So once they have that information, it becomes their choice of looking at

what options are available to them. It could be simply a connect to the line next to it, that is close by, because you happen to pick the wrong line, or it could be looking at alternative location for connection.

I think that is -- for a large project, that is fair.

THE CHAIR: Okay, thank you. I have no further questions. There seem to be no further questions from any side. So that concludes your examination, Mr. Chow, and we thank you very much for your explanations.

THE WITNESS: Thank you very much.

THE CHAIR: That leads us to the end of this day, as well. Is there any question about organization that we need to address before we close for the day on the claimant's side?

MR. MULLINS: Just if we could get an estimate of time.

THE CHAIR: Yes. We will mail it fairly soon so that you know for your preparations tonight.

MR. MULLINS: Yes, ma'am, that's why we're asking.

THE CHAIR: Is there anything on

the respondent's side, Mr. Spelliscy? You are hidden.

MR. SPELLISCY: No. I think we have a letter to go to the Tribunal. It is now ten after 6:00. So we might be a little bit past 7:00 by the time we get back to the hotel and put it to bed.

THE CHAIR: That's fine. It is not a strict limit, considering that we are finishing a little later than we anticipated.

Tomorrow morning we will start with Mr. Cronkwright, and then we will already get to the experts, and that will first be Mr. Timm from Deloitte, and I don't know what we have scheduled for tomorrow. Have we scheduled the next one, as well? Yes, Mr. Adamson.

MR. APPLETON: Mr. Adamson.

THE CHAIR: As well, I think.

MR. APPLETON: It is possible we can get to Mr. Low. You never know, but experts tend to take time. It depends on Canada.

THE CHAIR: Mr. Low would be available in case he is needed?

MR. MULLINS: Yes.

MR. APPLETON: Yes.

THE CHAIR: Fine. Then I wish you all a good evening and we will see each other tomorrow.

--- Whereupon the hearing adjourned at 6:09 p.m., to be resumed on Wednesday, October 29, 2014 at 9:00 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided transcription and transcribed therefrom, the foregoing proceeding.

Teresa Forbes, CRR, RMR,
Computer-Aided Transcription

PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONOURABLE CHARLES N. BROWER,
MR. TOBY T. LANDAU QC
held at Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario
on Wednesday, October 29, 2014 at 9:05 a.m.

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Melissa Perrault
Chris Reynolds
Cole Robertson
Sejal Shah
Michael Solursh
Mirrun Zaveri

Lisa Barrett, CRR, RPR, CSR, Court Reporter

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Toronto, Ontario

--- Upon commencing on Wednesday, October 29, 2014 at 9:05 a.m.

THE CHAIR: Good morning to everyone. We are starting Day 4 of this hearing. I am also greeting those who are in the viewing room.

Before we start with Mr. Cronkwright, and I apologize to you, you have to bear with us, there's a procedural aspect that we have to address now.

The Tribunal has reviewed your letters of yesterday and the day before on the damage expert issues, and we have the following to say to it.

First, with respect to the valuation date for Article 1106 of the NAFTA, we understand that the date of 5 August is confirmed. We do not think it is necessary to remove the slight transcript passage, as Canada requested. However, we would like the Claimant to address, in its closing submissions, what impact this change -- to address whether that has any impact on the computation of the six-month time period and obviously, Canada will then have an opportunity to reply in its closing argument or, if it prefers, in its post-hearing brief. That is for the first issue.

For the second one, which is the

change in the discount rate, we understand that Mr. Low will testify, orally on this change without the supporting documentations, since that was withdrawn, and we also understand that Canada is prepared to address this conceptually.

It is then afterwards up to Canada to either argue that the case is unsubstantiated because the documentation is missing, or to make some other request for substantiation. We will, of course, be open to any application that is made either in the course of the closing argument or -- yes, in the course of the closing argument would be the best time to do it.

With respect to the modification of the 1105 damage valuation, we have a provisional view, but we would like to hear you, briefly, more on this.

Our provisional view is that we stick with the rules on direct examination. It is true that this issue was raised in the first BRG report and therefore could have been addressed in the reply damage expert report of the claimants and therefore the expert should not be allowed to raise this in his direct examination.

Now, we would like to hear the claimants very briefly on this. Have we missed

something in the sense that this was not addressed, as I said, in the first BRG report, and once you have given us, I would say, not more than three, four, five minutes in answer, then I will turn to Canada for a reply.

Mr. Mullins, are you answering this?

MR. MULLINS: Thank you, Madam Chair.

In response to your question, as shown in our letter from both Mr. -- it's from Deloitte, from Mr. Low and Mr. Taylor, the BRG reiterated its response -- its position, and it is also in the rejoinder memorandum of Canada, that the position of Deloitte that you would look at the terms in the GEIA in calculating damages under 1105 would be wrong, and in fact, they reiterated that the GEIA terms should not be available to Mesa Power under any of the claims.

As we talked about earlier in our -- I spoke about, at the beginning of the hearing, our experience in commercial arbitrations, both commercial arbitrations and public international arbitrations is quite often experts are allowed to tweak and analyze their theories based upon the submissions of experts on the other side and frequently experts are put together in what we call hot tub scenarios -- and our

concern, and we understand the rulings of the Tribunal and the provisional ruling, is that we believe that we will be severely prejudiced of our due process rights, our rights to put out our case, if Canada is allowed to ask some questions, using the fact there is no support for this, or you didn't look at this, and our expert can't answer the question. We don't feel that is fair and appropriate.

We offered Canada to say that they're willing not to open that door, that's fine, but if they ask a question we should be able to respond. This is just a basic principle in any examinations in courts or in arbitration. Counsel opens the door if it gets to answer. If it can't answer it is simply unfair.

I reiterate that all this information goes to Canada's benefit. The first letter we got from Canada, said they hadn't even read the -- they said "Look at it. It looks like there is a lot of changes here. We haven't finished reading it." I said at the beginning of this hearing this is all to the benefit of Canada and I still have not heard that somehow Canada, these numbers are going to be to the detriment of Canada. And I am concerned, that given what the Tribunal has suggested, that we are going to

hear -- "Well, you don't have support for this because something's been excluded," and now evidence is going to be excluded when it essentially supports a lower valuation to Canada's benefit. So I know the answer is "Well, it's all gone all together and you can't prove your damages claim." I think that would just be completely wrong and unfair.

So, again, I go back to our beginning point: If the answer is that Canada is not going to ask any questions on these areas, particularly with respect to 1105, then that will open the door; then we will keep the report as it is. But if they open the door, I think we should have a chance to respond.

THE CHAIR: We understand that you are saying the second BRG report reiterated the position of the first, so that is what we understand, to the -- this is the answer to the Tribunal's question.

MR. APPLETON: I think -- sorry, my throat is not so good but it will better, I promise.

I just want to reiterate that the issue here is that after raising an issue the first time, the valuation experts respond with another answer. They give that answer and BRG in the second report refutes the entire answer in the second report of the valuators.

So, it is in fact opening and closing the door again on the Deloitte valuators. The Deloitte valuer said, "This is what we think." They had some revisions, they put some things in. And here, again, BRG in their second report has rejected it. So by saying that yes, they rejected it the first time and then you have some other information and they reject it again, that's new. And they should be entitled to respond to that, and by making a ruling, provisionally I understand, that because they have said, "We think you're wrong, you should get nothing," the first time that doesn't preclude the ability after they provide more information to then say, "Well, we think you should still get nothing." We think that they should be entitled to respond.

Saying, "You are not entitled in any scenario to get anything," is a pretty broad statement, and when you come back with detailed analysis and you say the same thing, I don't believe that that means you can't comment on it. And that's the difficulty that we have, is that -- and so, I wanted to just underscore that, and I am very thankful the Tribunal has given us the opportunity to help explain it because it is particularly difficult since Canada in its letter had no problem

characterizing -- that's its first letter -- characterizing the response from Mr. Low, without reading it, and if in fact they had read the response from Mr. Low they would have seen it -- for example, they would have seen there was no requirement to be able to change the Excel spreadsheets because there was no new information that couldn't have been changed entirely by experts with even one or two number changes. And experts all the time take a number and they say "assume this" and then they change it. That's what experts are supposed to do because the idea is to get the truth, to get a proper answer.

And here we have a situation where the experts say, "Okay, we're prepared to acknowledge something and let the Tribunal know so the Tribunal doesn't have to do the math to put it together," and yet we're excluding that. We've never seen that occur. So that's our difficulty because it's -- it responds to the second report.

THE CHAIR: So what I would suggest is that you give us the precise references in the different reports so we can trace exactly, is it simply a repetition of the first position or is it something new that was answered and then something new that was reiterated so, that we understand exactly

what the flow is from one report to the other, and then we can either confirm or deny, in a provisional ruling.

MR. APPLETON: We will do that by the end of the day.

THE CHAIR: You don't have to do it right now but during a break.

Would Canada wish to comment at this stage, or would you wish to wait for their references?

MR. SPELLISCY: Well, I think we can offer a few comments, I guess at this stage. I think they say are going to do it by today. Of course they were asked to do it in that letter on Monday night, and they did, they referred to a paragraph in the BRG rejoinder report Mr. Low did, he referred to paragraph 99. The sum total of what is there says with respect to the GEIA as at the launch of our first report cite.

So, we understand, of course that BRG doesn't change its analysis at all on this issue of causation from its first report to the second report. There is no new information that it presents in this issue at all. It just says "Huh, we made some conclusions, we made our own conclusions and Deloitte didn't respond." That's Deloitte's choice and counsel

for the Claimant has talked about the ability to tweak and analyze, well, you had that. You had that in your reply and you chose not to do it.

Now, the reality is, as you know, for 1105, he was wrong. Of course we would cross-examine on the fact that it was wrong. Absolutely. You want to correct that report, he's talking about severe prejudice. That's their choice. They were -- it's like the October 20th ruling of the Tribunal didn't exist. They were given a choice. Do you want to keep that in? We'll hold a separate hearing on quantum, or you withdraw it from the record. If we had held a separate -- if they had chosen let's hold a separate hearing on quantum which was fully within their option to do, there would be no prejudice. Then they show up to this hearing trying to do what they were told they could not do in writing, and they claim they will be prejudiced if they are not allowed to do it. But that is their choice. They put themselves voluntarily in this position by saying "We choose not to bifurcate."

And when we talk about tweaking and analyzing and doing that, the reason the Tribunal has procedural rules which set out when you can do that in response to what, is so that both parties' rights are protected.

Let's remember this is not a situation -- you know, they had the rejoinder report of BRG in July. They waited until a week before the hearing to tweak and analyze this. That's where the whole issue arises.

We've said -- I think Mr. Appleton has said, well, you wouldn't need the spreadsheets. That's just not true. We've explained in our letter why you do. In fact, there are so many assumptions based on GEIA treatment embedded in all of the analyses of Mr. Low, that then the question becomes okay, he says he's removed the GEIA, but has he really? Has he really? Because it is not just taking out a couple of line items there. It is embedded throughout his analysis without -- with respect to its discount rate, its risk assumptions, its completion risk, his company risk, it is embedded throughout every aspect that they would be entitled to this ...

So to say that we wouldn't need the spreadsheets, is just wrong. Of course we would. And when we need them, that's when we need time to analyze. Which is why we said in our letter last night: Look, we're prepared to conceptually discuss the idea of what is the appropriate approach, and I can tell you looking at what they've said on the

valuation, the experts are not going to agree, as a matter of conceptualization, what the appropriate approach is to 1105 damages, and Mr. Goncalves, he can talk about that.

If the question then becomes: All right, what about the actual reduced calculation that has been presented and Mr. Mullins continues to insist that it is for our benefit. I'm happy that he's looking out for Canada's interests, but the reality is we like to look out for our own and we like to look at that calculation and see if in fact it has been done appropriately. That, if it's not done appropriately, that could lead to more cross-examination needed on the actual details in that spreadsheet, whether or not all the assumptions based on the GEIA are actually removed from that analysis.

So this is why we said in our letter: Look, if they want to have a discussion about the conceptual approach to how damages should be calculated, what should be in, what should be out, we can do that, but what we can't do is actually take whatever new calculations they think that they can offer a week before the hearing and actually analyze them.

THE CHAIR: Thank you. I think that's

clear. Do my co-arbitrators have any further questions?

So obviously we'll need to come to a conclusion about this in the course of the day, and the sooner the better, I assume, for the preparation of your experts, as we are moving into the expert examinations quite soon.

When can we have these additional references?

MR. APPLETON: After lunch.

THE CHAIR: After lunch, yes.

MR. MULLINS: We will try to get it done after lunch. I guess I would suggest, I think the way the schedule is going to go is that it's probably not likely that the damages experts will be on before tomorrow.

THE CHAIR: That's what I think,yes.

MR. MULLINS: So I think if we could get a ruling by the end of the day, and then we could have that time. I think the rest of the time will be everybody else.

THE CHAIR: So we should have it, I would say latest after the lunch break, so during a break this afternoon we can review it and then by the end of the day we can give you the decision.

MR. APPLETON: And we will operate on the assumption that we will not put the damages experts on until we can get this done, so basically we know that our day is filled with all of our other experts, which shouldn't be a tough assumption.

THE CHAIR: No, I think it is a reasonable assumption. So, let's get started.

Mr. Cronkwright, thank you for your patience.

Is your microphone on? Now it is.

For the record can you please confirm to us that you are Shawn Cronkwright?

THE WITNESS: Yes.

THE CHAIR: You are Director for Renewables Procurement at the OPA; correct?

THE WITNESS: That's right.

THE CHAIR: And before that you were Manager of Technical Services in the Electricity Resources division of the OPA?

THE WITNESS: That's correct.

THE CHAIR: You have provided two witness statements, two written witness statements, one dated February 27, 2014 and the other one is 27 June, 2014?

THE WITNESS: Yes.

THE CHAIR: You are here as a witness in this arbitration. As a witness you are under the duty to tell us the truth. Would you please confirm this is what you will do?

THE WITNESS: Yes.

THE CHAIR: Thank you. So we will first have questions by Canada's counsel and then we will turn to Mesa's counsel.

AFFIRMED: SHAWN CRONKWRIGHT

EXAMINATION IN-CHIEF BY MS. MARQUIS:

Q. Good morning, Mr. Cronkwright. Do you have your witness statements in front of you?

A. Yes, I do.

Q. Could I ask you to confirm that you not have any corrections.

A. I do not have any corrections, no.

THE CHAIR: Mr. Mullins.

CROSS-EXAMINATION BY MR. MULLINS:

Q. Good morning, Mr. Cronkwright.

A. Good morning.

Q. You have in front of you what I've been calling a notebook but my colleagues have been calling are binders, so that's the big -- where I grew up those were called notebooks, but we'll call

them binders.

I only have a short period of time for questioning because we are timed and lucky for you we've heard from two people from the Ministry of Energy and we've heard from two people from the OPA, so what I'd like to do is follow up on some things that have come up throughout the hearing. So I really would be appreciative if you could listen to my question and just answer the question that I've asked.

If any follow-up needs to be done that might be a different area, Canada's counsel will have an opportunity to question you; is that fair?

A. Sure.

Q. You also find that often the Tribunal will ask questions and maybe completely different to what I'm asking and obviously you will be answering those questions; okay?

A. Yes.

Q. Thank you. Now, you currently work as a Director of Renewables Procurement in the Electricity Resources branch of the Ontario Power Authority; correct?

A. Yes.

Q. And is your immediate supervisor JoAnne Butler?

A. Yes, it is.
Q. And she was your supervisor throughout the relevant time period and to your knowledge, the relevant time period is from 2008 until, say, summer of 2011?
A. Prior to me taking this role, I had a previous supervisor.
Q. And when was that?
A. From 2007 until 2010.
Q. Who was your previous supervisor?
A. So I worked under Jason Chee-Aloy who held this position previously.
Q. Can you spell his last name for the record?
A. C-H-E-E dash A-L-O-Y.
Q. And we've seen his name in some of the documents. That was very helpful. Thank you.
Now, I've asked these questions for your colleagues, but as a government employee, do you believe that you have to do your job with honesty, forthrightness and transparency?
A. So I'm an employee of the Ontario Power Authority which is a corporation without share capital. I'm bound by the obligations of our organization reporting in through my management chain

and our board of directors.

Q. Let me break down your answer. So, in your position with the Ontario Power Authority you try to do your job with honesty, forthrightness and transparency?

A. Yes, and those are objectives of the organization.

Q. And I take it you don't agree that you are a government employee?

A. No, I'm not a government employee.

Q. Did you believe that before this arbitration?

A. Yes.

Q. You never told anybody in your life, while you were working for the OPA, that you were a government employee?

A. I work for the OPA. That's who my paycheque comes from and that's who I work for.

Q. That's one of those questions that I need to be answered. Have you ever told anyone in your life while you work with the OPA that you are a government employee?

A. Not that I'm an employee but I work with the government.

Q. Thank you. And you then agree that if the -- the OPA -- you said that -- you are basically saying that the OPA is not the government, per se?

A. That's right.

Q. And so anything that the OPA procures would not be government procurement; is that correct?

A. It is procurement under the objects and obligations we have.

Q. But not government procurement because OPA is not government; correct?

A. I'm not a government employee. I don't draw a paycheque from the Ontario government.

Q. So the answer to my question is, yes, it would not be government procurement because the OPA is not the government; correct?

A. I'm not sure what you want me to say there. I'm procuring under the obligations that we have as an entity and satisfying those obligations.

Q. Thank you. Now, in your job at the OPA, do you have experience both in the FIT Program and in the implementation of the GEIA?

A. Yes.

Q. So you are familiar, generally

with how those were implemented in the 2009, 2010, 2011 area?

A. So with the FIT Program, yes. With the GEIA, I'm responsible for implementation of the directives that flow from the GEIA, but the Ontario Power Authority is not a party to that document.

Q. Did you have any participation in the drafting of any directives with respect to the GEIA?

A. The GEIA, no.

Q. What about the FIT, did you have any role in the drafting of any directives of the FIT?

A. I was able to provide input and recommendations to the Ministry of Energy with respect to some of the FIT directives.

Q. Thank you. Speaking about the FIT Program, you agree with me that the projects varied in size; correct?

A. Yes, by the design of the program.

Q. And so some projects, for example, could be 50 megawatts, others would be 150 and more?

A. Yes, and some could be

500-kilowatts, so ...

Q. In fact, you are aware, as well, that many developers put -- had more than one project in the program; right?

A. That was very common.

Q. We've heard, for example, the NextEra 6-pack; have you ever heard that term?

A. No, I haven't.

Q. You are familiar that NextEra had a number of projects together?

A. I am aware that a lot of developers had a number of projects.

Q. Is it true that depending on the size of the project, there were different domestic content requirements?

A. Domestic content was triggered primarily off of technology, and then size based on -- micro FIT which was less than 10 kWs had a different requirement than FIT, which was greater than 10 kWs.

Q. Do the technological requirements indirectly relate to the size of the program and the domestic content or no?

A. So there was government direction for the micro FIT programs, there was a set of requirements for various technologies and then for the

FIT program requirements for various technologies.

Q. I really want to focus on the FIT Program so I just -- I was just asking, my understanding is that some of the FIT applicants required 50 per cent domestic requirement and others required 25 per cent, is that's correct?

A. So there was a distinction between wind and solar, different requirements for each.

Q. But they were all in the FIT Program?

A. That's right. They were all in the FIT Program with different requirements based on technology.

Q. And now, at what -- have you heard of the entity called Pattern Energy?

A. Yes.

Q. Pattern ended up being part of the Korean Consortium; correct?

A. I don't believe they are part of the consortium.

Q. Well, they participated in it?

A. I believe they have partnership arrangements but they are not recognized as part of the consortium, my understanding.

Q. So the only members of the Korean Consortium are KEPCO and Samsung?
A. I believe there are three members.
Q. Who is the third member?
A. It's listed in the GEIA, the three Korean entities.
Q. You just don't know what they are; right?
A. Samsung, KEPCO and I can't think of the third one, but there are three entities listed in the GEIA as being part of that.
Q. And the Government of Ontario or the OPA had no participation or selection of who would be in the membership of the Korean Consortium; right?
A. No.
Q. And speaking about Pattern's role, can you just go back and explain to us what you understand to be Pattern's role vis-a-vis the Korean Consortium?
A. My understanding is that the Korean Consortium brought Pattern in as a partner to be involved in the development of their wind projects.
Q. So for purposes of how you've operated with them, you understand they're in part of

the Korean Consortium group but they're not technically a member of the Korean Consortium; is that fair?

A. We understand that they have been brought in as a partner on the wind projects only and not the solar projects.

Q. Thank you. That's helpful. And similar to who decided who was going to be in the Korean Consortium, I take it Ontario and OPA had no say in Pattern becoming a partner in the Korean Consortium; correct?

A. I can't speak for what the Ontario government did. From the OPA's perspective we didn't have any input in that.

Q. And you are aware that originally Pattern was part of the FIT Program; right?

A. Yes, Pattern had made applications under the FIT Program.

Q. Did they get any contracts?

A. Yes, they did.

Q. So they got contracts. And what size were their contracts?

A. I don't have a full listing or aware of that.

Q. Now, when they became a partner

in the wind portion of the Korean Consortium, did they keep their contracts with the FIT?

A. Yes.

Q. All right. So they both were in the FIT projects and in the Korean Consortium?

A. They had successful FIT projects and they were partnering with the Korean Consortium for negotiations.

Q. So they participated in both projects simultaneously?

A. So you say "projects." They had become a supplier under FIT so they had a contractual relationship with the OPA as a FIT supplier.

Q. Right.

A. And my understanding is, again, they had reached some type of partnership arrangement with the Korean Consortium to work with respect to developing the Korean Consortium's wind projects.

Q. Just so I understand, the projects they had with the FIT Program, were they included in their partnership with the Korean Consortium or did they keep those separate?

A. Those are -- those were separate from the Korean Consortium, and they were supply contracts between Pattern or a project company and the

OPA.

Q. So they were simultaneously participating in the FIT Programs or projects, and they also were simultaneously doing other -- some participation with the Korean Consortium?

A. So I can't say simultaneously, because of timing. So they would have made FIT applications prior to our being aware of their involvement in the Korean Consortium. In terms of what -- when they got involved with that, we don't have the original dates.

Q. Well, you do recognize that the FIT Program, the Korean Consortium was running essentially simultaneously; right?

A. Well, there were different activities going on but we weren't actively negotiating with the Korean Consortium at the time that the Feed-in Tariff opened up and received applications on October 1st, 2009.

Q. The OPA had no problem with Pattern being in both programs; right?

A. It wasn't so much a case of whether we had a problem or not. They were eligible to compete in the FIT Program and our understanding was that the Korean Consortium had brought them in as

a partner and they had the ability to do so.

Q. When you were at the OPA, did anyone ever have a discussion whether or not it would be appropriate to have some kind of an opportunity for other competitors of Pattern to participate in the Korean Consortium partnership?

A. It wasn't our discussion. Again, it wasn't our agreement.

Q. So essentially anybody that Samsung wanted to do a partnership with, would be able to participate in the Korean Consortium deal, and there was really no other way to get into that deal; right, unless Samsung agreed?

A. It was an agreement between the Korean Consortium and the government and both of those parties were bound by the terms and conditions of their agreement.

Q. There would be no way to petition the government or petition the OPA and say "Look, I want to be able to get into this deal"; right?

A. People could do what they wanted. Our instruction would have simply been: it's an agreement between the government and this party, you know, you're welcome to contact either party and discuss it with them but we're not a party to it.

Q. That's the answer to my question. Thank you.

Now, for Pattern to be in the -- whatever projects -- you don't know how it participated in the Korean Consortium? Can you explain how -- what its role was?

A. So, through the directives that the OPA received, we were to look to sign PPAs for various projects and our understanding is that Pattern was a partner of the Korean Consortium for the purposes of developing their wind projects.

Q. You understood that Pattern was out looking to buy projects that had essentially ranked low in the FIT process; do you remember that?

A. We understood a lot of developers were doing that.

Q. Pattern was doing that specifically, you remember that; right?

A. It is anecdotal and common that a lot of developers were doing that at the time.

Q. Including Pattern?

A. Presumably, yes.

Q. So when Pattern was working with these projects and the Korean Consortium was working

with these projects, in the Korean Consortium deal, they were not -- those projects did not have to file applications; correct?

A. So the contracts that we were looking to negotiate under the GEIA directives were not part of the FIT Program so they did not apply to the FIT Program. They were done separately.

Q. And those projects then didn't have to be ranked; right?

A. That's right, they were negotiated; they were separately directed.

Q. And those projects didn't have to worry about satisfying criteria points; right?

A. They had to worry about various requirements as specified, such as having site access to control.

Q. But they weren't getting -- rankings were not being affected by their criteria points under the FIT Rules; correct?

A. They weren't part of the FIT Rules so they didn't have to follow that.

Q. And those projects in fact, didn't have to be shovel-ready; correct?

A. No, it was a separate deal and a separate negotiation for contracts separate to

different directions.

Q. So, in fact, these lower-ranked projects that were not getting criteria points and were not shovel-ready, those ended up being projects that ended up in the program under the Korean Consortium; correct?

A. So the Korean Consortium wasn't a program. It was a discrete procurement initiative, so it's not apples and oranges.

Q. Let me rephrase my question: The projects that ended up in the Korean Consortium initiative were projects that had been in the FIT Program but were very low ranked and some of those reasons, because they weren't shovel-ready or didn't have criteria points; is that correct?

A. So, when those projects would have been submitted into the FIT Program, they would have been submitted by whoever the Applicant was at the time. So their application would have had points, not points, what have you, based on the Applicant putting the project forward. And that's separate.

Q. If you go to paragraph 12 of your rejoinder statement. I point to the first paragraph, 12 of you rejoinder; do you see it?

A. Yeah.

Q. It says:

"I also understand that the Claimant has raised certain complaints about the fact that the Korean Consortium was allowed to require a project that had a FIT contract, the 10-megawatt Merlin Wind Farm, and then to cancel that contract and negotiate a PPA under the terms of the GEIA." [As read]

Now, can you tell us a little bit more about what the Merlin project was and who owned that originally?

A. So the Merlin project would have been successful through the FIT Program, they had then become a supplier under the FIT Program, and there was a request that basically the capacity in that project sort of be removed from the FIT Program and be included in the PPAs for the GEIA.

Q. In fact, Merlin was a Pattern project, wasn't it?

A. Yes.

Q. And so once Pattern joined the

Korean Consortium initiative, it was allowed to switch its contract from a FIT to the initiative; isn't that correct?

A. No, it didn't switch the contract from. We basically released the capacity for that project to let it get rolled into, it didn't remain a separate project. It got rolled into a GEIA project.

Q. It is essentially the same thing, more or less?

A. No, this was a 10-megawatt standalone project and the capacity ended up being part of a larger GEIA project.

Q. But that was a -- that's not a benefit that FIT proponents had, right, to be able to switch into different projects? If you look at paragraph 8 of your statement specifically.

A. So typically we don't allow suppliers to exit contracts unless it's in the benefit of the ratepayer.

Q. So, typically -- so you made an exception for Pattern in this particular situation because of the Korean Consortium initiative?

A. Actually we felt that it was in the best benefit of the ratepayer to do so.

Q. Thank you. Now, I'm going to switch topics on you. There was a transmission availability test run in 2010; right?

A. Yes.

Q. And this time though, no contracts were awarded in the Bruce Region; right?

A. That's correct.

Q. So, these projects had to wait for an ECT, right, that was going to be province-wide, that was a provincial test?

A. Right. So there was no capacity in the Bruce area when we ran the TAT/DAT, so they had to wait.

Q. But in other areas that you knew had that issue, right, there was sufficient capacity within the area and so contracts started being awarded in specific areas; correct?

A. Right. So subject to the rules of the TAT/DAT, we awarded contracts where there was capacity available.

Q. Ultimately, however, a conclusion was made, that doing a province-wide ECT would be a bad idea because this would open up way too many megawatts; is that correct?

A. I think it's much more

complicated than that.

Q. That was one of the reasons. We heard that earlier. One of the reasons was that it would open up too much megawatts; could you just tell us why that happened?

A. Could you please ask the question again?

Q. Why don't you tell us why a province-wide ECT wasn't run?

A. I think there were several issues and I think predominantly, the government had issued its long-term energy plan, and that caused the need to do a reconciliation between the targets in the long-term energy plan and the Feed-in Tariff program.

Q. That kind of -- I think that's somewhat similar, so essentially you had a limitation on how much megawatts and there was a concern that doing a province-wide ECT would put you beyond the intent for the long-term energy plan; is that fair?

A. Right. We had a long-term energy plan and a subsequent supply mix directive that we had to comply with.

Q. And that energy plan was entered after proponents had already filed applications and started -- they filed FIT applications, right, FIT

applications in 2009 and the plan comes in 2010; right?

A. Some had been submitted before, some were submitted after.

Q. Well, many, many -- in fact we heard from Ms. Lo yesterday that you had many, many applicants in the fall of 2009.

A. Yes, but I'm just clarifying that although we had some before, we also had some after. We continued to receive applications.

Q. The majority came in 2009; is that fair?

A. I'd have to check the numbers but a significant number came in 2009.

Q. All right. So, and so there then became a discussion what to do with the Bruce Region, in terms of how we're going to allocate contracts there, right? Is that fair?

A. Yes.

Q. So originally the OPA recommended a special TAT/DAT just for the Bruce Region to allocate this capacity from the Bruce-to-Milton line; right?

A. No, that's not correct.

Q. So what did I say that was wrong?

A. So we had originally envisioned performing an ECT province wide.

Q. Can you look at paragraph 18 of your rejoinder statement. I guess I was pointing to what happened in April 2011. So why don't we read what you said and you'll explain why, I guess, this answer might be -- you might want to expand on it, because you said in your statement:

> "As such, as we moved into April and May 2011 the OPA began to recommend a different process. In particular, we gave a proposal what we called a 'Special TAT/DAT process'. The proposal was in essence that the OPA re-run the TAT process that the OPA had originally executed but we just wanted for the Bruce and west of London regions." [As read]

So why, when I asked that question before, did you say I was wrong?

A. So, again, referencing

paragraph 18, it says as we moved into April we began to recommend a different process because we had an original process prior to this.

Q. So what you're saying is originally you wanted to do a province-wide ECT?

A. Yes.

Q. And then you were told by the Ministry of Energy or someone that you couldn't do that or how did that happen?

A. We understood that there were different issues and factors at play so we continued to try to work cooperatively to try to find a solution.

Q. When you say you understood, you understood that from whom?

A. From the government.

Q. The government being the Ministry of Energy?

A. Yes, we worked cooperatively with the Ministry of Energy.

Q. You've been very helpful.

So after that proposal is rejected then your next suggestion was as reflected in paragraph 18?

A. Right. So we had originally

started to work on the idea of a province-wide ECT, discussions around that. And then we -- again, the other thing to keep in mind here is timing.

Q. Yep.

A. So as time moved along and the time required to allow us to do our process, we proposed that alternate mechanism that has been referred to as the special TAT/DAT and again, as time continues to move on, the OPA is challenged with a process that we can actually run in the time required. So we are continually trying to be cooperative here to run a process and move things forward in the time allowed.

MR. MULLINS: Now, I need to go on confidential mode here for a document. So are we on confidential?

--- Upon commencing the confidential session at 9:48 a.m. under separate cover

--- Upon resuming in the public session at 9:59 a.m.

BY MR. MULLINS:

Q. Just for the benefit of the public, you just said that you knew there was going to be some kind of change.

Can you go to tab 7 of your binder. And have you -- can you -- the "C" number is C-445.

Could you tell us what this document is, sir?

A. Yes, so this is a briefing deck or a presentation deck that the OPA prepared for a meeting with the Ministry of Energy that took place on December 23rd of 2010.

Q. Am I correct to understand that what you were trying to do -- one of the reasons you were doing this -- maybe not the only reason, was to try to explain how we're going to finish out this -- at least -- in the contracts, including the Bruce and Milton regions, given these issues with the LTP and these other things we've been talking about; is that fair?

A. It was really to make sure now that the long-term energy plan had been released in November, to try to reconcile the government's objectives in the plan with the program itself.

Q. And in fact, on the last page of this deck it talks about the need for shareholder consultation for all these initiatives you were discussing with the Ministry of Energy; correct?

A. With respect to version 2 of the program, that is correct.

Q. But that also included changes in the FIT Rules to accommodate the LTP; correct?

A. Yes.

Q. Thank you. You say in your rejoinder statement -- and I'm going -- I'm trying to go chronologically, so I'm going back now to 2011.

At some point you say in your rejoinder statement you were asked to do this dry run. Can you tell us what that was? And that's on paragraph 19 of your rejoinder statement.

A. Yes, so, the timeframe we'd been talking about here, it's sort of March, April, May of 2011.

Q. Yep.

A. And based on the email that we just discussed, there was some back and forth about different options available to move forward. What's referred to here as the dry run was some analysis in support of those options.

Q. And the Ministry of Energy asked you to do this dry run and wanted to find out how a modified TAT/DAT would affect rankings?

A. Yeah, there were two main concerns that we were aware of from the Ministry of Energy. The first was the overall quantum of megawatts. So, we talked a little bit about the long-term energy plan and not only did it set out

total procurement targets but it also had cost assumptions as well. So we understood that there was a concern about quantum of megawatts awarded, impact towards both the targets and impact towards cost to ratepayers and separately, we understood that there was some concern about being able to communicate the results, and I guess some questions that had come up with the second phase of the TAT/DAT versus expectation.

So there were two sorts of -- a quantum and a cost impact and then a communications impact with respect to ranking.

Q. Well, but in addition, the Ministry of Energy ended up finding out how the results played out for particular proponents; correct?

A. We didn't share that specific information with them, but they understood how the quantum would shake out in that process.

Q. And this, well, the dry run results were confidential; right?

A. That's right.

Q. Because it would really be an untransparent thing for the results of this dry run to be released to the people making the decision or proponents; right?

A. So our obligation was to work cooperatively with the Ministry of Energy. We wanted to make sure that they understood that that information was confidential and they needed to treat it as such.

Q. Well, in fact, you told Colin Andersen that you were specifically concerned about showing the results to the Ministry of Energy; do you remember that?

A. Yep.

Q. And just for the record that's in C-446, so we don't spend a lot of time on it, but that's tab 10 in your notebook and that's the email that I just referred to; correct?

A. Yes.

Q. And you had a conversation with Mr. Andersen about this?

A. Yes, I did.

Q. And he said, "I want to see the results" and you said "No." What happened?

A. No, the issue was with respect to the information and how the information would be shared.

Q. So there was a meeting between you and the Ministry of Energy about the results

though; right?

A. That's correct.

Q. When was that meeting?

A. Umm ...

Q. Was it April 14th?

A. I'm looking in here and it looks like it was either the 13th or 14th.

Q. I think it's around April 14th because my chronology is correct; does that sound about right?

A. Yes.

Q. Could you go to tab 32 of your notebook?

Now I understand from your witness statement that you did not leave the results of the dry run with the Ministry of Energy; is that correct?

A. That's correct.

Q. But, in fact, sir, you showed it to them at the meeting though; right?

A. Yes.

Q. So they did have an actual listing of the rankings in their eyesight at the meeting; correct?

A. Yes, with respect to a slimmed down and hypothetical test.

Q. So if you look at this email dated May 18th, it talks about -- now it says to Bob Chow and Tracy Garner, who is Tracy Garner?

A. Tracy Garner is a planner who works for Bob Chow.

Q. I'm sorry?

A. Tracy Garner is a planner who works in the planning division, reporting to Bob Chow or a colleague.

Q. She says:

"I see Sue ..."

She means Sue Lo; right?

A. Yes.

Q. (Reading):

"... has set up a meeting for 10 a.m. ..."

And she says "Shawn." That's you, right? Shawn is you?

A. Yes, yes, that's me.

Q. (Reading):

"Shawn and I were talking at the end of the day, and he is concerned (as am I) that ENE..." [As read]

That's the Ministry of Energy?

A. Yes.
Q. (Reading):
"... expects a very specific outcome -- namely, they think (because they never fully understood what goes on in our tests) that now they've instituted the conn-point change and the gen paid connections they will get the top 750 MW etc. in order with no one failing (this is how their first draft of the Dir. sounded)."
Correct?
A. Yes, that is what it says.
Q. Is that an accurate reflection of the conversation that you had with Tracy Garner?
A. Yeah, I think it's pretty accurate.
Q. Now, Shawn, that's "he":
"... was referring to a previous dry run." [As read]
That's the dry run we've just been talking about?

A. That's correct.
Q. (Reading):
"... based on existing conn. pts that you and Charlene ..." [As read]
Who is Charlene?
A. Charlene is a planner as well, in the planning division, working for Bob Chow.
Q. (Reading):
"...showed them at a meeting" -- that is the April meeting; right?
A. Yes.
Q. (Reading):
"... (but did not leave with them)and wondering if we could produce some 'variants' of that."
So, if I understand this correctly, that Shawn -- sorry, you're Shawn, talked to Tracy and said that you were concerned that the Ministry of Energy wanted to see if you could do another run that made it look like the results of that original dry run you gave them; is that accurate?
A. No, that wasn't driven by the

Ministry of Energy. That was my discussion item.

Q. But that was your suspicion that that's what they wanted? I'm trying to understand what this sentence means. Could you explain to us what it meant where you said, "Wondering if we could" -- who was wondering if we could propose some variants of that? What does that mean, sir?

A. Tracy is referring to me. That I was wondering if we could do that.

Q. So you wanted to do another dry run, and try to come up and try to match the results that you'd already shown the Ministry of Energy?

A. No.

Q. Please explain to me. I'm confused.

A. I'm following the second paragraph as written here. So -- so Tracy is saying that I am wondering if we could get PSP to produce some variants, similar type ideas as a dry run using purely hypothetical scenarios with no analysis to just see how applications interact.

Q. What do you mean at the end of this -- or I'm sorry, it's not you writing this but "he" is you at this last sentence:

"He feels showing them

examples is the best way to reinforce to them ..."

-- that would be the Ministry of Energy --

"... that their plan is not fool proof, and ideally prevent them from freaking out later on if something turns out slightly different than they believe it will."

What did you mean by that?

A. So I mentioned it a little bit earlier, so before the Bruce-to-Milton allocation process we had completed the phase 2 TAT/DAT, so the phase 2 contract awards. When we had been doing the analysis on that phase 2 TAT/DAT earlier on, I think we felt that based on -- you know, the analysis takes several weeks but early indications were that we might have 300-megawatts or so coming out of the TAT/DAT process. That's input that the Ministry of Energy uses with respect to forecasting and quantum and pricing and so on.

When the final tests had been done, and as I mentioned it takes several weeks, the successful contracts didn't turn out to be 300; it

turned out to be just shy of 900. So, that's what I meant by "surprises". So when we had gone back and reported that concluding the TAT/DAT for phase 2, we didn't have 300-megawatts as the Ministry was sort of anticipating and we had earlier reported, rather than 300, we had 900, they were very concerned. I used the words "freaked out" here, because that was megawatts that were being contracted at a different time or in a different expectation with respect to their projections on pricing. So they were very concerned that whatever comes out of this process was very well understood in terms of the quantum of contracts and the relative price implication. So that's part of it.

The other part of it is that by the very nature of the testing, although we talked about criteria and we talked about ranking, it's never a guarantee that because you have a high ranking you are going to be successful. An example would be, we have two very highly ranked projects that want to connect to the same point. One of them will be successful, but the other one won't necessarily be successful. And the government, as we understood it, had a concern in terms of communicating the outcome of these processes that how could it be possible that a highly ranked project could be unsuccessful and we

were trying to demonstrate that due to the interplay of the applications, you wouldn't necessarily award contracts 1, 2, 3, 4, 5, 6, 7.

In fact, some of them could fail because they were competing for the same thing and that's what we were trying to demonstrate was that regardless of how this played out, it was very possible that high ranked projects wouldn't be successful for very valid technical reasons but the technical tests are quite complicated and it is hard to communicate that to folks that don't have the level of expertise that Bob and his staff do.

So that's the interplay we were working on, it was quantum and communications.

Q. So as I understand what the email indicates and I think you're saying it now, the Ministry of Energy really did not have a complete understanding of how all these tests really interplayed; is that fair?

A. I'd suggest that other than a very small few people, very few people understand that.

Q. Was there any discussion at this point, that maybe it would be a good idea to get stakeholder comments to see what they thought might be

a way to solve this problem?

A. With this point, this is still in terms of internal processes so, no.

Q. There was no discussion about it?

A. No.

Q. Other than the previous discussion we heard earlier in December, talking about stakeholder comments; right?

A. So generally we want to engage the stakeholders on things with respect to the rules. In terms of an internal process piece and understanding -- no.

Q. Did you understand at this point how fast they wanted to do this?

A. We understood that they wanted to move with this, in light of the fact that the Bruce-to-Milton approval had originally happened, the sector had expected contracts to be awarded but then shortly on the heels of that was appealed. So there was sort of pent-up interest in this line waiting for the appeal to conclude. And we did understand that the appeal -- it happens here in May, that once the appeal had been satisfied, that the sector and the government wanted to move forward expeditiously with contracts on this line.

Q. I guess what I'm saying is, what I'm trying to understand is you're saying that obviously you are trying to get the internal working worked out, but given that there was a time pressure don't you -- was there not any discussion at the OPA to say, "Look, we need to get a stakeholder comment period started right now so we can make sure that everyone's expectations are being met."

A. No, not with respect to this. No, the development community understood the line was becoming available and that contracts would flow and we needed to move forward with that. That was the expectation.

Q. So no-one told the development community that internally you guys couldn't figure out what test to use; right?

A. That is not usually the thing you would go out and stakeholder on. And again, we wanted to make sure we understood what our plan was first before we communicated that to anybody.

Q. If you look at paragraph 21 of your statement --

A. Which statement?

Q. Oh, I apologize. Thank you. Your rejoinder statement. You say:

"Ultimately, as I understand it ..."

I'll wait for people to get up there:

"... the government heard all the possibilities and decided at a high level meeting held on May 12th, 2011 to adopt a process that we eventually used to allocate capacity on the Bruce-to-Milton line. A procurement of a specific amount of capacity in the Bruce and west of London regions simultaneously which would occur after a connection change point window and which would allow for generator-paid upgrades."

[As read]

Do you see that?

A. Yes.

Q. Now, by May 12th then, you basically, at this point, the government has decided which path to take; correct?

A. With respect to what we've

outlined here. So, again, this is very high level. There is always a lot of details below that.

Q. Now, at this point, then, now that you've internally decided which path to take, was there then a discussion at the OPA or with the Ministry of Energy to now tell the stakeholders which program was going to be done or what the plan was?

A. Now, so, and again through reading some of these materials, my understanding is there were stakeholders plans put together and other materials developed but that couldn't happen until some of these decisions had been landed.

Q. But, May 12th then, the decision has been made, so then why was it not revealed to the stakeholders what the plan was going to be?

A. And again I would go back to, this is a high level decision. These are very complicated processes with lots of steps. There is still a lot of, you know, the government can decide from a policy perspective what they want to do, but how the OPA operationalizes and puts those various steps into play still takes additional work.

Q. Whose decision would it be to announce to the stakeholders about the decision made on May 12th: OPA or the Ministry of Energy?

A. We'd coordinate that.
Q. So, did you personally, in your role, suggest at that time, on May 12th, to now announce to the stakeholders what the decision was?
A. On May 12th, no, I don't believe I made that.
Q. Did anybody at the OPA to your knowledge, or the Ministry of Energy, recommend at that point that now we should tell the stakeholders what the decision is?
A. I can't speak for the entire organization or the entire government. I don't know.
Q. Were you at the meeting, at the high level meeting on May 12th, 2011?
A. No.
Q. So who was at the meeting that told you that the decision was made?
A. I don't know. My understanding is that it would have been a government meeting. Most likely with folks from the Minister's office and others.
Q. But somebody after the meeting told you; correct?
A. Through the emails we got correspondence back, I believe probably through Sue

Lo, that a decision had been made and there was a notional policy direction where we were moving.

Q. Perfect. Now, were you ever involved in the decision, sir, about how much notice would be given to the shareholders about the change in the change point window?

A. We had made recommendations on it.

Q. What were your recommendations?

A. So going back to -- it would have been even throughout 2011, I think we originally had advocated in the context of a six-month ECT process that we would typically look for three weeks as part of the six-month process.

Q. While these recommendations were going on and even as of May 12th, is it not true, sir, that you had envisioned that -- scratch this.

By May 12th you understood that there was going to be a change point window; right?

A. I'm suggesting here that we knew that there were a couple of options in play and it isn't until we actually heard back, that was the direction they were going. I mean, I think it could have been in or out at that point.

Q. Well, by May 12th, you knew there

was a --

A. By then yes, I --

Q. That's what I said. So as of May 12th then, is it not true that in your mind then, that you expected there to be a three-week period of time for people?

A. No.

Q. So you knew by May 12th, that it was not going to be three weeks?

A. We understood that there were timing preferences with respect to award of these contracts and that the entire process would likely be compressed.

Q. So was there any discussion at the OPA or Ministry of Energy to make sure we got this information out to the stakeholders as soon as possible given that you weren't even going to give them three weeks?

A. It certainly would have been our preference. In general that's how we would normally do things.

Q. You say your preference. Did you actually make that recommendation to the Ministry of Energy to get this out as soon as possible to the stakeholders so they could prepare?

A. We would have made those recommendations in general both for the stakeholders and for ourselves.

Q. Do you know how long the notice actually was?

A. I believe it was very short.

Q. It was a weekend; right? It was announced on Friday and started on Monday; do you remember that?

A. Yep.

Q. Were you shocked at that short period of time when it happened?

A. I'm not sure I am shocked but certainly it is short.

Q. That's standard business at the Ministry of Energy?

A. A lot of announcements are made on Fridays. That would be standard business.

Q. I see. Do you understand, sir, what the reason was to make that such a short period of time?

A. My understanding is that there was a desire, as reflected in the documents to have the contracts awarded as soon as possible.

Q. Whose desire?

A. The government's desire.
Q. Did you hear anybody else say -- did you hear anybody tell you ever that it was some other organization that was clamouring to have a weekend notice period?
A. No.
Q. You never heard that it was CanWEA that was demanding this?
A. No, and I wouldn't have necessarily heard from those folks, they wouldn't have said it to me.
Q. Were you aware, sir, that CanWEA had written a letter about this issue?
A. I've been made aware of it through the documents provided.
Q. That's the first time you saw that letter?
A. As far as I'm aware, yes.
Q. Were you also aware that after that letter was sent, a member of CanWEA wrote -- and this is at tab 29 of your notebook. Let's me see if you've seen this letter before. So this is -- pull it up. Do we have the "C" number on this?
MS. MOWATT: R-114.
MR. MULLINS: So this is R-114.

MR. APPLETON: The 27th letter?
MR. MULLINS: No, no, I'm pointing to the -- R-114.
MR. APPLETON: Thank you.
BY MR. MULLINS:
Q. Have you ever seen this letter, sir?
A. Yes.
Q. You didn't see this letter at the time, you saw it during the process of this arbitration or no?
A. No, my name is on it and I see here in the CC that it was copied to my boss, so at some point this would have probably been given to me as a copy.
Q. Oh, I see. I missed that. That is your name.
A. Yes.
Q. Oh. So that's a Shawn. You got a copy at the time. Okay. Thank you for that. So, what happened when you got this letter?
A. So, this is a letter addressed to the Minister, so there was no requirement for me to take action on it.
Q. Did you have any discussion with

your boss Ms. Butler about it?

A. I don't recall.

Q. Did you see, when you saw this letter, that now he's referring -- the author, Mr. Edey is referring to the CanWEA letter and if you want to -- just for the record, the CanWEA letter, which tab was that? It's tab 27 of your notebook, so let's just put that on the record. And what's the document there?

MS. MOWATT: R-113.

BY MR. MULLINS:

Q. This is R-113. So you are saying that you never saw this document at the time?

A. I don't recall, and if I look at the letter you've shown me this is a letter to the Minister from the president of CanWEA and I notice there is no CC of an OPA person on this, so, I don't recall seeing this at the time.

Q. Perfect. But you did get the later letter that was cc'd to your boss and did you not then look to see -- "Could somebody give me a copy of the letter that Mr. Edey is referring to"?

A. No.

Q. And you read this letter when it came in; right?

A. I would have read it when it was provided to me.

Q. And when you did that, you saw that it says:

"The letter purports to represent a majority of CanWEA members that has asked OPA to alter its path at this late hour to open the ECT process to allow certain parties to make changes to interconnection points. I can tell you without hesitation, this view certainly does not reflect the majority of applicants with megawatts (MWs) on the current cue list. In my view the letter was sent without appropriate consideration of the impact to all CanWEA members." [As read]

Do you remember reading that at the time, sir?

A. Yes, I remember it.

Q. When you got this letter, did you go down to the office to Ms. Butler and say, "Wow, maybe we should do something about this"?

A. This would not be surprising.

Q. Not surprising?

A. No.

Q. So, you didn't care that, at least Mr. Edey was telling you, that the process chain was not reflective, in his opinion, of the majority of applicants' members in the current cue list?

A. So he's not telling me anything. He is writing to the Minister of Energy, and it appears he is expressing a position that his interests aren't necessarily aligned with CanWEA members. We would find whether it is CanWEA or any other organization, that it is very rare that you would have 100 per cent alignment of all of their members on any policy that they deal with.

Q. At this point was there any discussion at the OPA or the Ministry of Energy to say based upon these conflicting presentations that at this point, maybe we should slow down the brakes, make an announcement to the stakeholders and get comment because now we're getting conflicting messages? Was there any discussion with anybody in any nature like

that, sir?

A. It is not uncommon for us to have conflicting opinions in the administration of any of these programs. It is very rare that all private sector interests line up on any one issue at any time. That's common.

Q. So the answer to my question is "no"; there were no such discussions; correct?

A. No, I can't say there were no such discussions. Generally speaking, we wanted materials to be available as early as possible and if the date that they were provided on the Friday was as early as possible, then that's when they were provided.

Q. I want to make sure -- we've been talking -- I want to make sure we're on the same page. You're not aware of any discussions that either you were part of or that you heard about, at the OPA or the Ministry of Energy as of May 30th, 2011, to suggest that based upon the conflicting messages you were receiving, that "we should pause and give stakeholder comment"; is that correct?

A. Generally speaking, our approach would be to have materials out in advance, to have lots of time for people to comment on them, to run

a very, you know, long stretched-out process and from the behind the scenes processing perspective, that also helps our team. That is not always in line with the government's policy objectives on this or any other program, so we are always in a bind between trying to take as much time as possible and at the same time trying to deliver the policy objectives. It is always a balancing act. That is always a discussion that is underway.

Q. Mr. Cronkwright, remember when I asked you at the beginning, I need you to answer my question. This is the third time now. I am asking you, was there any discussions about stopping the process to give stakeholder comment period, "yes" or "no"?

A. I can't tell you OPA-wide and all staff if there was any discussions. I can't speak to that.

Q. I'm only asking for your personal knowledge, sir.

A. I'm not aware, because I don't know of all of the discussions that happened, with all of the parties at the whole organization, it is very possible someone did, it's very possible that it didn't.

Q. And certainly you were not part of any discussions?

A. Our discussions would have simply been: Get the materials resolved as quickly as possible. We were looking to make sure that we had stuff available publicly, and also to look to make sure that we gave ourselves time to process things and satisfy the deadlines.

Q. No-one made a recommendation to you to that effect at the time, to stop the process and to allow stakeholder comment?

A. Not specifically as you've outlined, as far as I'm aware.

Q. And you do -- let's deal with this last paragraph, for example, it says:

> "With regard to process and fairness, each Applicant has had access to the same information. Each of us has acquired lands and developed our projects based on information that was publicly available. Now it appears we have certain members who believe an advantage could be

gained by this last-minute disruption." [As read]

Again, was there any discussion about whether or not -- and they mention Mesa Power, my client, specifically, they had bought -- had got projects, were waiting and they were currently ranked 8th and 9th on the priority list. Was there not any discussion at all about my client and how this might affect them and maybe, by chance, that there might be other people in the same situation that might want to have a chance to have an opportunity comment on this? Was there any discussion at all, sir?

A. So, to answer that I have to look at the letter because the letter is talking about changes, and the process, as envisioned, allowed for connection-point changes. So this letter is arguing that we shouldn't allow connection-point changes, which is something that was envisioned originally, so it's very strongly arguing that point, but it is arguing the opposite.

Q. So the answer to my question is, no, there were no such discussions; correct?

A. I think you're taking it out of context. I'm suggesting to you that the letter is arguing that should not follow the processes outlined

and instead should follow something else, because it would be most likely beneficial to the Applicant.

Q. The answer to my question is, "No, there was no discussion about my client or other entities in that region that might be affected by this decision after receipt of this letter," to your knowledge, isn't that correct? I think it's a "yes" or "no" question, sir.

A. I don't think I can answer it that way. I think we knew that we had lots of interest in the region. We knew that everybody in the region was not going to be a winner and regardless of what process we ran, some people were going to be successful and some people weren't. That was the reality of it.

Q. Please, could I just get an answer to that question.

MR. SPELLISCY: I'm sorry, I don't want to interrupt. But you can read the question back from the record.

THE CHAIR: The question has been asked many times and I think we have got the information that we need. And I wouldn't --

MR. MULLINS: Can I just check with my counsel.

THE CHAIR: Sure.

BY MR. MULLINS:

Q. Just really quick to follow up. You had previously told us that the recommendation about the special TAT/DAT process, that would not have included any connection-point changes; correct?

A. That's correct.

MR. MULLINS: Thank you so much. No further questions.

MR. SPELLISCY: As usual, I'll request a few minutes to confer.

RE-EXAMINATION BY MR. SPELLISCY:

Q. Good morning, Mr. Cronkwright.

A. Good morning.

Q. I will just impinge upon my colleague Chris here to help me pull up some documents, perhaps, and I think that the first one is probably just to clarify the record.

You mentioned in your testimony a March 2011 presentation that you said laid out the OPA's original proposal for how to allocate the Bruce to London capacity.

I want to get you to confirm so the Tribunal has it. If you could pull up C-0438.

Could we make it smaller.

This is an OPA proposal of March 21st, 2011 called "Economic Connection Test and Program Evolution". Is this the document you were talking about, which was the OPA's original proposal?

A. It is one of them. There is another one earlier in March as well. I believe it's the 3rd or the 5th.

THE CHAIR: Just to make sure that we understand you correctly, this is your first proposal and that's a provincial-wide ECT?

THE WITNESS: Are we able to flip through it? I'm sorry, I don't have it in front of me here.

MR. SPELLISCY: Bring the tab up there.

THE CHAIR: In your witness statement too, in paragraph 13 you say that when you began considering options for allocating capacity of the Bruce-to-Milton line, from the beginning the OPA have publicly stated that it would award capacity of this new line through an Economic Connection Test.

THE WITNESS: Sorry, are you referring to the original or the --

THE CHAIR: To your witness statement, the second one, paragraph 13.

THE WITNESS: Paragraph 13?
THE CHAIR: Page 5.
THE WITNESS: Yes.
THE CHAIR: So does this statement here correspond to the presentation that was just on the screen before, which is C-0438?
MR. SPELLISCY: I think if you go to paragraph 16 he actually describes this exact presentation. And I believe if you bring up slide 5.2. Just click through it. Keep going.
Sorry, we should go confidential on this.
--- Upon resuming the confidential session at 10:36 a.m. now deemed public
Q. This brings me to another question. At one point, in a rather long question, the Claimant's counsel said something about the Claimant's projects being ranked 8 and 9 in an area.
Can you explain whether the OPA ranked projects on an area or a provincial basis?
A. So, as part of the launch phase of the Feed-in Tariff program, when we examined the criteria, projects were ranked provincially. They all came in provincially. We ranked them provincially.

That's the way they were done.

For the purposes of sharing that information publicly with stakeholders with communities and so on, there was a benefit to kind of grouping it into clusters just for the purpose of sharing information, which is where the areas were. And the areas, as Bob Chow would speak to, are the electrical areas. So Bruce being an electrical area, London being an electrical area, Niagara to the east. So those were sort of identifiers but the rankings were provincial rankings based on how a proponent scored in their original submission.

Q. And in the FIT Rules there is mention of time stamp, and you just mentioned how the proponents scored. Could you explain how the time stamp worked for launch period applications and then for post-launch-period applications?

A. So in the launch period we purposely didn't want to rush out the door on Day 1 so we gave 60 days, make your submission, we evaluated them, awarded them or didn't award them, criteria scores, and then what we ended up doing is -- so we took a provincial ranking based on score and then we converted them to a virtual time stamp separated by like a second apart or something. So all of the

launch period criteria or the launch period projects were at the top of the list. After the launch period concluded, any application that came in got a time stamp and it was just added to the list in time stamp order.

Q. And there was never a separate time stamp issued by area, was there?

A. No, there was only one time stamp.

Q. And only one time stamp is mentioned in the FIT Rules; right?

A. That's right.

MR. SPELLISCY: I think that's all the questions I have. Thank you.

THE CHAIR: Did the co-arbitrators have questions for Mr. Cronkwright?

QUESTIONS BY THE TRIBUNAL:

MR. LANDAU: Mr. Cronkwright, I've just got one question which is really to better understand the context of some of the events that you describe.

Looking at your first witness statement from paragraph 11 onwards, specifically 13, you describe the Niagara Escarpment Commission's process in terms of approving the Bruce-to-Milton

transmission line.

That, as I understand it, was a process that went into a complex appeal system, appeal procedure from about October 2009?

THE WITNESS: Yes, that's correct.

MR. LANDAU: Which then would have been a chunk of time, putting it simply, that everything was, in a sense, stuck in the NEC process before you could actually -- or anybody could go forward with an expanded capacity?

THE WITNESS: That's correct.

MR. LANDAU: Could you just explain a little bit what that -- as far as you're able to explain -- what that NEC process would have been like in terms of proponents and users and people who are on the outside watching. How much of it would they have known? How much was in the public domain and what would have been the proponent's involvement if it?

THE WITNESS: So, again, I think the context that's important to note here is that the actual transmission line itself, so that had been proposed, I believe, in 2007 or earlier, by the OPA, comments to Hydro One and Energy, that there was a need for a transmission line.

That had gone through, sort of

approval that the line should be built. The Niagara Escarpment Commission, their obligation is similar to the Ministry of the Environment and so on, and their concerns were, how would this transmission line affect areas, sensitive areas and so on running through the escarpment, and so my understanding, again is that they made the determination that based on all of the evidence provided to the NEC and their requirements, it passed the test and that it should be approved.

However, any member of the public is able and eligible to appeal that decision, based on whatever grounds they had with the NEC. So, again, in reading some of the evidence it appears that whether it was home owners or local people had some concerns about the transmission line. They would have made an argument in front of the Escarpment Commission about why the line should be there or shouldn't be there, routings and so on, and the Escarpment Commission would then take all of that into its decision-making about whether or not the line moved forward and then also some details on routing of the line.

So, the discussion there wouldn't, from my understanding, have been about electrical generators so much as transmission infrastructure and

where the transmission infrastructure would go.

The impact would be that any generator, whether it was the nuclear facility, whether it was renewable generators, simply had to wait for that process to run it its course and it wasn't an issue so much about generation as it was an issue about the line, the towers, the impact of that and that's the scope that the Escarpment Commission looked at the decision regarding the line on.

MR. LANDAU: So presumably that would have been an entirely public process?

THE WITNESS: I assume that it would be entirely public or public disclosure is part of that, yes.

MR. LANDAU: So proponents or people who had an interest in transmission capacity would be well aware during that long period as to its progress and when the outcome would be?

THE WITNESS: And would have followed it. And that's why we understood that even from -- if we look at the timing, the decision I believe was rendered in September, so presumably generators would have thought, okay, this line has been approved and then in very, very short order --

MR. LANDAU: So September '09, so you are talking about the first decision before the appeal?

THE WITNESS: That's right. So when the Niagara Escarpment Commission made their decision, I would expect the generators looked upon that favourably and then in very short order, I think it was October of 2009, it was appealed, so people had sort of gotten ready to move and then had to sort of sit back and wait while that process ran its course.

MR. LANDAU: I see. Thank you very much.

THE CHAIR: You said in your witness statement, in the first one, in paragraph 17, and you repeated it in another fashion orally, that the June 3rd direction required the -- you said -- and you wrote, the June 3rd directions require the OPA to conduct what amounted to a regionalized and modified ECT, and you also said today that the June 3rd direction, parts of it did not need -- parts of the content of this direction actually did not need a direction because they were in compliance with the actual rules. So I was interested in understanding better what was not in accordance with the rules? Was it just the timing or was it something different?

THE WITNESS: So there are a couple of pieces to it. Again, when I talk about modified, all of the portions of the ECT that would have talked about clustering and build out and expansion --

THE CHAIR: So the whole part is economic justification of expansion which is the second step, if I understand it correctly, that is not being pursued?

THE WITNESS: So that was not being pursued in this process. So there would have been proponents expecting that process to happen. It wasn't going to happen so we wanted that communicated in the policy direction.

As well, the fact that this was only going to take place in the Bruce and west of London areas and it wasn't going to happen province wide. So, again, to clearly communicate that. And the third piece was the capacity allocation.

So, the fact that there was more capacity available, but that that capacity was being assigned to other projects, that required a direction so that it was clear that it wasn't going to be awarded through a FIT; it was going to be awarded through other mechanisms.

THE CHAIR: And was that derogation

from the FIT Rules?

THE WITNESS: So what the FIT Rules didn't talk about, because when they were designed, it didn't talk about the interplay of any other procurement initiatives. So people in the FIT program were following the FIT Rules. If you were involved in any other OPA procurement exercise you would have been following the rules at the time that applied to you.

We wanted that it -- you know, the government state its policy clearly, that in the context of what we were doing here, the megawatt allocation would be up to a certain point, because the understanding is that the line would technically enable more than that and the government had made a decision that some of that capacity would be held aside for the Korean Consortium, we wanted that to be communicated in the directive so that FIT applicants understood that this is what was being allocated under the FIT program.

THE CHAIR: In your second witness statement, in paragraph 4, you say the OPA is typically directed to use one of three different mechanisms to procure electricity: competitive procurement; standard offer programs; and sole or single-source contract.

I understand that the FIT falls in the second category and the GEIA in the third one?

THE WITNESS: That's correct.

THE CHAIR: You're directed by the government.

THE WITNESS: Yes.

THE CHAIR: Because here it says it is typically directed but we do not know who directs?

THE WITNESS: Right, so the OPA receives all of our procurement directions from the Ministry of Energy under the Electricity Act. So we would get directives to procure certain assets or certain types of assets or classes of assets.

THE CHAIR: And when you would receive these directions, would anything be specified about the interaction of these different mechanisms?

THE WITNESS: So, at this time frame, there wouldn't be very much, if any. Sometimes but not often. So we would get a direction on a certain program that would specify parameters around that program, and it wouldn't necessarily speak to other initiatives. So we had several directives at the same time that were all in place and all valid and we were trying to implement all of them.

THE CHAIR: And did it occur that you

had conflicts or overlaps between different mechanisms?

THE WITNESS: So, I would suggest that up until this point, there hadn't been very many where we had been able to manage them. So the example would be, we previously had two directives at the same time. One was for renewable energy supply 3, a competitive procurement for renewables.

A different one was for combined heat and power. And what we had done in that instance, in order to kind of manage it, we looked at basically where we felt the interest was in renewable supply. Where we felt the interest was in combined heat and power and we actually split the province in half and then we said in this program you are only allowed to compete on these circuits, and on this program you are only allowed to compete here.

That's the way we had done it before. We hadn't really seen it, other than that, up until this point.

THE CHAIR: Thank you. No further questions on either side.

Is there a follow-up question on your part, Mr. Appleton?

MR. APPLETON: Yes, Mr. Cronkwright,

I'm sorry. I'm going to ask him from here if that's all right.

THE CHAIR: Yes of course. Speak close to the mic.

FURTHER CROSS-EXAMINATION BY MR. APPLETON:

Q. All right, sorry, Mr. Cronkwright, I'm already getting a cold situation like you.

I just want to ask a question arising from the questions that Mr. Landau raised about the Niagara Escarpment Commission and that process. This was a new area of discussion that we hadn't otherwise gone into and I wanted to make sure that the Tribunal was clear and everyone was clear.

Just to make sure that we understand the facts, the Ontario Energy Board approves the line in 2008, I believe, that's what you -- you referred to 2008 in your witness statement. That's when this line was first approved; correct?

A. So, the Ontario Energy Board would be looking to approve it on behalf of the ratepayers and whether that's economically justified based on the argument. So they would have said economically or system-wide it's approved.

Q. So that's a "Yes"?

A. But they don't have any control over environmental aspects.

Q. I didn't ask you that question. I just said "That's a yes?" The reason I'm asking is I just want to confirm my understanding here, so it would be much easier if you just answer -- if I ask you if the Ontario Energy Board approved it, and the date, that's all I want.

The reason it's all I want is I want to understand the dates for everybody. We're not asking you about the policy reasons. I just want to confirm the dates. So, when you made reference to 2008, you were making reference to when that was first approved; right?

A. So, I don't think I actually said 2008 at all.

Q. I believed you did but --

A. 2007, I believe or earlier. So all of the evidence that we would have made is filed publicly and that would all be available on the public record with respect to filing any Ontario Energy Board decisions.

Q. That's what I've been checking and that's why I'm asking these questions. So would it surprise you if the Ontario Energy Board had

approved this in 2008? Would it surprise you?

A. Nothing would surprise me if I found it but there's material filed with respect to the line.

Q. This was just with respect to a series of dates. I didn't really want to go there so let's move along.

I understand that the next step was that there was an environmental assessment and that took place in 2009 or it was approved in 2009; would that be roughly consistent with your understanding?

A. So, I don't know the specific details of that because it pre-dated me coming in this role but that would be roughly the timeframe.

Q. All right. And then there was a hearing that took place after this environmental assessment and I understand, is that the hearing that you're talking about when you refer to a process of the Niagara Escarpment Commission?

A. No.

Q. So, because I understand that the Ministry of Natural Resources directed the Niagara Escarpment Commission to issue development permits. This is how the Ministry of Natural Resources can direct the OPA to do things, and that was the basis of

the appeal done; is that correct?

A. It could be. You have the evidence in front of you. I'm just suggesting that the issue that came up to play for us was the appeal and its implication as opposed to what pre-dated it.

Q. I'm just trying to understand about the nature of the uncertainty. So there was an appeal and I assume that that meant there was some type of a hearing presumably?

A. Presumably.

Q. And then a decision-maker -- do you know who the decision-maker was that everyone was waiting for?

A. I believe the Niagara Escarpment Commission makes recommendations or makes an output and then that has to go to a level of the government for final decision.

Q. So there had been some hearing of some form and then people were waiting for the decision.

A. That's my understanding.

Q. And people can wait for some period of time?

A. Yes.

Q. So I just wanted to explain that.

I think the uncertainty here that you are referring to, is while people are waiting for the decision on the appeal to take place, it wasn't as if there was some other iterative process here and that's -- is; is that correct?

A. I'm not familiar with the intricacies of their process but we understood that between the Niagara Escarpment Commission and the proper regulatory bodies it was with them for review of the approval decision.

Q. That's what everyone was waiting for. That was the decision that you had referred to?

A. Right. That's what everybody was waiting for.

MR. APPLETON: All right. Thank you.

THE CHAIR: Fine. So this ends your testimony, Mr. Cronkwright. Thank you very much.

We'll now take a break. And we will resume at 11:15; is that right? And then we will hear Mr. Timm.

MR. APPLETON: Excellent.

--- Recess taken at 10:57 a.m.

--- Upon resuming at 11:23 a.m.

--- Upon resuming the public session at 11:23 a.m.

THE CHAIR: Are we ready to resume?

It looks like we are. Good morning, sir.

THE WITNESS: Good morning.

THE CHAIR: For the record, you're Gary Timm?

THE WITNESS: Yes, I am.

THE CHAIR: You are a partner with Deloitte in Ottawa?

THE WITNESS: Yes, I am.

THE CHAIR: You have filed one expert report in this arbitration dated 28 April 2014.

THE WITNESS: That's correct.

THE CHAIR: You are here as an expert witness in this arbitration. As an expert witness you are under a duty to make only such statements that are in accordance with your sincere belief. Can you please confirm that this is what you intend to do?

THE WITNESS: Yes.

AFFIRMED:GARY TIMM

THE CHAIR: You will first be asked questions by Mesa's counsel and I also recall that the experts have an opportunity to make a presentation, as part of the direct examination, which should not last more than 20 minutes. That is what we have in the rules.

MR. DICKSON-SMITH: Thank you, Madam

Chair.

THE CHAIR: Please.

EXAMINATION IN-CHIEF BY MR. DICKSON-SMITH:

Q. Good morning, Mr. Timm. As Madam Chair asked, you have submitted one expert report in this arbitration on April 28th?

A. That's correct.

Q. Can you turn to tab A of your binder. I think you will find your expert report there.

A. Yes.

Q. Thank you, and can you turn to appendix B in your report. You will find your CV. That is your CV; correct?

A. That's correct.

Q. You are an advisor with Deloitte Financial Advisory Group in Ottawa, Canada; is that correct?

A. That is correct.

Q. Your CV states that you have worked exclusively, or you've worked in the investigative accounting area, amongst others; correct?

A. That is correct.

Q. So can you tell us how government

process review that you cover in your expert report is related to the area of investigative accounting?

A. Yes, in terms of process reviews we undertake them either -- I'll call it after the fact or before the fact. In other words, the after the fact is where an allegation or something, complaints come forward with respect to some process such as procurement, we'll get involved and do an investigation around that complaint to assess the merits of that complaint.

On the before aspect of a process, we'll get involved in terms of undertaking fairness monitoring of the process and overseeing processes such as procurement.

Q. Thank you. You are a chartered accountant?

A. That's correct.

Q. And you are a certified fraud examiner?

A. Yes, that's correct.

Q. And you are a chartered accountant with a specialist designation in investigative and forensic accounting; correct?

A. Yes, that's correct.

Q. And you have a certification in

financial forensics?

A. That is correct.

Q. Now, your CV also states at items 1 to 3, down the middle of the page, that you have been a fairness monitor for public works in government services, Canada. So can you tell us what a fairness monitor does?

A. A fairness monitor will observe the process in the case of the three that are listed. Our team would have been involved in terms of looking at the process, making sure that it was fair, transparent, more as an observer throughout the process, from start of when the RFP would have been issued through to the evaluations through to -- that whole process until the evaluation is completed.

Q. Thank you, why is a fairness monitor relevant to public sector purchasing processes?

A. In this case it would be to ensure the transparency to provide comfort and assurance that the process would be undertaken in a fair and independent manner.

Q. Thank you. And have you done any other work for the Mesa Power Group?

A. No, I have not.

Q. Have you done any other work for

the Government of Canada?

A. Yes, I have.

Q. Can you briefly describe that work?

A. It's from investigations on behalf of the Federal Government to doing various financial-type consulting with the government. I've worked on commissions of inquiry on behalf of the government as well.

Q. Now, at this stage you are permitted to give a 20-minute presentation to set out your conclusions to your report, and your methodology. Do you have a presentation?

A. Yes, I do.

Q. I think you'll find that presentation at Tab C of your binders.

A. Yes.

MR. DICKSON-SMITH: I'd just like to go to confidential mode.

--- Upon resuming the confidential session at 11:28 a.m. under separate cover

PRESENTATION GIVEN BY MR. TIMM (CONFIDENTIAL)

--- Upon resuming the public session at 11:35 a.m.

BY MR. DICKSON-SMITH:

Q. Thank you, we are public.

Mr. Timm, do you have any corrections to make to your expert report?

A. No, I don't.

MR. DICKSON-SMITH: Okay, thank you, I'll now turn matters over to Canada for their cross-examination.

CROSS-EXAMINATION BY MS. SQUIRES:

MS. SQUIRES: Good afternoon, or good morning for a few more minutes, Mr. Timm.

THE WITNESS: Good morning.

BY MS. SQUIRES:

Q. So you've now had the advantage of sitting in the room for the last couple of days and you've heard this introduction several times now but for the sake of completeness I'll run through it.

As you know, my name is Heather Squires and I'm counsel for the Government of Canada in these proceedings. I'm going to ask you a few questions so we can understand the conclusions that you've made in your report.

If you don't understand the questions let me know, I can rephrase it. It is important that we understand each other. In that regard, it is also important that you answer with a "yes" or "no" if you're able and then I'll provide you with time to

provide context or further explanation, if you feel that's required.

Now, I'd like to start today by getting a better idea of your background. I know counsel for the Claimant has asked you a few questions in that regard. Your CV indicates that you are part of the Financial Advisory Group at Deloitte; correct?

A. That's correct.

Q. Your work is focused mainly on public sector, pharmaceutical, financial services, high tech and manufacturing sectors; correct?

A. That's some of the areas, yes.

Q. Well, you don't regularly advise clients on electricity procurement; correct?

A. In terms of electricity, no.

Q. And specifically on OPA procurement programs?

A. No.

MS. SQUIRES: Now, I'm going to go in confidential session for a minute here.

--- Upon resuming the confidential session at 11:39 a.m. under separate cover

--- Upon resuming the public session at 11:44 a.m.

BY MS. SQUIRES:

Q. I'd like to turn to tab 8 in your

binder and that is Exhibit R-073. Sorry, there are a lot of binders on the go.

Now this is the request for quote, or RFQ, that the OPA put out in order to hire a fairness monitor to assist in the FIT Program's criteria review; is that correct?

A. That's correct.

Q. I understand from Annex A of your report that this document was not listed in your scope of review; correct?

A. That is correct.

Q. Now, under the "Task" heading there in that document, the OPA indicated it was looking for an entity to act as a fairness monitor at point 3; correct?

A. Both at point 3 and actually in the heading title under "Request for quote" it says:

> "Fairness monitor required in assisting..." [As read]

So it is clearly right at the top as well.

Q. So your report then takes issue with LEI's role as a fairness monitor given it had additional roles in the evaluation process that, in effect, the role of a fairness monitor is incompatible

with the additional roles that are listed in this RFQ; correct?

A. In terms of the additional roles, as you put it, yes, we take issue in terms of the roles versus a fairness monitor, that's correct.

Q. Now, I'd like to turn to paragraph 5.1 of your report, which is in the other binder, and I want to look at the first sentence there in paragraph 5.1. It indicates that you conclude that, based on your review of the LEI report:

> "We have identified a number of issues which cause us to question whether the OPA evaluation was fair and consistent." [As read]

Correct?

A. Correct.

Q. So you don't actually conclude though that any fairness issues existed, just that you questioned the process; correct?

A. Because of the limited documentation or information we had, we could only question. We couldn't conclude. That's correct.

Q. Nor do you conclude that if the fairness monitor as you described in your report

and as you described it earlier today was used at the conclusion of LEI or the conclusion of OPA's process would have been any different; correct?

A. We can't tell, based on what information we had.

Q. So you don't actually conclude in your report that the OPA's use of LEI in this way impacted Mesa in terms of the ultimate outcome for the TTD and Arran projects; correct?

A. Okay, we don't know what impact there may have been on, whether it be Mesa or any other applicants, whether it could be positive or negative so we can't conclude on that.

MS. SQUIRES: Those are all the questions that I have for you, Mr. Timm.

THE CHAIR: Thank you. Any questions in redirect?

MR. DICKSON-SMITH: I do. I have two questions.

REDIRECT EXAMINATION BY MR. DICKSON-SMITH:

MR. DICKSON-SMITH: Hello, Mr. Timm, once again.

Now, counsel for Canada referred you to a document, the RFQ which is at tab -- the request for quote, that was at tab 8 of Canada's binder.

R-073. This RFQ, or request for quote, came after you prepared your report; correct?

THE WITNESS: I received it after that date, that's correct.

BY MR. DICKSON-SMITH:

Q. And it was part of Canada's responsive submission to your report; is that correct?

A. Yes, I don't know that for a fact but I just know that I've got it after the issuance of our report.

Q. Ms. Squires also took you through your observations with respect to the LEI report; correct?

A. That's correct.

Q. Now, bear with me, I'm going to do some crude maths here. So, you understand from this week that the total megawatt capacity that was aimed under the FIT Program was 10,700-megawatts, according to the LTEP?

A. I would have heard that this week, yes.

Q. Okay, and you've also tried to put a value on this using Samsung's 2,500-megawatts that was valued at roughly 18 billion of revenue.

A. If that's what it is.

THE CHAIR: I'm just not sure how does this relate to the cross-examination?

MR. DICKSON-SMITH: I'm just merely trying to establish with the witness the magnitude of this program and what he thought was appropriate. I'm not asking him to verify these numbers at all.

MR. SPELLISCY: I don't think we asked any questions about the magnitude of the FIT Program or anything -- certainly the word Samsung wasn't even used.

THE CHAIR: That is why I was not sure, but maybe you get to your question and we will see what it relates to in the cross-examination.

MR. DICKSON-SMITH: I'll get there very quickly, Madam Chair.

BY MR. DICKSON-SMITH:

Q. So, on that basis, let's go back to the Samsung, it's about 2,500-megawatts and that's about a quarter of the capacity that was aimed for under the LTEP, about 10,700; correct?

A. If those numbers are correct, that is correct.

Q. So if I was roughly to, in a crude way, extrapolate that, multiply that by four, it will be about 18 billion, is what we're looking at

of the value of the FIT Program?

A. So assuming the numbers are correct and 4 times 18 billion or whatever, sure, in that neighbourhood of 18.

THE CHAIR: Have you, in the course of your report, reviewed the value of the FIT Program?

THE WITNESS: No, I haven't. No.

MR. DICKSON-SMITH: Sorry, Madam Chair, what I'm trying to get at with this witness is to establish what Mr. Timm's view, in response to Ms. Squires about the fairness of the program in light of the magnitude of the program, in terms of the...

THE CHAIR: So maybe we could ask the question in the following fashion: Does your fairness assessment vary depending on the value involved in a program or in an application?

THE WITNESS: Okay, in...

THE CHAIR: Is that what you're having in mind? Not exactly.

MR. DICKSON-SMITH: Can I just quickly ask, ma'am?

THE CHAIR: Yes.

BY MR. DICKSON-SMITH:

Q. Given the large amount at stake in the FIT Program, wouldn't you expect a process that

was more robust than you observed in this process, from your review?

A. Okay, from the limited review of documentation that we did have to look at, certainly you would expect when the reserves magnitude have request system in place. In terms of what was here, it was done over a very short period of time and it seemed to be very quick. Even the audit that was done by LEI, when they did an audit of some samples, like here it was just one person, one for each evaluation criteria.

In the LEI they actually did two people and then compared and still came up with differences and had to go through that. That's the kind of thing one would expect, where it would be more robust than just one person looks and you're in or out.

So I don't know if that's what you are dealing with but in terms of the process, you would expect the kind of dollars that you are dealing with and if I look at a fairness monitor, where I've been involved in that, they've varied from hundred thousands and millions and the robustness of those systems do vary somewhat just because of the significance of what's involved.

So, here again I have limited information but I would suggest that you would normally have more than one person look at it or to have some information, so that the robustness, I think would be more than what was here but...

Q. So what would you expect, Mr. Timm, more staff? More independence in terms of the fairness?

A. Well, I guess the other thing in terms of -- there could be more staff certainly, if that was required. Or it could be the same staff doing just a longer period of time to do it but making sure what happens. In terms of other things, there could be other things but I, at this stage...

THE CHAIR: Why did you not address this in your report?

THE WITNESS: That's -- yes.

THE CHAIR: Because it was not asked or because it does not refer to you when you reviewed the process?

THE WITNESS: Again, we were looking at just the particular process that was undergone. No, we did not address that.

BY MR. DICKSON-SMITH:

Q. Finally, Mr. Timm, who does

a fairness monitor protect?

A. Well, it actually protects all parties, really, in terms of both the proponents, from a point of view of their comfort in making sure that the process is done in an independent and fair manner, and also for the parties that are writing out the procurement in -- as done, it protects them as well to make sure that the process was done appropriately as well.

MR. DICKSON-SMITH: Thank you, Mr. Timm.

MR. SPELLISCY: Professor Kaufmann-Kohler, if I could just for a second, because counsel for the Claimant had introduced a question that was essentially, I guess, a statement to which the witness didn't know, and it was talking about the RFQ as part of Canada's response on submissions in your report; is that correct? He said, "Yes, I don't know." We can clarify the record. It was not part of the rejoinder. It was part of the counter-memorial documents. You will find that at the index of exhibits as well as in our counter memorial.

THE CHAIR: Having seen the number of the exhibit, I thought that it could not be a rejoinder exhibit, indeed. It's just agreed on the

Claimant's side because it is R-73.

MR. DICKSON-SMITH: So sorry, Madam Chair, we stand corrected.

THE CHAIR: So the question then is to Mr. Timm: You have not listed these documents among those in your report that you have reviewed; but does it mean that you have not seen this request for quote at the time you wrote your report?

THE WITNESS: That's what that would mean, that's correct.

THE CHAIR: So, if you now look at that, and especially at the part that is entitled "Tasks" having seen these tasks which, for instance, include providing advice, does that change your report in one way or another?

THE WITNESS: No, it wouldn't change our findings or our conclusions either way, because again --

THE CHAIR: So your witnesses would go to the tasks as they were defined, here?

THE WITNESS: Again, this is reviewing, it is normal to do that. Our issues were that, effectively, LEI was helping to define the task, put them in and then determining whether that was fair or not and that's not appropriate to do that because

you are not independent at that stage.

THE CHAIR: I thought -- that was my point.

THE WITNESS: So that's why my conclusion would not change.

THE CHAIR: Would not change. Yes.

Any questions from my co-arbitrators side? Yes, please.

QUESTIONS BY THE PANEL:

MR. LANDAU: Mr. Timm, I'd like to understand, just a little bit further, the task that you've actually done, as an expert task.

As I understand it, you've looked at the role of the LEI and you've looked at the role of the OPA, in particular respects and for each of those you've emphasised that you've done a process of evaluation, a process evaluation but not the end result.

THE WITNESS: Correct.

MR. LANDAU: So I want to understand a bit further what that means in real terms to look at the evaluation of the process, but not take into account the end result. If we could focus on the OPA part of your report.

As I understand it, you are not

an expert in electricity procurement?

THE WITNESS: That's correct.

MR. LANDAU: And you wouldn't have any particular experience or expertise in how an entity such as the OPA might exercise its discretion with respect to electricity procurement; you are just looking at process in the abstract?

THE WITNESS: That's correct. That's correct.

MR. LANDAU: But if you're not looking at the actual evaluation of OPA in the end, what I'm having trouble understanding is how can you look at the process in the abstract without, for example, factoring in OPA discretion? Isn't there an OPA discretion on how to evaluate each of the conditions?

A. There certainly could be discretion and, in fact, one of the examples, as were under "Successful", there needed to be some more definition of successful which the OPA did do and we did look at that.

So there is discretion that can occur, but for example, we're looking at: Did they undertake the process in line with what the FIT Rules seem to say, in reviewing those questions.

So, for example, on the experience

criteria, where there was a requirement for a statement to be made as to the group or individuals on experience, that was one of the process items. But, in fact, when you look at the FIT Rules, that wasn't really necessary.

What we see there is that the 26 per cent of the proponents that put in, apparently they failed just because they didn't give statements. So that becomes something you say: Is the process fair then? So you don't always have to understand electricity to look at the process.

MR. LANDAU: Let's look at that part of your report, if we may, which is Section 6 and, in particular, if we start with 6.4 of your report, you set out the relevant FIT Rule for this additional criteria. Section 13.4(a)(3).

So there we have what is the test that's set out in the FIT Rules, but presumably you would have to be taking a view as to how to read that rule and, in particular, what would be the extent of OPA's discretion in applying that rule.

THE WITNESS: And we would look at the questions or tests put around that rule, that's correct.

MR. LANDAU: In the end it will be for

OPA, won't it, to take a view as to whether or not the criteria has been satisfied?

THE WITNESS: In terms of their evaluation?

MR. LANDAU: Yes?

THE WITNESS: That's correct.

MR. LANDAU: Wouldn't it be possible that even if they break that evaluation into a number of different criteria, some criteria might be more significant to the OPA than others?

THE WITNESS: That's definitely possible.

MR. LANDAU: So it is possible that the OPA could come to criteria number 2 in their criteria in their list and if it's not satisfied that might trump all the other criteria for them?

THE WITNESS: And that's fine. Except if it's a criteria that is kind of a question that creates a criteria that is not really here, in other words, you require a statement, then I would suggest that that's reasonably clear that that's not required here and if people get eliminated, the parties get eliminated, then that's probably unfair that they didn't know they had to put in a statement.

MR. LANDAU: Can I ask you then just

to look at -- if we stick to this one for a moment. If we actually look at the FIT Rules themselves which presumably you are familiar with?

THE WITNESS: From reviewing them, yes.

MR. LANDAU: If you go back to your binder, and look at tab 2, I think you've got the FIT Rules there, at least one version of them. If you look at internal 27, the page is at the top.

THE WITNESS: Yes.

MR. LANDAU: You can see 13.4 at the bottom of that page "Criteria"; do you have that?

THE WITNESS: Yes, I do.

MR. LANDAU: So you would be familiar with -- these are the criteria that you would have been assessing in your report?

THE WITNESS: That is correct.

MR. LANDAU: So look at the bottom of page 28. It says:

> "For each criteria set out in Section 13.4a, where the Applicant has provided evidence satisfactory to the OPA acting reasonably ..." [As read]

How did you interpret that:

"... evidence satisfactory to the OPA acting reasonably..." [As read]

Wouldn't that give the OPA some discretion?

THE WITNESS: And as I indicated there was, I think, some discretion that they would have had. Absolutely, so long as it's not in any way taking away from what the proponents are putting in, or adding something extra that the proponents, on the surface, if one were to read 13(a), sub 1 to 4, because typically, for instance, when we're doing fairness monitoring, when we're going through it, if there is something that wasn't as clear as it should have been for the proponents, and notwithstanding that entity or department wants a certain thing, usually you've got to err in some fashion that you are not being unfair to the proponents because you weren't asking for that in the first place.

All I'm saying is I don't disagree. It's just that looking at the process there are some things that may stick out that say it's not necessarily -- it wouldn't have been on the surface that a proponent would have known they had to put in,

that's the differential, okay.

MR. LANDAU: I see. All right. Thank you.

THE CHAIR: So your point is to say that although there was no statement, the OPA should have continued to review the application, looking for indications about prior experience?

THE WITNESS: That's effectively what we're saying because that statement wasn't out there for the proponents to know to put in. That's effectively what we're saying. That's correct.

THE CHAIR: You have not said much in your presentation about your third conclusion about the adjustments that caused concern about the process.

THE WITNESS: Okay.

THE CHAIR: Can you just briefly expand on this?

THE WITNESS: That is the LEI did the audit or they did a sample of the population, the entire population, about 16 per cent. From the LEI report, and it appears that there was some type of discrepancies, they concluded at the end there wasn't, but it does say within there that there was adjustments by LEI and OPA as a result.

That's only on a sample basis, so we

don't know what those adjustments were and to the extent that there was any adjustments made, then the question becomes: How does that impact the rest of the population, all the other applications, should they have been looked at for those adjustments. So that's where the concern comes in which is: Was that done or not? We don't know. So it's just a concern that –

THE CHAIR: Is it a concern about consistency of the process?

THE WITNESS: Well, it could be. Again, we don't know the adjustments so it could be the consistency. It could be, again, could it affect rankings. I don't know. It's just because there are apparent adjustments, we don't know what they are, we can't comment one way or the other. It just creates a concern.

THE CHAIR: Okay. No further questions, "yes" or "no"?

MR. DICKSON-SMITH: Yes. We have one arising from Mr. Landau's.

THE CHAIR: It has to be related to from the Tribunal's question.

MR. DICKSON-SMITH: Thank you, Madam Chair.

If you recall, Mr. Timm, Arbitrator

Landau questioned your -- asked you about your expertise and experience with how the OPA might exercise its discretion; do you recall that?

THE WITNESS: Yes.

BY MR. DICKSON-SMITH:

Q. Can you briefly comment on your expertise on the review of government's review processes, and as a fairness monitor?

A. Okay, in terms of that, what typically a fairness monitor would do is whatever the parties, in this case we'll say the government department, if they're putting something in place or in this case, exercising that discretion, as a fairness monitor we would look at it and we would say: Does that appear to be fair and transparent for the proponents?

If that was the case, then fine, it moves on. Otherwise we may indicate that there is a fairness issue here and you've got to take care of it. That would be the extent of what a fairness monitor typically what we would do. We don't determine how you resolve it. It goes back to the department to deal with and therefore exercise their discretion.

Q. Sorry, Mr. Timm, my question was

actually what your experience is as a government process reviewer.

MR. MULLINS: Sorry, could I ask, Mr. Timm, can we try it this way. I think the question was not so much how you did your work as a fairness monitor. Explain to the Tribunal, what industries and areas and how long you were a fairness monitor, that kind of background so we have your understanding of your expertise. That's what we're asking.

THE CHAIR: I think we have reviewed Mr. Timm's CV and I think we have the information we need with respect to his prior experience. You have also in your direct examination, and in response, in part, to cross-examination questions that elaborated on this.

MR. MULLINS: We'll withdraw the question then. Thank you.

THE CHAIR: Thank you. No further questions, then thank you very much. This ends your examination, Mr. Timm.

THE WITNESS: Thank you.

THE CHAIR: It is now 10 past 12:00.

We can start with the next expert or we can take a somewhat earlier lunch break than usual,

which depends not only on us but also on the logistics of knowing whether lunch is ready or not. It would be preferable to break now, in my view.

MR. APPLETON: I believe it would be preferable too, since we've decided not to proceed with evaluation witnesses so that the only other witness to be done today is Mr. Adamson.

Mr. Timm, with the estimate that we had for examination of Mr. Timm, from Canada, I believe was either two hours or three hours, so it went considerably shorter. So it would seem to me that we might as well take the lunch. We could even have a -- whatever you want. Mr. Adamson is here and we certainly could proceed now, so what would you like?

THE CHAIR: Any preference on Canada's side?

MR. SPELLISCY: Is lunch ready?

THE CHAIR: That is what I don't know.

MR. MULLINS: While we're waiting, Madam Chair, given the progress of the hearing, if we do the damages experts tomorrow, I would suspect that we would be able to do our closings on Friday and just for scheduling purposes, but at least on our side we feel that that's, timing wise, but I would turn the

questions over to Canada to see if there is something that I'm missing.

THE CHAIR: I think we should wait for Saturday.

MR. MULLINS: Well, in terms of travel and...

THE CHAIR: No, if we can do it on Friday, of course it would be welcome. I think there will be time. Would you complain?

MR. SPELLISCY: I think our position was always that this could be done for Friday. I think it is unfortunate that we will have paid for the room for Saturday and that we will have done all of that even though Canada months ago said this could be done by Friday so there will be costs associated with that.

THE CHAIR: So you will make submissions and when time comes to it but right now you are not objecting to being at home over the weekend.

MR. SPELLISCY: I am not objecting to being home. If this ever gets out to my wife and children, I am not objecting to be at home on the weekend.

THE CHAIR: This is a public hearing.

MR. MULLINS: Just because the comments made about the cost, we obviously do not believe we should be charged with the costs of an extra day for the room. I have much experience with arbitrations and where there is more witnesses on the other side, the fact that they hadn't had to cross-examine five fact witnesses is not our fault.

So, at the end of the day, if they're not using their time as much as they have, but we can deal with that later, if there is any suggestion that we should pay for another day of the room.

THE CHAIR: Don't provoke them because --

MR. MULLINS: I do have a client in the background, in fact, behind me but...

THE CHAIR: We can have this debate later. For the time being we will hear this afternoon, Mr. Adamson. Then we will hear tomorrow, the damages experts. We will have a discussion about that a little later today.

I assume that this will leave you enough time tomorrow afternoon to work on the finalisation of your closing statements and then we can do the closings on Friday.

I think, unless you tell me otherwise,

I think we can all rely on this timing from now on and make any appropriate changes to flight tickets and hotels and the like. Are we all agreed on this, Mr. Spelliscy?

MR. SPELLISCY: I would agree in principle. The only question I would have would be the transcript from Thursday's proceedings. I note that we didn't actually get a transcript from today's proceedings until this morning which could make preparation of any closing arguments on testimony.

So if the court reporter is willing to somehow try and get that out earlier, even in rough version, then I think that would assist the parties in preparing their closing arguments on Thursday night for the Thursday testimony, for Friday.

THE CHAIR: Is this noted on the court reporter's side, we should get at least rough transcript fairly soon after the close of the hearing today and tomorrow.

MR. APPLETON: Of course, Madam President, the issue of course is that Canada still has a fair bit of unused time and they have Mr. Lo. And if Canada tells us they reasonably believe they'll finish Mr. Lo in the morning, we certainly would reasonably expect that we would finish Mr. Goncalves

in the afternoon. But if Canada, I believe has eight hours or seven hours, it they were to use seven hours then that of course would be impossible because then Mr. Goncalves would actually either testify very late tomorrow evening or he would be testifying of course on Friday.

THE CHAIR: Yes, of course. I mean, everything is possible but it doesn't seem reasonably foreseeable to me, and since everyone has agreed to the suggested timing, I understand that this will not happen and I'm looking to Mr. Spelliscy. I think he...

MR. SPELLISCY: I can't imagine an eight-hour cross-examination of Mr. Lo.

MR. APPLETON: Okay.

THE CHAIR: Good. Then let's start again at 1:15. Maybe we can say 1:30?

MR. APPLETON: Sure, thank you.

--- Lunch recess at 12:15 p.m.

--- Upon resuming at 1:34 p.m.

THE CHAIR: So we can resume. I hope you all had a good lunch.

For the record, can you confirm that you are Seabron Adamson?

THE WITNESS: Yes.

THE CHAIR: You are vice-president at Charles River Associates?

THE WITNESS: Yes.

THE CHAIR: And you have provided us with one expert report dated April 27th, 2014.

THE WITNESS: Yes.

THE CHAIR: You are here as an expert witness in this arbitration and in this capacity you are under a duty to make only such statement in accordance with your sincere beliefs. Can you please confirm that this is your intention?

THE WITNESS: Yes, it is.

AFFIRMED: SEABRON ADAMSON

THE CHAIR: Thank you. So we will first have questions in direct by Mesa's counsel Mr. Appleton, and I assume a presentation that should not last over 20 minutes.

THE WITNESS: Yes.

MR. APPLETON: Thank you very much, Madam President.

EXAMINATION IN-CHIEF BY MR. APPLETON:

Q. Mr. Adamson, good afternoon. Thank you. I know that you've been here through the hearing. It is your turn now. So you know how the routine goes so I'm not going to explain the general

process. I'll ask a couple of questions; Canada will ask a few questions when I'm done. The Tribunal can ask you any questions at any time they like.

A. Yes.

Q. I'm going to ask you some questions about your expert report. I'm going to confirm that's the expert report dated April 27th, 2014?

A. Yes.

Q. Now I see that you filed a correction to your expert report on October 15th. Do you have any further corrections to make to your expert report?

A. Yes, I do.

Q. Could you tell us?

A. If you turn to the expert report, on page 19 there is a typographical error that makes the sentence meaningless. The sentence should read:

> "In the remainder of this section I show that the manufacturing commitments of the Korean Consortium heralded by Canada as the basis of superior treatment of Canada under the GEIA ..."

[As read]

That should read, "heralded by Canada as the basis of the superior treatment of the Korean Consortium under the GEIA."

That makes it make sense.

THE CHAIR: Can you just tell us which number it is?

THE WITNESS: I'm sorry, paragraph 19.

THE CHAIR: Paragraph 19. So, we understood page 19.

THE WITNESS: I'm sorry, I thought I said paragraph. Page 9, paragraph 19.

MR. APPLETON: We have that in here.

THE CHAIR: "The treatment of the Korean Consortium under the GEIA."

THE WITNESS: Yes.

THE CHAIR: Is that what you meant instead of "of Canada"?

THE WITNESS: Yes.

BY MR. APPLETON:

Q. So could you just confirm now that we're looking at it all together.

How does your paragraph 19 read now, sir?

A. Well, starting with the sentence

here I've highlighted:

"In the remainder of this section I show that the manufacturing commitments of the Korean Consortium heralded by Canada as the basis of the superior treatment of the Korean Consortium under the GEIA." [As read]

Q. Read the rest.

A. And then the rest of the sentence.

Q. Just read the rest of the sentence.

A. (Reading):

"... amount to little or nothing more than the Domestic content requirements imposed on FIT participants such as Mesa." [As read]

Q. Great. Thank you very much. Do you have any other corrections to make?

A. No, sir.

Q. So, Mr. Adamson, could you just tell as you little bit about your educational background.

A. Yes. Starting from the more recent, I have a master's degree in economics from Boston University. I have a master's degree in technology and policy, focusing on energy, from the Massachusetts Institute of Technology. I have a master's degree in applied physics and an undergraduate degree in physics from Georgia Tech.

Q. I'm still with you, sir.

THE CHAIR: We're listening.

THE WITNESS: It's okay. I was waiting for Mr. Appleton to get back to his soothing tea.

BY MR. APPLETON:

Q. Excellent. And I see here you are currently a vice-president at Charles River Associates which is an international economic consulting firm. You previously were a senior consultant. Can you tell us about your role at Charles River Associates?

A. Yes, I'm a vice-president in CRA's energy practice, based in Boston, and work on energy, economics, consulting projects around North

America, Europe, and sometimes other locations.

Q. And what was your experience prior to joining Charles River Associates?

A. I started my consulting career in the United Kingdom. I joined a firm called London Economics in 1992, when I just finished grad school at MIT. I later started the US office of London Economics in Cambridge Massachusetts.

I then co-founded another economic consulting group called Frontier Economics which still exists and is headquartered in London. I then joined another firm called Tabors Caramanis which was sold to CRA at which time I joined CRA for the first time.

From 2008 to 2010, I left CRA and joined a large alternative investment firm called Tudor Investment Corporation, before I started working with CRA again.

Q. And I see that you are an adjunct lecturer at Tulane University; what do you teach there?

A. I usually only teach one class a year. Tulane is actually in New Orleans. I live in Boston. I usually only teach one graduate course a year in the energy programs which is part of the business school.

Q. Can you tell us about your energy experience in Ontario.

A. Over the years I've done a pretty considerable amount of work in Ontario, really starting from the period of the initial restructuring of the electricity sector in Ontario.

I've testified before the Ontario Energy Board. I've been a witness in a contract arbitration case in Ontario. I've advised on a lot of regulatory issues with respect to the market rules in Ontario. And I've also assisted clients who were evaluating thermal power project investments in Ontario.

Q. And can you tell us about your experience generally with renewable energy.

A. Yes. My firm and I do a lot of work in the renewable energy space. Most of my renewable energy work has been in the United States. I've advised people who were wind farm, wind project, mainly, developers. I've worked with banks who provide the financing of these assets, and we also work with some -- I also work with companies who are the buyers of wind energy, like utilities.

Q. Now, I just want to go through a couple of the things that the Tribunal has asked

experts to be able to do when they come here. So first of all, the Tribunal has asked that experts bring their preparatory files. Did you bring those files with you today?

A. Yes, I brought my -- my set of documents is here with all the ...

Q. Sir, that's the witness binder, is it not?

A. Yes.

Q. Sorry, I've asked you, did you bring your preparatory files you used to prepare your reports?

A. Yeah, that's all related here. The -- there's a few other things that I've looked at recently, but the materials that are in the report are here.

Q. So somewhere here with you you have everything?

A. Background, yeah --

Q. We're going to ask every expert the same question so ...

A. Okay.

Q. Now, as you know the Tribunal has permitted experts to give a presentation, not lasting more than 20 minutes to discuss their conclusions of

their expert reports and their methodology.

Do you have such a presentation today, sir?

A. Yes, I do.

Q. All right. So, your 20 minutes will begin now. I understand that your presentation is -- actually it won't begin yet -- your presentation is set out in the binder at tab E, but for ease again we're going to put an extract so the members of the Tribunal and Canada can take notes as you go along, and Ms. Qi perhaps you'll give a copy to Mr. Adamson to make it easier for him --

A. That would be ...

Q. -- and we'll project this for you on the screen.

THE CHAIR: We need one more. Oh, we have one more. Thank you.

BY MR. APPLETON:

Q. Now, Mr. Adamson, you can -- sorry, your presentation of 20 minutes will begin now, sir?

PRESENTATION BY MR. ADAMSON AT 1:42 P.M.

A. Okay, thank you. I'd just like to start with a summary of what I looked at, the issues I examined and the methodology used.

In terms of methodology, it's really pretty straightforward. I'm an economist and I did an economic analysis of these issues based on really pretty standard micro economic concepts.

What did I look at? First, what were the competitive market conditions of wind power development in Ontario? How did the overall market work. Second, and probably the most information in this report that you have seen, is what were the competitive conditions between FIT and GEIA competitors? We had these two tracks, as they've been described, and what were the competitive conditions between those two?

Third, what was the financial and regulatory treatment of the two sets of competitors between FIT and GEIA?

And finally, I had some brief comments in my expert report with respect to information release, the timing of transmission information associated with the transmission availability test.

So, just to sort of start with the conclusions, to provide a high-level summary, in my expert opinion, FIT and GEIA wind developers provided the same product -- exactly the same product -- and were in competition with each other for scarce

transmission capacity.

Second, the so-called investment requirements under the GEIA imposed on the Korean Consortium placed no material or significant economic burden on the Korean Consortium over what was already required of FIT developers.

Third, FIT developers and competitors such as Mesa were therefore in a very similar competitive circumstances in the market with the Korean Consortium.

Fourth, the Korean Consortium and its JV partner, Pattern Energy, sorry, joint-venture partner Pattern Energy, who was the team they firmed up here with in Ontario as a project developer, under the GEIA received superior economic treatment than the FIT suppliers.

And finally, with respect to the limited issues I identified, the changing transmission rules and the information availability process and last-minute changes to the regulatory process, undermined the credibility of the OPA process, and sort of undermined its integrity, from my perspective.

So, again, kind of on slide 3, starting back with the start, as we've heard, again, so I won't belabour it, what happens? Wind farms are

connected -- large-scale wind farms are connected to the IESO controlled transmission grid in Ontario.

Power flows through the grid, again, as you've by now heard -- flows through the grid instantaneously. It can't be stored, at a reasonable cost anyway -- so as the wind blows, wind farms turn, the wind turbines turn, power is generated, it flows through the grid and is used by load, used by customers.

All sales under the rules are made through the IESO grid to customers who pay all the costs.

In terms of the actual payment flows in the contracts, the wind generators are paid what's called the "Hourly Ontario Energy Price" which is a price that's set by the IESO every hour, and it changes, as the title suggest, every hour, and they're paid that amount and then they're paid an additional amount under the PPA, which basically tops them up to get to the specified contract price in the FIT.

Now, those amounts all come from customers, both the HOEP price, and the contract payment that makes up the FIT total price. The FIT contract payment comes through a thing called the "Global adjustment charge" which is imposed on all

costs paid by ratepayers and it changes quite frequently as well.

It helps pay for all of these types of costs for renewable energy we've been hearing and some other things.

One thing that has kind of changed is that originally started out as seeming like a pretty small amount and then later grew into a pretty big chunk of people's bills.

Now, that's for the FIT. For the GEIA only, there was also an additional provincial payment, the economic development adder, which would be paid on top of the FIT contract price.

So, let's move on to thinking about the competitive circumstances between FIT and GEIA competitors. They provided the same product, power is power, it flows through the grid, electrons move, power flows, it is like water in the river, you can't tell me whose water it is.

They all had to be connected to the IESO grid. The contract forms between the FIT and GEIA were very similar to identical, the GEIA made that clear, and they had the same local content rules. We'll talk about those in a minute.

What other indicators can we get off

of the competitive circumstances? First off, Pattern Energy, who was the company who was the joint-venture development partner in Ontario, specifically viewed Mesa and other FIT developers as its competitors to sell wind energy in the province. Third, it also emerged from Pattern and from the deposition of Colin Edwards of Pattern, that FIT projects had actually been brought by Pattern and the Korean Consortium and re-labelled as GEIA projects. So they had started out as FIT projects and in some cases, relatively lowly-ranked projects, and had been put into projects that became -- incorporated into projects that became GEIA projects, including, as far as I know, the only GEIA project which has actually hit commercial operation to date, which is South Kent.

Fourth, what was the manufacturing commitment for the GEIA for the Korean Consortium posed really no substantial economic burden on the Korean Consortium. Its real requirement was to designate manufacturing partners, which just meant identifying a company that manufactured things, and didn't require the creation of any jobs specifically.

Even later, after they am amended it, they put on another reporting requirement but it still didn't say that Korean Consortium had to hire anyone,

all they had to do was identify the jobs created by their suppliers.

And both the FIT and the GEIA competitors had local reporting requirements. I'll move on.

So the quick summary of just left versus right, FIT versus GEIA. Qualification, well, FIT projects had to fit FIT Rules of course but as we've seen, FIT projects could be turned into GEIA projects, exactly the same projects, and a number of them have been done so.

The domestic content rules were the same, specified in the GEIA and in FIT Rules.

For the Ontario suppliers, really the only difference with the GEIA is I had to go to my suppliers and say, oh, would you be my partner? Meaning I can identify you which, at least in my opinion, didn't pose any significant economic burden.

There is a reporting difference that the Domestic content requirement under the FIT, above already mentioned, and then later under the amended and restated GEIA, they did add this job reporting requirement finally in Section 9.3.2.

Just to summarize and we can move on, onto the treatment. What were the differences.

Obviously transmission access, we've talked about that. FIT had to have a competitive process, competitive process for securing transmission access under the entirety of the FIT Rules. In some places that was hard. The GEIA, there was kind of a guaranteed priority access. There was a free lane marked off on the highway.

On the economic development adder, clearly the FIT didn't have one; that was not a FIT concept.

In the GEIA there was one, the government originally estimated that as having a value of over 400 million, I think the precise number was 437 million. That was later capped down to 110 million in the amended GEIA. Still a large amount of money.

And finally, under the GEIA, the Government of Ontario agreed to, and was obligated to work, through a special working group, with assistance on siting and a whole bunch of other issues that are required to build a wind project. That same exact process was not part of the FIT process.

That provides just a quick summary, so that concludes my presentation.

Q. Thank you, Mr. Adamson. Now, I'm

going to ask you some questions about issues that have arisen since the filing of your report.

A. Uh-hmm.

Q. There's a copy of the rejoinder memorial in front of you. Do you see that? It's right in front of you.

A. Oh, this one?

Q. Yes. Canada has stated in its rejoinder memorial, at paragraphs 126 to 129, they've commented on your expert report. I'm just going to read something out of paragraph 126 where they say:

> "The Claimant relies on the Adamson report to argue that the Korean Consortium and FIT proponents were afforded treatments in like circumstances. However shown below this report is inaccurate, cites to the wrong version of the GEIA and misinterprets the GEIA's obligations." [As read]

Do you have any comments make on this?

A. Yes, I believe that this comment is inaccurate. I actually cite multiple versions of

the GEIA in my expert report which we can flip through and see. And the original GEIA which is the one I originally started the analysis on in the expert report, is the GEIA that was in place until 2011, until an amending agreement. So much of the time of what we've been talking about, that was the contract that was in place. There were later changes of more or less difference, but that was the deal.

Q. Do you have any other comments you'd like to make now? I'm sure you'll have an ample opportunity to be questioned on some of these things in any event by Canada, but do you have any other comments you'd like to make?

A. Only that I did review both -- all three GEIA versions, the original GEIA, the amending agreement which just consists of a whole bunch of changes, sort of slightly out of context, and in the amended and restated GEIA, which was the 2013 GEIA. So I did review all three of those in coming to my conclusions.

MR. APPLETON: Well, thank you very much. That concludes our comments, Mr. Adamson. We'll turn this over to Canada now.

MR. SPELLISCY: Just give me one minute.

THE CHAIR: Sure.

Fine. Now we're ready Mr. Spelliscy.

CROSS-EXAMINATION BY MR. SPELLISCY:

Q. Good afternoon, Mr. Adamson.

A. Good afternoon.

Q. As Mr. Appleton noted, you've heard the spiel many times before but for the record my name is Shane Spelliscy and I'm counsel for the Government of Canada.

I am going to be asking you some questions today. I'm not sure how long we're going to go today but if you need a break at any time, let me know, and I'll try and find an appropriate time to do so as quickly as possible. Hopefully it won't be too long that we'll need to do that.

If you don't understand one of my questions, let me know. I'll try to ask it again in a way that you do understand. We want to make sure that we understand each other and I want to make sure I understand what your opinions are actually in your report.

I think you've heard counsel on both sides say it, but obviously we are trying to create a clear record here so to the extent that the answer to one of my questions is a "yes" or "no," it would be

great if you could give that answer first and then explain that context if necessary.

It is not a "yes" or "no" you can of course answer in a way that you best see fit.

Now, first I would like to -- you gave a little bit of information about some of the work that you were doing in Ontario. I'd like to clarify that in the 2008 to 2011 timeframe while the claimants were making their FIT applications, you were not advising them in any role; correct?

A. No, sir.

Q. Great. And in fact, I've looked through the experience described in your report and I've listened this morning, during any of that application time period you weren't advising FIT proponents on the FIT program; correct?

A. No, sir.

Q. So, that I understand the basis of your report, it is the documents that you were given to review in the context of this arbitration; correct?

A. Yes.

Q. Now those documents are, at least I think you partially listed in Appendix A but I think you mentioned you reviewed some other documents this

morning, including the amending agreement to the GEIA, which is not in the appendix.

A. I did review the amending agreement at the time. I did make a reference to it. It is not in this binder.

Q. But otherwise the scope of the documents reviewed is listed in Appendix A to your report?

A. The scope of the documents I relied on. I mean, obviously there was a lot of other documents that didn't have anything to do with my testimony which I, you know, looked at enough to see whether I wanted to look at them, and general background information, of course, about the Ontario system --

Q. Right.

A. -- which, well, many -- looking at which long pre-dates this arbitration.

Q. Right. Right, so Appendix A, those are the documents that you relied upon in giving the opinions that are in your report though?

A. Yes.

Q. Now, in the presentation that we just went through, there was -- you had a slide at the beginning and you had mentioned that the areas that

you covered in your report and the majority of your report is about Ontario's Green Energy Investment Agreement, and the Korean Consortium and you did note, although you didn't have a slide on it, you did cover a couple of extra small sections at the end of your report on transmission availability and the June 3rd direction; correct?

A. Yes.

Q. I'd like to turn to those first.

A. Okay.

Q. So now, in paragraph 126 of your report, you reference the testimony of Bob Chow who explained that the TAT table published by the OPA was, in fact, the "lowest availability capacity at each circuit." You then comment on that and say in paragraph 129:

> "If, in fact, all of these values did imply minimal available transmission capacity, it does not seem that this modification or distinction was clearly conveyed to all FIT applicants who were relying on the TAT tables to complete

their FIT applications." [As read]

And it's this last sentence again that I'd like to explore with you now.

To be clear, I think you clarified this, so the record is clear, because you weren't involved with the Claimant at the time, you actually have no idea what the Claimant or its consultants understood about the TAT table and the information in there at that time; correct?

A. No, I was not involved with Mesa's application process.

Q. And you would have had no idea what any of the FIT applicants understood about the TAT tables because you weren't involved, correct, at the time?

A. My statement was a general one, based on -- having seen the documents and what was provided, it did not seem very clear to me.

Q. But you are also aware that the OPA gave numerous public presentations about the FIT Program; correct?

A. Yes, I know there were various public presentations and webinars, I think is the correct phrase.

Q. I think Bob Chow could explain better but we'll leave it there.

A. I think that's the correct buzzword of today.

Q. Right, right, you never attended any of those presentations; did you?

A. I did not attend.

Q. So you have idea what the OPA said about those TAT Tables at the time they did those presentations; correct?

A. I wasn't there.

Q. Let's turn in your binder there in front of you; it's the white binder. It's tab 1. It's Exhibit R-179, for the record.

A. Hold on one second.

Q. This is one of these webinars that we're talking about from the Ontario Power Authority dated October 20th, 2009 and it's called:

"Feed-in Tariff program transmission and distribution technical information session." [As read]

Do you see that?

A. Yes.

Q. Now, this isn't a document that

you list in Appendix A so you didn't review this document in rendering your opinion on what FIT proponents would have known about the TAT Tables?

A. Sorry, no, I did not.

Q. You are aware that the claimants' FIT applications were made in late November, November 25th, 2009; you probably heard it this week?

A. I know November -- roughly around November 2009. I certainly won't say I know the date.

Q. So you are not sure that, sitting here right now, whether or not the applications were made before or after this presentation?

A. I don't know the date.

Q. But you would agree that if the applications were made after this presentation, the claimants could have been aware of what was in this presentation; right?

A. That is possible.

Q. In your report in this section you also talk about what you believe FIT proponents would have understood about transmission available in the context of the Bruce-to-Milton application process, and I want to turn to that because it's a related topic, and particularly in paragraph 124 you talk about circuit called the L7S

circuit.

Are you aware that during the Bruce-to-Milton allocations proponents of projects could ask questions of the OPA and the OPA posted answers to those questions on the web?

A. I know there was a Q & A process generally.

Q. Right. You are aware that one occurred during the change window?

A. A specific Q & A process? No, I know there was a general Q & A process. I'm not sure that I can tie the -- I can't -- I am not sure that I can tie in my knowledge that there was a Q & A process with the fact that it was specifically operational during the change window.

Q. I guess I just want to understand the limits of what your opinion was based on, your conclusion regarding Mr Bob Chow's statement that this wasn't sufficiently communicated. So, in offering that conclusion, you didn't look at the PowerPoint presentation that was made on transmission availability and you didn't review the questions and answers about transmission availability that the OPA publicly posted during the Bruce-to-Milton allocation?

A. I didn't review that. I did

review the -- I did review the document -- the question and answer document that was an exhibit to Mr. Chow's testimony.

Q. Let's take a look at that. I'm not sure if this is the one that you're talking about, but if you go to tab 5 in your binder which is Exhibit C-0291, for the record -- in the white binder.

A. White binder. I'm sorry. Binder congestion.

Q. It is a hazard of this job.

Is this the document you reviewed in the context of offering your opinion?

A. Yes.

Q. So, let's take a look at the second page of this document. If you look at the third question on that second page, it says -- this is a question from the public:

> "The L7S" -- well, question from a developer -- "The L7S circuit has 477" -- you probably know it better than I "conductor size on the first 30 kilometres of the Seaforth transmission station but only 211 on the final

section." [As read]

And then it asked:

"What is the 30-megawatt circuit limit listed in the table based upon? If we were to connect to this section with the highest conductor size what is the available injection capacity?" [As read]

And you will see that the answer publicly posted is:

"The value on the circuit table is intended to reflect the weakest point on the circuit." [As read]

Correct?

A. That is what this says but think about when this is offered. June 8th, 2011. We'd had the notice on June 3rd. The window had opened on the 6th. The 3rd I believe was a Friday, as I indicated, I was on a calendar the other day and I looked up on a calendar when I prepared my report. The window opened on a Monday so that must have been the 6th. The 8th was a Wednesday. This seems to have been provided

in the middle of the connection window change period and, kind of, even worse, what about if somebody had already, kind of, made a change and, based on this or other information in this, on the Monday or the Tuesday. Are they supposed to now go back and change this? I mean you've offered this information but kind of smack dab in the middle of the process.

Q. Mr. Adamson, that's why I asked if you had reviewed the earlier PowerPoint presentation.

So let's maybe go back to that.

A. I'm sorry, could you give me the tab on that.

Q. We are back to tab 1 and we are back to R-179.

I want you to turn into slide number 7 which is listed in the lower left-hand corner of the slides. Again, for the record this is a November 2009 presentation. This slide is called the "TAT Availability Tables"; do you see that?

A. Yes.

Q. And in the first bullet there it says:

"The TAT Tables are developed to provide a general

indication of the transmission system's capability." [As read]

Correct?

A. Yes.

Q. And then if you look at the first sub bullet there, and you look at the last one, sort of after the semicolon, it says:

"For lines - the most limiting sections."

Correct?

A. Yes.

Q. And if you look at the third bullet on that page, it then tells people:

"As such, information provided by the tables are indicative in nature and is not necessarily the basis for determining the TAT outcome." [As read]

Do you see that?

A. Yes.

Q. So you would agree that on March 2010 the OPA was giving, in a public presentation, developers' comments that this is the most limiting

section on lines and in fact these are just general indications and it's just indicative; correct?

A. Well, clearly -- it was clearly made clear it was indicative, although, to the extent that all of the information is rather indicative, it's then kind of hard to see how anyone made much of a decision upon it.

Q. They could ask, couldn't they?

A. They could ask, but practically I think that could have been a pretty limiting process for both the developers and, actually, for the OPA. I mean, if you had to ask about every element of the transmission data, that could be a lot of data.

Were you supposed to go back and submit a question for: What is this guy doing? What's this point? What does that mean? What element is that? You know, my general comment was this seems to provide a relatively weak information set for people to make transmission connection decisions. Yeah, I guess you could go ask and I guess, you know, one could have asked probably many, many, many, many questions, but so if it's indicative, I guess it was indicative.

My comment there is, it makes it pretty hard to actually make many decisions. On the

second -- on the point under the first point, so the "based on ratings of equipment", based on ratings of equipment and interregional power transfer constraints, for lines, the most limiting sections -- I'm not sure that's utterly clear, is that on a specific -- is that referring to a circuit which is what was referred to in the table?

Is that referring to transmission constraints that had to be modelled in order to -- as part of a regional or interregional power transfer constraint? That's not completely clear to me.

Q. So you're -- sorry, just so that I understand your opinion. You're looking at this presentation now and your answer is it's not completely clear to you that the OPA was saying the most limiting sections and what that meant. It is completely clear to you that the OPA is giving proponents fair warning that the information on the table is indicative and you also did testify that of course you could ask, though you wonder about the practicalities of how the OPA would have handled such requests; is that what you're saying?

A. Given the voluminous nature of all the individual requests, yes.

Q. But you could have asked if you

had wanted to.

A. One could, I presume one could have asked.

MR. LANDAU: There is one question I'd like to ask on this.

This question is not meant to be rude if it sounds a bit rude but just to be clear: what I wasn't clear about in my own mind is, on the last last part of your report when you talk about access to information, what is your expertise on that part of the process and from what are you deriving these opinions as to how people could have understood something and whether they had enough information? Because the rest of the report I had understood much more as an economic analysis --

THE WITNESS: Right.

MR. LANDAU: -- and I wasn't quite sure how that met with the last part, which looked more like a process opinion that you are giving?

THE WITNESS: Well, my response is really two. Given that I work pretty much as a, significantly as a power market economist. One thing that we look at in the context of these markets a great deal is around the economics and the regulatory processes of interconnection, connecting

generators to the grid. Because that really affects the viability of -- and economics of projects in many cases.

Now, while I have some technical background, I am clearly not a professional electrical engineer until so I don't do engineering studies, but I have worked with providing a number of clients who are looking at these types of questions trying to judge the relative economics of different interconnection options. Because that might affect the price they are going to get paid; that might affect the cost of connecting their facility.

So that has sort of played a role in my work. So I have worked with clients who are trying to understand how these types of interconnection decisions and interconnection options may include connecting to different points on the grid, affect, for example, the financial and economic viability of a project. That was the second part of your question, sir, and I'm afraid I probably have forgotten the first part now.

MR. LANDAU: It is a testament to a bad question because there was only one part.

THE WITNESS: Sorry, but I do remember now actually, sorry.

The other thing is from a -- but the real -- the real thrust of my comment did have kind of an economic objective which is these are, these are really complicated markets, right, very multi-dimensional markets with lots and lots of different options for market participants, and they have trouble, even in an ideal world assessing all those options very quickly.

If the information set isn't as clear as possible, it just seems to me that that type of lack of clarity of information reduces potentially the efficiency of the providence.

Am I going to be able to make the right choices if all the information's not there? And to me, and if I get back to the kind of final conclusion of that segment, it didn't really seem to me that that supported the most efficient process by which everyone had to make these economic decisions. And because they're economic decisions as well as ...

(Court reporter appealed.)

THE WITNESS: I said they're economic decisions as well as purely technical decisions.

They are costs (unclear) and therefore affect that project viability.

MR. APPLETON: Keep closer to the

microphone.

THE WITNESS: I think, yes, well, I think the difficulty is, when looking at that gentleman, I need to --

MR. APPLETON: We'll work it out. Just keep it close.

THE WITNESS: Okay, thank you.

BY MR. SPELLISCY:

Q. Let's turn to the second point that you make at the end of this section in your report and about what you call in paragraph 130 your opinion, "the sudden changes to the FIT Program."

In particular, if you go to paragraph 133 you say that:

> "It is important to allow enough time to ensure that all bidders can reasonably evaluate the full information provided in the context of a change window." [As read]

Is that correct?

A. Yes, that's the sense.

Q. So I just want to understand that sentence and I won't spend a lot of time on it. But in light of documents that you reviewed as well as a

history of what was happening in Ontario, because I note in this section that you referred to certain parts of Canada's counter memorial in this arbitration but I didn't see any documents in Appendix A that were actually from the relevant time period about what was being told to FIT Program developers.

So I guess my question is: Before reaching your conclusion that you reached here, you did not go back and actually review contemporaneous documents about what developers would have understood about the connection-point changes at the time?

A. Well, I reviewed and referred to the document which was the ministerial direction or directive -- direction. Thank you. Requiring -- requiring the OPA to start this process, which provided the structure of what the OPA was to do. I -- that was also later updated into the FIT Rules themselves, kind of translated into that.

And then I had reviewed the counter memorials which, you know, referenced the other testimony of the parties about this question.

So, I guess I haven't listed, you know, any of the other information, but certainly, you know, Canada's counter memorial listed the positions of its experts, and so you know, that's what I --

that's what I -- that's the documents I directly relied on for my information here. But as my comment shows, I mean, you know, the other part of the -- of the conclusion here is really kind of supported by something that's a little more general than FIT here, which is personal experience with kind of utility competitive type mechanisms, such as RFPs, which is something I have interacted with a lot. My firm's even helped run RFP processes for utilities, for example.

So, you know, it was that -- that part was also more of a general comment about, in my experience, how those types of processes run and contrasting it, and comparing it with the very short notice made here, under the Ministerial award.

Q. So you looked at the June 3rd directive?

A. Uh-hmm.

Q. I think you said earlier that you looked at a calendar to see when that happened and when the change window was, but you didn't go back and look at any of the documents from the preceding years as to what had been told to developers about what to expect with respect to this change to the window; correct?

A. Well, there was information about -- there was things like in the FIT Rules about process. Yes.

Q. Well, let me -- because I'm trying to understand sort of the basis more for your opinion here. You would agree that the planning to develop the Bruce-to-Milton line had been ongoing for a while; are you aware of that?

A. Yes.

Q. Probably 2006, 2007, 2008 something in that time frame?

A. Planning transmission lines is often a rather excruciatingly long process.

Q. I think Bob Chow could tell you stories. And you would also agree that since that had been introduced the wind industry had been aware of the coming into this line, since the time of its initial development; is that correct?

A. I haven't polled the wind industry but I can imagine that's true.

Q. That would be something that they'd be aware of, wouldn't it?

A. Yes.

Q. Now, I want you to turn to tab 7 in that big white binder in front of you. And for the

record this is document C-0034. It is a March 23rd, 2010 presentation by the OPA and it is called the "Economic Connection Test Process"; do you see that?

A. Yes.

Q. If you could turn to what is slide number 14 in this presentation. I wanted you to look at the first bullet there. And the first bullet says:

> "After an Applicant receives a TAT result, they may request a change in connection-point for their project." [As read]

Do you see that?

A. Yes.

Q. And the third bullet says:

> "Such changes in order for the application is just" -- if you look at the last clause -- "such a change must be requested prior to the ECT application deadline." [As read]

Do you see that?

A. Yes.

Q. Now, if you look at the next slide, we'll get through these, I promise -- if you look at the next slide, which is slide number 15.

A. Yes.

Q. You will see at the very top bullet it says:

"ECT application deadline is contemplated to be June 4th of 2010." [As read]

Do you see that?

A. Yes.

Q. Let's go a little further in this webinar that the OPA gave and go to slide number 23. I want you to look at the first bullet. It says:

"Transmission capability which may become available between the end of the TAT for the launch period applications and the ECT start date (August 2010) will be allocated based on time stamp priority during what is called the IPA." [As read]

Do you see that?

A. Yes.

Q. We're almost done with this. If you look at the next bullet, it says:

"This" -- meaning the above bullet -- "may include capacity made available due to the new Bruce-to-Milton transmission line." [As read]

Do you see that?

A. Yes.

Q. So the OPA then was telling FIT applicants and developers in March 2010 that if they wanted to change their connection points in order to access the capacity made available on the Bruce-to-Milton line they would have to be ready to do so by June of 2010; would you agree with that?

A. And this was with respect to a prospective June 2010 ECT, I believe. I haven't gone through this whole document obviously.

Q. Sure. If you look at the first bullet on the page it says:

"The ECT start date will start in August of 2010." [As read]

That's that first bullet on slide 23, so it would be in August 2010, the ECT, but the change

in connection-points we just saw on the previous slides was due by June of 2010?

A. My understanding is they never held an August 2010 ECT.

Q. That's correct, but I want -- and we're going to get to that in a second. I want to know if you would agree with me that the OPA is, in March of 2010, telling developers that if they wanted to change their connection points, in order to get onto that Bruce-to-Milton line which might be awarded in the August 2010 ECT, they would have to be ready to change by June of 2010?

A. It actually doesn't tell anyone when to get ready. It says:

> "You may become available and the start date, the ECT start date will be allocated based on the time stamp." [As read]

I think you are actually reading something slightly more into it than that, than what the document says.

Q. Let's go back to slide 14, the first slide we looked at. I want you to look at the third bullet on slide 14. It says:

"In order for the application to be assessed based on a revised connection-point ... a change must be requested prior to the ECT application deadline." [As read]

Do you see that?

A. Yes.

Q. If you go to the next slide -- this is the one we looked at before -- the first bullet there says, on slide 15, that the ECT application deadline is June 4th; do you see that?

A. Yes.

Q. So now we're back on slide number 23, they're saying for that ECT, which may include the Bruce-to-Milton line, those two slides together tell us, do they not, that you would have to be ready by June 4th if you wanted to request a change in connection-point and get capacity, should that ECT run and should that Bruce-to-Milton line capacity come on line; correct?

A. You can take that as a logical conclusion about a potential August ECT that never happened and I believe you're trying to kind of

stretch that to say well that put everybody on notice, either indefinitely forever or the fact that this had been released, put everybody on notice for the Bruce-to-Milton allocation process, which wasn't

Q. I'm just trying to focus on your testimony on change in connection points and how much notice would have been needed. And so you've said it was a logical conclusion that developers could reach, so if you were a prudent developer at that time, if you were paying attention to what the OPA said, you see this March presentation; you would agree with me, that at that point you start comparing your interconnection strategy, where you might change, thinking about that anyways, in March of 2010; correct?

A. At that time, in March 2010, thought that you might benefit from a connection-point change, then logically you could start doing all the analysis maybe then at that time.

Q. Right.

A. But perhaps later you didn't think you were going to have to make a change. It sort of depends on where you think you are and where you think other people are going to be. So, I mean, this, to me, seems pretty specific around an August

2010 ECT, an Economic Connection Test, which is kind of a -- it is not a very technical conclusion but kind of a big deal under the FIT Rules and was an ECT.

We get to June. We don't have an ECT, and finally we have an official notice on the Friday for a Monday. So everyone's supposed to either be doing lots of time-consuming, costly analysis all the time or sounds like they really, really got to scramble.

Q. Well, you said you wouldn't know, and I think you said that you would agree, at the beginning anyway, that if you thought you might benefit from a connection-point change, you would start preparing in March of 2010.

A. For the August 2010 ECT.

Q. Right.

A. Which never even happened.

Q. Which didn't happen. So now nobody would have known that the August 2010 ECT wasn't going to happen prior to that. They would have started preparing; correct?

A. They could have. They could have started preparing for an August 2010 ECT with the expectation that an ECT would actually happen. Now, it doesn't actually happen despite the fact that that

was a whole component of the FIT Rules.

Q. Uh-hmm.

A. We now have kind of a roll-up through the spring and into the early summer of 2011. We don't have an ECT. There's never an ECT. And all of a sudden, there's a date announced, very, very short notice. My experience in these processes is, when you require somebody to do something in kind of a regulatory process, you have to kind of give them adequate notice. You don't just sort of expect that they'll know to do everything under your rather -- we could do anything we want at any moment, so you better be ready.

Q. Well, let's go through the history because I think you said you didn't go back to look at this, because I think we agree that the Bruce-to-Milton line didn't receive its approvals in the summer of 2010; correct? You've heard the testimony on that earlier?

A. Yeah. I don't remember the exact date, but that sounds right.

Q. Right. So if it didn't receive the approvals, obviously the capacity couldn't be allocated on it; correct?

A. Yes. I mean, it would not have

made much sense to allocate capacity on a line that had not yet had all the siting completed.

Q. Right. So now let's go and follow on this to the rankings that were published by the OPA for the projects which didn't receive FIT contracts after the first connection test. And you are aware those came out in December of 2010; correct?

A. Are you trying to steer me to a different tab or should I --

Q. I will. I'm just asking you first: Are you aware that rankings of the projects came out in December of 2010?

A. Yes, I know there was a ranking.

Q. Great. Let's go to Tab No. 21. I think that's one of our favourite documents in this arbitration because it is so small.

A. Is that the three font?

Q. The three font. Now, again, this is not a document that's listed in your scope of review, so in coming to your opinion on the sudden change, this is not a document that you relied upon; correct?

A. I had seen this. I didn't specifically rely upon it in coming to that conclusion.

Q. So now I want to understand because these rankings, they make clear on these rankings where are all the projects that are remaining are electing to connect on the transmission grid, at least the project from the launch period; correct?

A. Yeah. There is a connection point in very, very small font.

Q. Yes. You had talked about needing the information as to whether you needed to change connection points. These December 2010 rankings would have given developers the information to assess, preliminarily, do I have a problem here; correct?

A. I think it would have been the starting point for that analysis. I don't think it would have been the end point.

Q. Fair enough. Now, if you look on the Bruce Region page, which is the first page in -- and I can probably have it blown up on the screen there. For the record it's --

A. I think we've seen it, but I think that would still be helpful.

Q. -- c-0073.

Maybe, Chris, just bring up the entire top portion up there, from the notes right down to the

Bruce area. Just that, right there. Can we call it out even more so that we can actually see it? Scroll over to the right. All right. Looking at the second sentence here -- a little bit to the left, Chris -- where it says:

> "Additional capability which will be made available by the Bruce-to-Milton transmission line will be allocated during the ECT." [As read]

Correct?

A. Yes.

Q. And if you scroll up just a little bit and over to the left, here it says:

> "Connection --"

If you keep going to the left. Keep going:

> "-- FIT applicants will have the opportunity to request a change in connection points prior to the ECT." [As read]

Correct?

A. Yes, that's what it says.

Q. So in December of 2010, again, the OPA is informing people that there will be an ECT

upcoming to allocate the Bruce-to-Milton capacity and that they will allow a change in connection points prior to that ECT; correct?

A. Well, it says:

"FIT applicants will have the opportunity to request a change in connection point prior to the ECT." [As read]

Q. Uh-hmm?

A. Which is consistent with the FIT Rules.

Q. Yeah.

A. It didn't tell them when the ECT was going to be.

Q. No. Fair enough. But, at this point, if you were thinking you now had the information on where other developers were going to connect; correct?

A. Yes, you had the connection points.

Q. So at this point, you now had further information available to you to plan your interconnection strategy, looking at the Bruce, knowing, again, that the OPA is saying there will be an ECT upcoming for the new Bruce-to-Milton line;

isn't that right?

A. You have the information to start comparing yourself to others. Like I said, I think these connection-point data would only be a starting point, one small subset of the data, probably not all of it, but, you know, if you took this to say "Oh, you know, people will have the opportunity to change connection point" which was kind of clear under the FIT Rules, so that's not exactly new information. But this is prior to an ECT, and OPA didn't seem to have ever indicated to people when there was actually going to be an ECT.

Q. No.

A. Which, in fact, there never was.

Q. Right. Well, they had indicated in the March presentation. You saw that they expected the first ECT to be run in August; correct? Of 2010? We saw that; right?

A. Yes, but then they never did it.

Q. They never did it.

A. So now we're kind of over into the next year, 2011. They were going to have an ECT. It didn't happen. Now we just have kind of a broad notice that there can be one, which there clearly can, because it's allowed under the rules and it's -- it's

really (a) never happens, and when there is any Bruce-to-Milton allocation process, it happens on really short notice.

So, again, I mean, it just doesn't seem very practical that, you know, people were going to be on permanent standby waiting, waiting, doing everything all the time, waiting for an ECT. It's like waiting for Godot. I mean, you know, we wait and we wait and we wait.

Q. But is it your testimony that, with all these notices, prudent developers wouldn't be preparing their interconnection strategies for the Bruce-to-Milton line should any ECT be run? They were just going to wait until the OPA gave notice; is that your testimony?

A. Well if you thought that the OPA would run an adequate process that would give people some notice and let people know when things were going to happen, then people, perhaps, could have actually done their homework when it was due. It would be on the information of the time, so they wouldn't constantly have been redoing it. That seems to be, to me, a fair process and an adequate process.

I mean, I was here the other day when Mr. MacDougall himself said he thought this was a

rather inadequate process. You know, I guess you could try to interpret that, because there was the possibility, because they'd had one but it never happened, that people were on that should be, you know, have -- sleep with their boots on and their coats on so they could run out the door at any moment, but that doesn't seem very practical. I think that type of analysis actually would be kind of costly for people to do.

Q. Uh-hmm. Perhaps we can come to another document. It's tab 9.

MR. LANDAU: Are you still on the same --

BY MR. SPELLISCY:

Q. I'm on the same topic. If you could come to Tab No. 9, which is Exhibit R-113. It is the May 27 CanWEA letter to the Minister, and we've looked at this letter a lot. I'm sure that you've seen it. If you look down to the third paragraph there, you will see what it says. It says:

> "Over the past several months, our members have collectively invested significant time and money to prepare the respective

interconnection strategies."

[As read]

Do you see that?

A. Yes.

Q. So isn't that indication to you that, in fact, the developers in the industry were, as you say, sleeping with their boots on?

A. I don't think that necessarily says that. They've expended and invested significant time and money to prepare their respective interconnection strategies. That doesn't necessarily tell me that they were doing, really, the kind of detailed transmission interconnection engineering analysis which might require kind of more significant expenditures to go out and hire engineering consultants to do specific analyses which then could be outdated.

Q. Well, let's then look at the first paragraph of this letter. Pull it back up.

It says:

"CanWEA is writing to express the view of the majority of our members that the Government of Ontario and the Ontario Power Authority

follow through with the established Feed-in Tariff process by immediately opening the window for point-of-interconnection changes to enable the next round of FIT contracts to be issued in June of this year." [As read]

Do you see that?

A. Yes.

Q. So this letter is written on May 27, 2011; correct?

A. Yes.

Q. They're talking about awarding the members. The membership of CanWEA is saying that they're asking you to open the window immediately to award contracts in June of this year, the month that's going to start in four days; correct?

A. Yes.

Q. So isn't that an indication to you that, in fact, at this time, developers were ready to change the interconnection points for the Bruce-to-Milton allocation process?

A. I would take that to say that

some developers may have been and wanted to push that very hard. The fact that CanWEA says the majority of its members do doesn't necessarily make for everyone. I would think, personally, that a regulatory process needs to look after everyone and not just the majority of members of a trade association, which probably doesn't have any legal authority to represent anybody.

We heard that not everybody within CanWEA actually necessarily agreed with the comments expressed in this letter. You know, it's a letter from a trade association. You know, I think one would kind of take that as what it is.

Q. Uh-hmm. I'm just a little confused, I guess, by one of our your last comments. You've got significant experience with regulatory programs. I think you said that in your testimony.

A. Uh-hmm.

Q. Is it your opinion that, in developing regulatory programs, the governments can make everybody happy all of the time?

A. No. They can't make everybody happy all of the time; clearly, that's not what it's about, but I think an effective regulatory process is about ensuring that things are fair for everyone, and that, you know, you give people kind of due notice.

You give them time to respond. You give them time to comment. It's not about necessarily making everybody happy, and everyone goes home smiling, but a regulatory process, as least from my perspective, in my experience, at least ought to have some element of predictability, some sense of, you know, everybody kinds of gets to have their say. They didn't have a comment process, which Mr. MacDougall, once again, sort of seemed a bit dismayed about.

You know, it doesn't seem like this organization would not have necessarily had the authority to express the opinion of every member. You know, it's a comment from a trade association, but the regulator is not trying to make everybody happy. The regulator, I would think, or an agency conducting, such a process as the OPA was in this case, does have kind of necessity to do things in a fair way and in a way that actually allows people to participate without having their interests being ignored or not being able to make the right decision simply because you announce on Friday you are going to do something on Monday, and then you want to do it in a hurry because of some kind of political reason. That seems like kind of a weak process, and that's really kind of what my conclusion in my report was.

Q. I have just a couple of more questions on this, and I know Mr. Landau had his finger on the buzzer, so give me just a couple more minutes.

You are aware, Mr. Adamson, of how many developers actually changed their connection points during this five-day window?

A. I don't know. I don't know the number.

Q. You are not aware that 39 developers changed their connection points?

A. No, I don't know the exact number.

MR. SPELLISCY: I will accede the floor to Mr. Landau.

MR. LANDAU: Sorry if my being poised on the buzzer has put you under pressure.

I wanted to follow up on one of your answers in that line of questions, when we talk in a pejorative sense of expecting people to be sleeping with their boots on. If you put yourself in the position of being in December 2010, and you are in a competitive process, as a proponent in the FIT program. You're given information in December 2010 which lists -- we've got a ranking that you're

provided with, which we've seen, by OPA. You know about the Bruce-to-Milton line that's not yet on stream but will be, or most likely will be. You know the capacity, the extra capacity, transmission capacity that's going to be made available. What I don't understand is why, in that setting, would you not, acting reasonably, it being a competition overall, why would you not start work at your interconnection strategy if you are being told that there will be an opportunity to change connection points?

You've said, well, you wouldn't want to do something which would become outdated, or you would only want to invest the time and energy on that, but on the basis of the information at the time. So what I'm unclear about is: What further information might change? How could it become outdated, and how could it become not worthwhile to start your strategy?

THE WITNESS: Well, as I mentioned, the transmission information one might rely on is far greater than just this kind of set of interconnection points; right? And there is all kinds of potential changes to the transmission grid which aren't even controlled by the OPA. It's controlled by the IESO. It has its own kind of information process like the

transmission grid.

So I agree with you that you might think about -- particularly, you know, depending on one's competitive position, you might think about what your kind of strategy is.

I was really mainly referring, though, to -- I think it's one thing to be, you know -- if you were a developer having a group saying, you know, we think we might want to change based on the broad set of conditions that you mentioned; right? I think it might be another to undertake the costs to do the details to really prepare. Now, maybe some people did. I think it would have been a little more simpler and straightforward to have had announcement prior to the process that would've had enough time for everyone to kind of have done it once.

I mean, most of these wind developers are not particularly large organizations. These aren't like giant utilities that have huge engineering staff. They are kind of going to go with Hay Engineering Consultants and stuff to do these kinds of technical analyses.

So I agree. I think people were probably constantly thinking about this and their kind of competitive position. I'm not sure that that would

provide enough for me to really think about a specific connection-point change for my project, given that I think some other things could shift in between, like some other transmission data.

MR. LANDAU: Could you give me just a few examples of other things that might shift?

THE WITNESS: Well, we've been talking about Bruce-to-Milton. That was a big line and a big project. That's years. That's like building a new highway; right? It takes years of siting, studies, approvals, everything else. But the ISO can make other changes to the transmission system which are not as big as that; right? There are lots of other smaller changes to the existing transmission system which can affect flows and which could affect the transmission availability-type tests, which are quite detailed, that Mr. Chow and his group would have been running.

So that could have changed. Just in my view of having worked with a lot of wind developers, these are often relatively small organizations. It's not like a giant utility. They kind of need to do everything once or a relatively small numbers of times.

To me, it would have been more

efficient from a process standpoint to have had enough kind of standard regulatory notice and then just let people do it. Clearly people could anticipate; probably some may have anticipated. My only comment was that that seemed a bit like a second best.

MR. LANDAU: Just putting aside for a moment your view about how it should have been done – and forgive me because you are speaking to a layman -- give me some concrete examples of things that might have changed. All you've said so far is there could have been other changes to the transmission system. Could you just give me some concrete examples so I can understand, then, a further?

THE WITNESS: Right.

MR. LANDAU: What are the parameters that might have changed to justify not doing the work at that stage?

THE WITNESS: Well, over a period of months or -- and, you know, remember, going back to this case, you are really talking about 2010 into 2011, over a year. For example, someone thinks, well, I've seemed to notice the IESO says it's going to bring another transformer into operation at a substation. I don't kind of want to be too simple now, but, you know, the big thing is you see the

substation; right?

MR. LANDAU: You could never be too simple.

THE WITNESS: All right. Well, I don't want to try to oversimplify. But those big things you see at a substation, you know, there is a lot of equipment other than just adding lines that affects how power flows. Okay? Rather than just the giant highway projects. There is lots of changes to the Infrastructure. You have changes in switchgear. You might have had changes in transformers. Sometimes, in some systems, you even have changes in announced operating procedures in transmission-constrained regions, what are called protection schemes, and stuff like that.

I would think, you know, people might anticipate that those type things can happen as well.

Remember, now we're talking over -- if it was a period of a month only or so, I think the comment would be absolutely right and very little probably would practically change, but over a year, I think you could foresee some changes could happen that, you know, could be material. And then, I guess, there would be an economic tradeoff of constantly doing it versus the cost of doing it.

I don't want to kind of belabour it that it made the entire thing completely impossible.

BY MR. SPELLISCY:

Q. I was going to move now to the majority part of your opinion, which is the Green Energy Investment Agreement, so if the Tribunal has any questions on any of this, if they want to ask, that's fine with me now.

THE CHAIR: No, I think we can move on.

BY MR. SPELLISCY:

Q. In Section 2.8 of your report, which begins on page 10, and I'll ask it not to come up on the screen just because I think there is some confidential information in there.

A. I'm sorry. Can you give me the section --

Q. Section 2.A of your report, which starts on page 10.

A. Okay.

Q. It is titled "The Exclusive and Confidential Development of the GEIA."

And if you go to paragraph 23 in this section, you say:

"The exclusive nature of the

MOU, the framework agreement in the GEIA, along with the strict confidentiality provisions clearly prevented any competing entities, such as Mesa and its partners, from entering into the same economic transaction." [As read]

I just want to understand your opinion and your basis for that. And, again, obviously, for the record, you don't know what the Claimant understood about the GEIA at the time that this is all happening because you weren't working for the Claimant; right?

A. No, I was not working with Mesa at that time. But your question was: What did I base my comment on?

Q. We'll get to some specific questions on it, but I just wanted to understand what this opinion was about. You are aware that the FIT Program did not open for applications until October 1st of 2009; correct?

A. Yes.

Q. And because you've been sitting

here, and I don't know if you were aware of it before -- I don't think you refer to it in your documents -- but you are also aware that the negotiations with the Korean Consortium were publicly disclosed in an announcement by the Minister of Energy on September the 26th, 2009; correct?

A. Yes. I think we all heard and read about the Toronto Star article and the subsequent press release from the Ministry.

Q. And I want to understand first how you say that the confidentiality provisions could have prevented competing entities from entering into the transaction. So FIT proponents would have known prior to even making an application that some sort of deal was being negotiated with the Korean Consortium; correct?

A. Well, they knew before they may have made the submission, not necessarily before they started the process of preparing for it. Before the submission, they may have known that there was the Toronto Star article and the, very shortly following press release.

Q. The press release. And we've seen it. We can try to find it if we have to. But they've seen also that there was a press release, and

then a few days later, there was a direction from the Minister of Energy directing the OPA to hold 500 megawatts of capacity in reserve for proponents who have entered into a framework agreement; correct? Do you remember that?

A. Yes. There was a Ministerial direction -- I just keep saying direction -- to the OPA to withhold certain amounts of capacity. I don't remember the exact dates.

Q. But before the launch of the FIT program; do you recall that?

A. Well, I mean, it was after the --

Q. Press releases?

A. -- after the press release obviously. The submissions to the FIT Program were due very much around the same time.

Q. Now, we've also seen -- and we can pull it up if we need to, but since you've been here, you are aware that, on October 31st of 2009, which is before the launch period applications close, there were press reports mentioning that the deal with Samsung included priority access to the transmission grid; correct?

A. Can you take me to those? I just want to make sure I'm actually sure which one you're

talking about.

Q. It's at tab 12 in your binder, which, for the record, it's R-178. It's another Toronto Star article. If you look at the last paragraph here, and in the last clause it says:

"Foreign firm which would also get priority access to Ontario grid space." [As read]

It's easier to look up on the screen?

A. Yes, I think that would be easier. Again, we have the font issue.

Q. And you see the last clause there. It says:

"Which would also get priority access to grid space." [As read]

Correct?

A. Yes.

Q. I think even in your introduction remarks, but certainly in your report as well, you would agree that priority access to grid space would have been something very important for a developer; correct?

A. I mean, access to the

transmission grid was really important, given the structure of the industry and the FIT.

Q. Right. And priority access would have been -- if somebody else was getting priority access, that would have been even more important to the others, correct, who weren't getting that priority access?

A. Yeah, it certainly could have been an issue.

Q. So this comes out October 31, you already acknowledged that the claimants made their FIT applications sometime in November of 2009. So you would agree with me, then, that, at that time, the claimants at least could have known that Samsung Korean Consortium was negotiating a deal with the government and that it at least possibly included priority transmission access; right?

A. Well, they could have known that was after the Ministry of Energy announcement. From this, I guess, if they read the Toronto Star, they could have taken this as a general indication of priority access to Ontario grid space, which is a very kind of general statement that doesn't tell them about quantities or where the transmission space was being reserved.

Q. Fair enough. But at that time, anyways, they could have at least known that that was the deal; that was potentially part of the deal at that time; correct?

A. They could have known this information as of these dates.

Q. Right. Correct. Great. So at that time, the Claimant could have known this, and if they were aware of this, you would agree that they certainly could have approached the Government of Ontario about trying to negotiate their own investment agreement in exchange for priority transmission access; right?

A. Just to make sure I understand your question, which is that you're saying because this came out, and there was this article in the newspaper, that a FIT developer could have gone to the government and asked for a priority access. Is that your question?

Q. They could have approached the government and proposed an investment agreement that would include priority transmission, because there was nothing stopping them; correct?

A. I assume there was nothing legally stopping them, no.

Q. Right. Now, you also are aware that the GEIA was publicly announced by the government on January 21st of 2010 when it was signed; correct?

A. I believe there was a press release around that date. I don't know the exact date.

Q. But around January of 2010; correct?

A. Yeah, that makes sense.

Q. We haven't talked about this yet, but the Claimant made several other applications to the FIT Program, and that was in May of 2010; correct? Were you aware of that?

A. I'm not exactly sure about the date of other applications.

Q. So --

A. I believe there were some early on, but I don't know the dates of those.

Q. But you would agree with me that at least they could have gone -- you said there was nothing legally preventing then from going and approaching the government after reading these articles prior to making their FIT applications, but certainly also after January of 2010, when the Green Energy Investment Agreement is publicly announced,

they could have also approached the government at that time to try and negotiate an investment agreement; correct?

A. There clearly was no legal bar to them approaching the government, which I assume almost anyone could approach the government.

Q. Uh-hmm.

A. I don't think there was much information out there in detail about the investment agreement that would have indicated to everybody what the components of such an agreement would have been like because there was no announcement of agreement, and there was no release of the agreement.

Q. Uh-hmm.

A. I believe that the GEIA itself, the text of the agreement, wasn't released until significantly later, as I remember, well after 2010.

Q. Right. But let's go to another document in your binder, which is Tab No. 20 in your big white binder. No, not in --

A. Oh, I'm sorry. Wrong colour.

Q. Now, this is the January 21, 2010 backgrounder, it's called, from the Ministry of Energy.

It's called "Ontario Delivers $7

Billion Investment of Green Investment," And I think it's R076, for the record.

Now, here this is a backgrounder, and it describes, and it gives notice that Ontario is negotiating an agreement with the consortium. It says who those partners are; correct?

A. Yes.

Q. And then in the bottom paragraph that says "stimulating manufacturing," it says:

"In addition to the standard rates for electricity generation, the consortium will be eligible for an economic development adder."

[As read]

Correct?

A. Yes.

Q. And then it actually says what the adder is contingent upon, and on the next page, if we scroll down to "ratepayer impacts," it says what the net present value of the adder is; correct? $437 million. The first paragraph under "ratepayer impact."

A. Yes. There's 437 million NPV listed.

Q. Right. So at this point, on January 21, 2010, the fact that there is an economic development adder and the fact of its value has been released publicly; correct?

A. The fact of the economic development adder and the fact of a NPV calculation, not the actual EDAs on a cents per kilowatt basis, which isn't kind of quite the same thing, that had been announced.

Q. That had been announced. And if we look down the page to more renewable energy, the heading there, which I think is the last, it talks about:

> "The Korean Consortium is committed to the construction of 2,500 megawatts of renewable energy generation, 2,000 megawatts of wind power, and 500 megawatts of solar." [As read]

Do you see that?

A. Yes.

Q. And then it says:

> "Construction is expected to occur in five phases." [As

read]

Do you see that?

A. Yes.

Q. And then in the last sentence, it talks about there was a 500-megawatt cluster that will be built in the Chatham, Kent, Haldimand counties in Southern Ontario. I think you comment upon that in your report, and you say that capacity had been reserved for the Korean Consortium in September of 2009; correct?

A. Yes.

Q. The next line there says:

"Assurance of transmission in subsequent phases." [As read]

Do you see that?

A. Yes.

Q. So at this point, developers are being told, are they not, that there is 2,500 megawatts and that, as long as Samsung meets its commitments, it will be assured transmission capacity for those 2,500 megawatts; correct?

A. Here is where I think it gets a little trickier. It says:

"Assurance of transmission in

subsequent phases is contingent on the delivery of four manufacturing plant commitments mentioned earlier." [As read]

Okay?

Q. Uh-hmm.

A. And those clearly are the four that were listed on the top of the preceding page; right? And that part starts and the very bottom is on the front of the first page:

"It's contingent upon the consortium manufacturing partners operating four manufacturing plants according to the following schedule..." [As read]

So you can say everyone knew that additional subsequent phases of access of transmission was contingent on the delivery of the four manufacturing plant commitments, but there's not very much information here to tell me, if I was a potential competitor, what those commitments were. All it tells me is, really, what was at the top of the other page. It doesn't tell me what I would have to do or kind of

not do in order to meet the requirements, because at this point I haven't seen the agreement. I won't see the agreement for a very long time. So it provides a fair amount of information, but it provide some information here, but it doesn't tell me contractually what I would have to do, and it doesn't allow, in my opinion, people to say, "Boy, we could put together a set of partners and do that." It doesn't give any indication of the details of what those commitments actually were.

Q. Let me understand your opinion here, then, Mr. Adamson. You've got experience with commercial transactions. Do parties typically release the terms of those transactions to other parties who might be interested in negotiating the same transaction such that they could never get a better deal? Is that typical in your experience?

A. Well, remember, we're not talking about me contracting with you to buy a building across the street. We're talking about a pretty large policy initiative here that, by their own admission, had a value of $7 billion that was completely tied to a governmental decision. So we're not talking about you and me selling an office building here. We're talking about a major, major agreement that was going to cost

ratepayers a lot of money even by the terms of this press release.

So the fact that such a huge agreement was entered into and then with -- and as we found out in the Auditor General's report, with very little economic or business case analysis put out there, you then expect people to come up, but you won't tell them what the deal was. I don't see that that's necessarily very practical.

Q. So your opinion is that, when the government negotiates a deal with an investor, that it has to disclose that deal to everybody in its full commercial terms, but you would agree that would pretty much handicap the government in any future possible negotiations; correct?

A. Well, first, in a practical case, from the documents we've seen and what we've heard this week, the government wasn't looking to a second case, but you laid out the hypothesis that other people could have come and asked for the same deal, but in this case, they didn't even know what the deal was, so it would have been very hard to ask for it. I suspect if you had gone and said, "Give me a copy of the GEIA," you would have not have gotten it. So I think you've really laid out a very unrealistic

hypothetical here.

Q. So let me just understand, then. When you wrote in your opinion that it clearly prevented people from negotiating a deal, you said the same deal. What you really meant is nothing prevented an investor, a developer from going and trying to negotiate a similar deal with the government; they just couldn't negotiate the exact same deal with the government?

A. Well, they clearly couldn't have negotiated the exact same deal, and they certainly weren't told what the terms of this deal was, so that, I think, stands to reason. I think, though, there is some things here that maybe might have even sort of indicated that, boy, maybe the obligations under these manufacturing commitments, which, as I said, were unspecified, would be very different than what was out there, so there really wasn't a signal to what an extraordinary deal this was.

It says "creating jobs." There would be more than 16,000 Green Energy jobs. If I thought I had to create 16,000 jobs, I might think that was very costly. Well, what did we find out? Even later, in the restated GEIA, I'm only responsible for 765, and I don't even have to employ them.

The $7 billion of renewable energy generation investment, I don't think that number actually appears in the final document. Later, it says:

> "These manufacturing facilities will produce wind turbine towers, wind blades, solar converters, and solar assembly, creating more than 1,440 manufacturing jobs."
> [As read]

Well, that's very overstated over what was, in fact, in the actual document.

So it doesn't seem to me there was a whole lot of transparency here around what the deal was, which I can imagine would have put off some people thinking, "We could do this." You know, why not take the alternative approach and have said, "We're looking at deals, but when we sign them, can somebody else top it?"

Q. You think that that's the approach the government should take, that, when somebody comes to a deal, what's fair is for government to take that proposal and then see if anybody else can beat it? Do you think that that

would get commercial deals done? That's your opinion?

A. Clearly, we had a deal here that was developed in pretty considerable secrecy. I'm not necessarily advocating you would have said, "Here's where we are at each stage of the negotiation." Hold it up. "Do you want it? Do you want it? Do you want it?" But had you announced what roughly you were looking for in terms of arrangement and put that out there, I think you might have had considerable competition, because there are other companies other than Samsung who could have undertaken such an activity, with pretty considerable experience in the renewable energy sector. And what you did was you came to an agreement with the first one who turned up.

Q. But to be clear -- and it is your opinion; I think you've said this -- nothing prevented any other company from coming to try to negotiate with the government; correct?

A. I don't imagine that there was any legal way that anyone could have been prevented from coming to the government and saying, "Here is a proposal."

Q. want to now move on to talking about the reasons for the GEIA, and I think I didn't ask a question on it, but you raised some of the same

comments you asked in your report just a second ago, so I'd like to first understand the limits of what your opinion is.

In paragraph 25 of your report, you say that our you're going to analyze the argument that the manufacturing obligations of the GEIA justified differential treatment. I think you've said something similar in your presentation this morning, that that's what you did. Then at paragraph 26 --

A. Hold on. Can you just give me one second?

Q. If you'd like to read it.

A. I just want to get to the right page.

Q. The page for you is page 29.

A. Yeah, I know. I've got it now. I just wasn't there at that moment.

Q. And at paragraph 26, you say in your opinion:

> "... if the GEIA imposed costly burdens on the Korean Consortium, superior treatment could make economic sense." [As read]

Do you see that?

A. Yes.

Q. But you would agree that, when making decisions, government have to have other policy considerations other than just economics; right?

A. Well, the economic costs and benefits can include values for other policy objectives. For example, I may make an economic decision that affects the environment, and I might have to include an economic cost for what my pollution might entail. That doesn't completely take it outside the realm of economics, of course; right? I would want to consider that.

So from an economic analysis -- and I'm doing an economic analysis of A and B -- then I am making a comparison of were there very, very costly burdens that were very different? Because we have noticeably different treatment.

Q. But in paragraph 25, you're analyzing the theory that the manufacturing obligations of the Korean Consortium under the GEIA, whether or not it's true, that that makes a supply of wind energy under the GEIA fundamentally different than the supply of wind energy under the FIT Program; do you see that?

A. Yes. The broad thrust of what

I'm analyzing here is really the competitive conditions between FIT components and GEIA components -- sorry, GEIA competitors and FIT competitors. It's getting to be a tongue-twister.

So one difference which was raised by Canada, I believe, was that, well, the GEIA is so different because it is this investment agreement that has these manufacturing obligations, so to do an economic analysis, I kind of want to have an economic theory that I can test.

Q. Uh-hmm. So I want to, then, understand because, in your scope of review, you do list the witness statement of Sue Lo, the first witness statement of Sue Lo, and you have been here during the testimony. So I want to understand the limit on what you were doing there, which is you have heard the testimony that, in signing the GEIA, one of the things the government saw as an advantage was because they were uncertain as to how much interest the program would actually generate; do you recall that?

A. I recall that, but let's place that in the right context. The GEIA is signed in January 2010. I think we all agree that the first round of FIT applications had happened by then. There

had been a very large number of FIT applications that had happened by then; right? I believe that the quote that was used the other day was -- maybe I didn't quite get the quote exactly right, but a very large, more than expected, unexpectedly high volume of FIT applications that happened. It was a very large quantity of megawatts that were being offered.

So before this was actually signed, you kind of actually had a data point from the FIT Program, which was that interest was really, really high.

Q. Let me ask you a couple of questions on that.

A. Okay.

Q. You would agree that's happening in 2010, but you would also agree that the negotiations with Samsung happened in 2008; correct?

A. I'm sorry. You said that's happening in 2010?

Q. The signing was in 2010.

A. The signing was in 2010.

Q. The negotiations started in 2008.

A. Right, but, sorry, just to make sure I understand your reference, but the actual FIT applications started not in 2010.

Q. Right. The signing of the GEIA was in 2008?

A. The signing of the GEIA was in January 2010.

Q. And negotiations started in 2008, and they went all the way up to 2010; correct? You're aware of that?

A. Yes.

Q. You would also agree that, at least in 2008 and 2009, there is a financial crisis going on; correct?

A. There was indeed a financial crisis.

Q. I think we can all agree on that.

A. I think we can all agree on that.

Q. And we can all agree that, during that point, financing credit for large infrastructure projects were difficult to obtain; correct?

A. I think you're making a very broad statement there. Let's place this in the context. First off, from 2008, really the kind of financial crisis is really just then picking up wind. Sorry, no pun intended. It really wasn't. It was strengthened.

The summer of 2008 was a period of

extremely high energy prices around the world. You may remember the summer of 2008 was the peak oil price that we've ever seen, over $145 a barrel. I think it got to 147, 148.

As importantly for the context of the particular industry we're talking about here, in the summer of 2008, natural gas prices in North America, really, really shot up, sky rocketed really, really high. Now, when natural gas prices are high, electricity market prices are high, in general, in many markets because the marginal fuel for generating electricity is natural gas. So power prices throughout North America tended to go up. In many cases went up a lot in that whole period. Remember, this is before the Shell thing. This is a whole different era in terms of gas supply in North America.

So in 2008, power prices being really, really high. There was a really strong interest, to my knowledge, in investing in the renewable energy sector because the cost of conventional alternatives, which in many markets are gas, fire, thermal power plants, had shot up. In 2008, at least, there was a tremendous amount of interest in -- and gas prices were still relatively high in 2009, much higher than now. So it's particularly in 2008 and into 2009.

There was still a lot of interest in the renewable energy sector.

Q. But I think we've heard Mr. Pickens testify that, by the summer of 2009, gas prices had dropped and that financing for renewable deals was becoming harder; correct?

A. By the summer of 2009, gas prices had indeed dropped, and I think we had a combination of some downturns in gas demand, and we had a lot of supply coming into the market.

Q. Right.

A. And the gas market isn't really a Canadian market or an American market. It's a pretty integrated market, so those prices kind of follow each other. It's really kind of a North American gas market with little regional variations.

In the context of applications for FIT, do think about kind of what's on offer here. Yeah, there truly was a credit crisis and a financial crisis. I spent most of those couple of years sitting in front of a Bloomberg terminal, which is those things you see for investments.

But in the FIT Program, you had a pretty attractive set of deals here; right? Another part of what happens in a financial crisis is you have

a decline in interest rates, and you were going to offer a very attractive price in the FIT Program, which I believe we've also heard, locked in for a very considerable period of time in a country which, to my memory, had actually one of the best -- Canada had one of the best credit ratings around then. You were actually doing pretty good. Compared to most of the world, you were looking really sharp. Tied in at a time when there is not many long-term investments necessary to put money to work locked in, guaranteed against a fixed and quite attractive price.

So certainly by 2009, we had FIT applications, and people obviously perceived, despite the recession, that they were going to be able to raise finance to build wind farms, or at least some fraction of them ought to have perceived that they could raise finance to build wind farms, and I think it was because, actually, you had a very attractive investment vehicle in a sense of these PPAs, and it sort of almost doesn't matter what I think or we think. I mean, the market demonstrated that lots of people were willing to turn out.

Q. Well, I guess I'm trying to understand, because you say it doesn't matter what you or I think, but you would agree that, in trying to

launch a Green Energy sector, it would matter what the government thought about what their prospects were; correct?

A. If the government launches a government program, then what the government thinks is obviously important.

Q. So when you hear the testimony of Ms. Lo and Mr. Jennings saying that they weren't certain people were going to show up to this program, you have no reason to question that testimony; do you?

A. No. Other than, perhaps, before they agreed to this, they could have opened their eyes, but obviously I don't know what Ms. Lo was thinking at that time.

Q. And so, essentially, I guess your opinion that you are giving me here is that the government should have had more confidence in the FIT Program; correct? And, in your view, it didn't need the Green Energy Investment Agreement; is that what you're saying?

A. You know, that's not really the conclusion I come to. My conclusion is really about, again, the comparison of the competitors. I don't really come to any conclusion, and I don't actually analyze the economic costs and benefits of actually

either of these programs. You can look at all kinds of costs and benefits; right? Environmental benefits, right, for having Wind Energy? Could be; probably is. Right?

So there are lots and lots of different economic costs and benefits. I actually don't analyze that. Remember, I'm kind of really looking at: What are the competitive circumstances? This is really the question I was tasked with. What are the competitive circumstances of GEIA competitor, the Korean Consortium, and the FIT competitors?

So I have not actually done an analysis that says, "I think that this was a great thing," or, "I don't think that this was a great thing." It's not in here, because I haven't done it, and I don't reach a conclusion on that.

MR. SPELLISCY: Right.

THE CHAIR: Mr. Spelliscy, are you going to move to another area now? Because we have been going over two hours now, so we should have a break.

MR. SPELLISCY: We can have a break. That's fine. Sure.

THE CHAIR: How much more time do you think you will need?

MR. SPELLISCY: If they're long answers, it's going to take a while.

THE CHAIR: Yes, I know.

MR. SPELLISCY: If they are shorter answers, I only have a few more pages.

THE CHAIR: But there are pages.

MR. SPELLISCY: Yes, I'm not trying to cut the witness off at all. If he wants to offer the context, that's fine, but, I mean, we've had some quite long answers --

THE CHAIR: Yes.

MR. SPELLISCY: -- and so it's taking a little bit longer than I would have hoped. It's hard to judge where we are going after this, but I'm guessing I'm two-thirds of the way through.

THE CHAIR: That's an indication. Thank you. Let's take ten minutes now and resume at 3:45. Is that fine? I should please ask you: You've been here earlier during the hearing, so you know that you should not speak to anyone during the break about your testimony.

THE WITNESS: Yes, I will not speak to anyone about my testimony.

THE CHAIR: Thank you.

--- Recess taken at 3.35 p.m.

--- Upon commencing at 3:55 p.m.

THE CHAIR: Are we ready to start again? It seems like we are.

Mr. Adamson, you're ready.

Mr. Spelliscy, you are as well. All right. Good.

BY MR. SPELLISCY:

Q. I'd like to turn now to some of the benefits that you say were granted to the Korean Consortium out of the GEIA, and I can understand your opinion there. So let's turn to that now.

We talked a few minutes ago about the priority transmission access, and I think you identified that as a benefit under the Green Energy Investment Agreement; correct?

A. Yes.

Is this on? It had a green light.

THE CHAIR: Press the button.

THE WITNESS: Okay.

BY MR. SPELLISCY:

Q. Priority transmission access.

A. I'm sorry. With the button thing -- can you just repeat the question again.

Q. Sure. You would agree -- your

opinion was that the priority transmission access was one of the primary benefits under the Green Energy Investment Agreement; correct?

A. Yes, it was a the ... one.

Q. Now, you understand that the Korean Consortium did not get 2500-megawatts of priority access immediately, did they? They got it in five phases; right?

A. Yes. There were phases applied to phases.

Q. And then in paragraph 93 you acknowledge that -- of your report -- you acknowledge that the Korean Consortium would only be granted the access in later phases, Phases 2 through 5, if a manufacturing partner was in operation; correct?

A. Yes.

Q. Now, I'm going to pause very briefly here because you also note in your report that this was not a precondition for Phase I priority access projects, but you're aware that the Phase I projects were in Haldimand County, Essex Chatham-Kent; correct?

A. Yes, in that region.

Q. In that region; right. So that's not the region where the claimants apply for projects;

correct?

A. I don't believe so. I'm not -- I won't opine too much on Ontario geography but remembering a map --

Q. Right.

A. -- so...

Q. So you don't have an opinion, then, on whether or not that initial Phase I access actually impacted the claimants at all; is that your testimony?

A. I don't know whether it did. That would depend on the pattern of transmission constraints and the network, which would require an engineering analysis.

Q. Coming back, then, to phases 2 and beyond, where we just talked about the priority access was dependent upon a manufacturing partner, and so that I understand, and if you understand, in order to get power purchase agreement under the Green Energy Investment Agreement for a phase 2 project, the Korean Consortium was required to be able to identify a partner that was actually manufacturing wind turbines or towers or solar, I guess, in Ontario at the time; correct?

A. Right. Let me just flip back to

the GEIA.

Q. Sure. If you want to -- you can use yours or it's at, in our book for the Tribunal, at tab 17.

A. I'll use your book.

Q. Tab 17. It is Exhibit C-0322.

This is a Green Energy Investment Agreement, the original one.

A. Okay. I'm there. Now...

Q. Section 7.4.

A. Section 7.4.

Q. It says --

A. Can you give me a second to read the beginning?

Q. Sure.

A. Okay.

Q. So it says there that the government of Ontario's undertaking in Article 7.3C, that article says:

> "To provide priority access to the bulk transmission system." [As read]

And then it goes back to 7.4:

> "In respect of the priority access for phases 2 to 5 is

conditional upon at least one manufacturing partner during the previous phase -- during the previous phase commencing manufacturing of a component." [As read]

Correct?

A. Yes.

Q. So, in order to get a PPA, a power purchase agreement for phase 2 project, in order to get that -- they had to get the access first; then they get the power purchase agreement; they had to have at least one manufacturing partner to commence manufacturing; correct?

A. Yes, as defined.

Q. As defined. And that wasn't a requirement for FIT Program proponents to get power purchase agreement, was it?

A. Those specific terms were not.

Q. So FIT proponents could get a power purchase agreement with nobody manufacturing in Ontario, even though later on they would have to meet domestic content requirements; correct?

A. Can you say that again?

Q. FIT proponents could get a power

purchase agreement from the OPA, even if nobody was manufacturing equipment in Ontario at that time that they got the contract; correct?

A. A FIT proponent would have to submit a domestic content plan and, in order to fulfil it's PPA, would have to be able to demonstrate that it had met the domestic content requirement.

Q. A domestic content plan, that comes at the notice to proceed stage; were you aware of that?

A. Yes.

Q. And that happened after the contract has been issued; correct?

A. Yes.

Q. Okay. So FIT proponents could get a contract for -- a FIT contract without having anybody manufacturing capacity -- manufacturing equipment in Ontario at the time of contract; correct?

A. That is possible, yes.

Q. That is possible.

A. Although I will note that people were manufacturing components and that people were planning to manufacture components for FIT projects.

Q. Right. But having an actual person that you could designate or point to that

you -- that the Korean Consortium could point to, it was only a condition upon the Korean Consortium getting PPAs. It was not a condition upon FIT proponents getting PPAs?

A. The "pointing to" component, I think the actual word it uses is "identifies" -- "pointing to" is kind of the same idea, I suppose. But that was specific -- that specific language was specific to the GEIA, not to the FIT.

Q. And getting a FIT contract, that allowed you to lock in your connection points to the transmission system; correct?

A. Okay, that allowed you to...

Q. Basically you picked connection points in your FIT contract; they were specified. You then had -- assuming you could actually, technically, but from the OPA's perspective, that got you those -- that transmission capacity on that connection-point; correct?

A. At the time that -- by the time you got to a contract award --

Q. A contract.

A. -- then you had a designated connection-point. Kind of would have to.

Q. Right. So let me try and

understand something with you here. I want to come -- so in your report, and you talked about this, you comment that the FIT contracts and the Green Energy Investment Agreement PPAs were substantially the same.

And I think if we have tab 17 open still, which is the Green Energy Investment Agreement, we could turn to Section 9.1.

If you look about halfway down that paragraph, on the right-hand side, there is a sentence that starts -- it's just got the one word, "such." And then it says:

> "Such PPA shall be substantially in the form of the FIT contract and used by the OPA at the time such PPA..." [As read]

Do you see that?

A. I'm sorry. Could you give me the --

Q. Section 9.1. Paragraph 9.1.

A. Oh, I'm sorry. No wonder I'm not seeing "such."

Q. About halfway down on the right side, there's the word "such," and that starts the sentence I'm talking about there.

A. Okay.

Q. So it says -- so it actually -- you commented that they were substantially the same. And you went through some analysis in your report to be substantially the same. But the Green Energy Investment Agreement itself requires them to be substantially the same; correct?

A. Yes.

Q. Now then it goes on to say that shall be:

> "Substantially in the form of a FIT contract... at the time such PPA is being entered into as amended to give effect to the terms and conditions." [As read]

But:

> "At the time that such PPA is being entered into." [As read]

Do you see that?

A. Yeah.

Q. If you could continue to reading the sentence.

A. Being entered into as amended to

give effect.

Q. Okay. So, in fact, what this says is for the Korean Consortium PPAs, they will take the form of whatever FIT contract is currently in force at the time that those -- that the Korean Consortium's PPAs are signed; correct?

A. Yes.

Q. Okay. Now, you understand that, in fact, then, they're taking -- actually, I'll just go down a little bit further. And it says:

"Subject to -- "

If you keep going down, right before the enumerated sections there:

"Such agreement will be the aggregate of, for wind, the price specified in the current price schedule." [As read]

Do you see that?

A. Yes.

Q. So for Korean Consortium PPAs for phase 2 and beyond --

A. Uh-hmm.

Q. -- they are going to be whatever the FIT contract and whatever the price schedule is at

the time that they entered into those PPAs; correct?

A. Yes.

Q. Now, price digression, reduction of prices in FIT programs, that is a standard part of FIT Programs, isn't it?

A. Can you start again?

Q. Price digression or regression, the price starts out high in a FIT program and then it ends up in subsequent years --

A. Changes.

Q. -- it comes down; correct?

A. Yes.

Q. Okay. So the Korean Consortium in here is accepting a risk -- they are committing to a specific amount of development and accepting the risk that their future PPAs might be at a lower price than what they're getting in their first PPAs; right?

A. Yes, as FIT proponents would be at the time of entering into FIT projects at the same time.

Q. Right.

A. Because you're using the same price schedule.

Q. Right. Now, of course, FIT proponents at the time that they're applying, they

hadn't committed to a certain amount of capacity in advance, had they? They commit to the capacity at the time they're making their application; correct?

A. Yes.

Q. Now, you are aware that there was to be a FIT review at least every two years; correct?

We can go to the clause in the FIT Rules if you'd like.

A. Yes, there was a FIT review. I can't remember what the exact original date was, but, yes, every two years.

Q. And so that review would include a review of the price schedule; right?

A. It could do.

Q. FIT Program is launched in October of 2009; correct?

A. Yeah. Right.

Q. So two years later would be October of 2011; correct?

A. Yes.

Q. Okay. So knowing that, you would agree, then, that given what's in the GEIA about the pricing they are going to receive, the Korean Consortium would have had a significant incentive to obtain their PPAs prior to that first FIT

review; correct? Because, otherwise, the prices are going down, right?

A. Their prices could go down.

Q. Could go down?

A. Not clear that they had to go down.

Q. True. But you would agree, considering how FIT programs work around the world, that they would have been incentivized at least to get -- they know what the prices are when they signed. They would have been incentivized to get their PPAs as quickly as possible; right?

A. What if the prices went up? Prices could go up.

Q. Is it your experience with FIT programs around the world that prices go up?

A. They could have. There was -- I mean, it was to be set against a -- against a target. I'm not saying that they necessarily do, but they could do.

Q. Do you have experience with FIT Programs around the world and how they operate?

A. I have some knowledge of the German one --

Q. Okay.

A. -- of the German FIT program. They are -- which now is under pressure because the -- because the rate impacts are very high.

Kind of a -- I mean, there have been some FIT-like programs, but there haven't been that many that I think one could do like a real analysis of them, but remember that the FIT review process was designed to continue the incentive to invest.

Q. In terms of the FIT review process, is it your testimony that your understanding was that there was no mention of the prices potentially going down as part of that process?

A. No. The prices could go down.

Q. So --

A. But if you were going to continue a FIT program, my only comment was that the prices had to reflect changing expectations of what it would cost to bring in new renewable capacity.

Q. But you would agree with me that if you are the Korean Consortium, when you signed the GEIA you've got this clause in that says your prices will match the current FIT contract with the risk, the risk that price will go down, you would be incentivized to try and get your PPAs as soon as possible, would you not?

A. If you thought that the prices were definitely going to go down, yes.

Q. And in that sense because for phases 2 through 5 they needed to have at least one manufacturing partner operating to get those PPAs, you would agree, then, that they were incentivized through the GEIA to bring in or to be able to identify that manufacturer prior to 2011; correct?

A. If you thought that -- if you thought that was a primary risk, that may be the case.

Q. And, in fact, Samsung is able to identify Siemens as a partner in Ontario in 2010; correct?

A. Do you want to take me to a document?

Q. Sure. If you to go tab 22 in the binder. It is Exhibit C-0594. It appears to be a press release. It says, "Siemens" from the Board of the Business and Trade Press. It's entitled, "Siemens Selects Tillsonburg, Ontario, As New Home for Canadian Wind Turbine Blade." It's dated in Tillsonburg, Ontario, on December 2nd, 2010.

And you will see in that first paragraph --

A. Ah, good.

Q. -- it talks about it being the company's first manufacturing plant in Canada, how it represents an investment in excess of $20 million.

Then in the second paragraph -- and it is expected to create 300 jobs, an additional 600 related jobs for construction and commissioning.

And the second paragraph there, that says:

> "This new manufacturing facility in Tillsonburg is intended to allow Siemens to help Samsung and Pattern Energy meet their contractual...commitments."
> [As read]

Do you see that?

A. Yes.

Q. So in December of 2010, Siemens comes in to make its first investment into Canada, it says, in order to help Samsung and Pattern Energy meet their commitments; correct?

A. Yes, but can you scan down further? I mean, I can read it out, but it is very hard to see.

Go down a little.

In the last paragraph, according to Bill Smith, senior vice-president, energy sector, Siemens:

> "We're extremely pleased that we are opening our first Canadian facility in Ontario. Through its Green Energy Act and the associated Feed-in Tariff program, Ontario has become one of the most supportive provinces of wind and other renewable forms of energy and solar."
> [As read]

I take that to also mean that they were probably looking to fit demand for their products, as well.

And, in fact, I understand from other trade press articles that they had been looking at facilities in Ontario before the GEIA was signed. They had been trying to site a facility in Ontario before the GEIA was signed.

Now, they picked Tillsonburg in December 2010.

Q. But you were here. You heard the

testimony of Ms. Lo and Mr. Jennings. Having an anchor tenant like Samsung, which would allow the FIT manufacturers to benefit from the manufacturing as well. That was one of the point of the GEIA; wasn't it?

A. That was her character -- I believe that was Ms. Lo's characterisation of the program. She -- but, I mean, that, in itself, is not in the GEIA, that it's "an anchor tenant."

I don't remember that. I don't remember the word "anchor tenant" being used in the GEIA.

Q. Fair enough. But you understand that the government has -- the testimony has been that that's one of the reasons, for exactly the reason that's being talked about here. And you would also agree, would you not, that they say here they're coming to help Samsung; correct?

A. Can you put that back up, actually?

Q. Sure. We can put that back up, please.

A. Sorry. We lost it a little -- we lost it a little early.

Q. It's the second -- after all the

explanation about the jobs and the investment in Ontario, it's the second paragraph; it's the first sentence:

"It's intended to allow Siemens to help Samsung and Pattern Energy meet their contractual requirements."

[As read]

Do you see that?

A. (Reading):

"It is intended to allow Siemens to help Samsung and Pattern Energy meet their contractual requirements."

[As read]

Right?

And then later, further back down...

Q. Yes.

A. We talk about -- they talk about -- Siemens talks about, through its associated Feed-in Tariff program, Ontario has already become one of the most supportive provinces of wind and other renewable forms of energy, such as solar.

And now I just -- we combine that with the fact that they announce this in December. The

GEIA wasn't even signed until January.

Q. No. This is December of 2010. The GEIA was signed in January of 2010, a year earlier.

A. Yes. December. Sorry. I wasn't complete in my reference.

It was signed in December 2010.

Q. Yes.

A. The GEIA was signed in January.

Q. 2010?

A. 2010. So we've got approximately 10 months, 11 months. Right.

But that Siemens had been looking to site a facility for wind turbine blade manufacturing before the GEIA was signed.

Q. But they didn't site it until after the GEIA was signed; correct? And they sited it specifically in reference to Samsung and Pattern Energy; right?

A. I don't -- well, it says the site was selected for a number of reasons, such as excellent access to major highways and wide roads to transport the blades, which are very long -- we know that; right? -- in addition to close proximity to the market.

You see, from this, they already referenced the Feed-in Tariff program. I would say the market could be more than just Samsung.

They didn't necessarily say they were building it only for Samsung. They were building a facility to serve the demand for wind turbine blades, which is also FIT.

Q. But you understand, Mr. Adamson, that one of the goals that the government's procurement initiatives here were to encourage job growth and investment as quickly as possible; correct?

Correct?

A. Sorry, can you repeat?

Q. We've heard the testimony. You've been here hearing it, and you've seen it; you've seen it in the witness statements, that one of the goals of Ontario in these initiatives is to create jobs and encourage investment quickly; correct?

A. That was the stated goal.

Q. Okay. And Siemens is saying they've come in, in 2010 to help Samsung. Then they talk about the FIT Program; correct?

A. Well, they talk about the FIT Program in the same -- in the same thing. But the same gentlemen -- again, we lost that piece of

paper --

MR. SPELLISCY: Put that back up, please. Keep it up for now.

THE WITNESS: -- had previously said they were trying to site a facility for two years before picking the Tillsonburg site. I guess I would raise the question of why were they trying to site a facility that was designed only to help Samsung when, at that time, there was no Samsung agreement?

THE CHAIR: Excuse me. Could I just ask for a clarification? Where does it say two years?

THE WITNESS: That's actually in a different interview.

THE CHAIR: Because here it does not say two years.

THE WITNESS: No, it does not in this --

THE CHAIR: Here it says:

> "Tillsonburg was the best selection from among a number of sites Siemens considered since first making the announcement to open a Canadian operation in August of 2010." [As read]

Which is after the signature of the GEIA.

THE WITNESS: (Reading):

"First making the announcement to open a Canadian operation..." [As read]

THE CHAIR: Yes.

THE WITNESS: And I agree that that seems to be when the announcement was made. I just note that they seem to have been trying to site a facility well before that and well before January of 2010.

THE CHAIR: Fine, but that is certainly not to be seen from this press release, which says:

"The sites Siemens considered since August of 2010." [As read]

Or am I misreading?

THE WITNESS: (Reading):

"Tillsonburg was the best selection from a site considered since first making the announcement." [As read]

No. You're reading that correctly. I read another...

THE CHAIR: You have another source?

THE WITNESS: Quoting something that was just on the web saying that they had been looking for two years to site this.

THE CHAIR: Okay.

BY MR. SPELLISCY:

Q. And so you --

A. And it's kind of interesting, in a way, that what did Samsung do? Which was trying to make wind turbines, but ended up signing a deal with Siemens, which is a competitor in the global market for making renewable energy equipment.

Q. In your opinion, you reference -- you say "demand" -- in paragraph 41 of your opinion, you talk about plans for people to come -- other manufacturing is what you mentioned.

You say:

> "Demands with even larger FIT components has directly stimulated new manufacturing." [As read]

A. Uh-hmm.

Q. Now, in paragraph 42, you then go

and talk about some actual, I think, wind power, rotor blades, turbines. Anything you cite there is from 2012; correct?

A. The wind power things I quote in paragraph 42 are, in fact, from 2012.

The one in 2011 with Canadian Solar about -- was actually made in October 2009, and that was prior to the GEIA.

Q. Right. But for wind, there was nobody until 2012 in the FIT Program; correct?

A. Well, these are ones I found that I could tie to dates, so I won't say that all these people didn't have plans. These are the ones that I happened to come across basically in the trade press that had dates.

Q. So you looked, and you couldn't find anything earlier than 2012, then; correct?

A. Well, the solar one was in 2009.

Q. Right. And I'm asking about the wind.

A. About the wind?

Q. The wind turbines.

A. Okay.

Q. And so the wind -- you looked in the trade press, you said. And the wind turbine

manufacturing you were able to identify coming to Ontario for the FIT Program was in 2012; correct?

A. I looked some; but, I mean, there is not an exclusive -- there is not an exhaustive catalogue of these types of announcements. So I won't -- I -- you know, I can't say that I or someone working for me found every one.

Q. The examples you provide on the wind turbine, that is about two years after Siemens comes to Ontario and invests the money that we just saw earlier related to what it said, its desire to help Samsung; correct?

A. Again, we lost that. Remember, what they're actually saying in this...

Q. I'm just asking about the timing, I guess. We've had you read the document several times. But you could do it again if you'd like. We've read the document. It says, Help Samsung. It says, FIT proponents below.

I'm guess I'm just asking you about -- that's about two years before any of the other projects that you were able to identify in your report that came, what you say, solely for the FIT Program?

A. Sorry. There is something in the text, which I think it may be irrelevant.

Q. Is it relevant to my question or something else?

THE CHAIR: Is it something that we have not yet seen in the text?

THE WITNESS: Well, yes. It is really about the question about the timing. You are saying that Siemens was making -- was announcing their site selection; right?

Okay, and they, you know, had a site selection process, and they make the announcement. I don't remember that document saying that the timing of when the actual investment would occur, and that's why I was asking.

MR. MULLINS: Madam Chair, is it just possible that counsel could give a copy of the document to the witness so can he testify?

MR. SPELLISCY: He has a copy.

THE WITNESS: I have it.

MR. MULLINS: Okay.

THE WITNESS: It's just -- it's just extremely hard to read --

MR. MULLINS: Oh, I see.

THE WITNESS: -- because it's very, very tiny.

BY MR. SPELLISCY:

Q. That's why we're putting it up on the screen.

A. Okay. Hold on. Give me one second.

THE CHAIR: So we are still on tab 22?

MR. MULLINS: Yes.

THE CHAIR: Yes.

MR. APPLETON: Perhaps, Mr. Spelliscy, we could have it copied here and they could make it larger and it could be seen?

MR. SPELLISCY: It's probably not going to work because it is a full page of text, but I'm sure we can manage with this?

THE WITNESS: Just back up one more point. Again. Again.

It says:

"The blade factory will be established and represents an investment." [As read]

I agree. And they make the announcement of the -- that they made the site.

But your comments -- your statement, however, was around the investment, and I don't think it actually gives the exact timing of an investment.

BY MR. SPELLISCY:

Q. You're not aware of when that -- are you aware that this manufacturing facility is operating now?

A. Yes, I believe it is, but it's now 2014.

Q. You have no knowledge of when it actually became operational; is what you're saying because you don't change order --

(Simultaneous speakers - unclear)

A. I don't know exactly when they first started production.

Q. Let me ask you something else, I think along relatively the same lines, which is in your report, you note that Samsung has announced four manufacturing partners in Ontario for wind and for solar projects; correct?

A. Yes, do you want to take me to the paragraph number, please?

Q. Sure. Paragraph 40 of these reports.

A. Yes.

Q. Now, you said something during your opening remarks today that there's only one, that you know of, only one Korean Consortium project that is currently operating in Ontario; correct?

A. One of the wind farm projects.
Q. One of the wind farm projects.
Are you aware of other Korean Consortium projects operating in Ontario?
A. Of the wind farm projects?
Q. Right.
A. No. As far as I know, they are not operating. The Samsung renewable energy website doesn't state they're operating as far as I know.
Q. So Samsung has been able to bring four manufacturing plants to Ontario to identify four partners, people who have partnered with Samsung, even though it only has right now one operating wind farm; correct?
A. It has announced its designation of the four manufacturing partners, which, as I indicate, really indicate -- indicates that they've been indicated.
Q. But you would agree that from a government's perspective as to what they're looking to accomplish -- you say they've been indicated. You would agree that jobs are jobs for government, regardless of who creates them; correct?
A. Well, I guess the same job may be a job as far as the government.

Q. Sure.

A. But that's not really -- that's not really the tenor of the conclusion. Right?

The tenor of the conclusion isn't, would there be jobs, because we know there will be jobs from -- from building things. Right?

I mean, to me, at least -- and I've tried to lay this out. But it sort of stands to reason, you were going to build a lot of wind farms. We'll just stick with the wind farm part.

You are going to build a lot of wind farms. That was going to require equipment which isn't just lying around. Someone has to make it. Making it was, we're going to require employees; that's jobs.

So, if there's demand for equipment, there is -- and with domestic content or other requirements that it be Ontario, there would have to be demand for equipment in Ontario; and that would drive employment.

Now, what -- so those two things, to me, seem to be floating the same -- going the same way, FIT and GEIA. We're going to add demand for a lot of wind farm construction, and that was going to create demand for equipment. It had to be

Ontario-based, and that was going to drive jobs.

Now, what's kind of interesting, another feature that's kind of interesting to me, as you say, the GEIA had a -- had a job objective, which I -- which I think -- which I think is, you know, an announced job objective, which I think is true, and that the government wanted to create jobs, which I'm sure is true, but the FIT Program was creating many, many jobs, many more jobs, many more jobs by the statement of the OPA.

And by the -- in the OPA -- and I will take you to the document so that I can make sure that it's quoted correctly.

I'm sorry. I seem to have lost my...

The OPA and its two-year review of the FIT program -- and I'm still just trying to find the tab.

There we go. Tab 18 of the blue binder. that's C-0609, I believe, direct and indirect jobs. And this actually a Ministry document, not an OPA document. This is the Feed-in Tariff program two-year review report. And it says "Direct and Indirect Jobs."

> "The FIT Program has contributed to Ontario's

manufacturing base. Since 2009, it is estimated that the program has created almost 2,000 direct manufacturing jobs." [As read]

Q. So the FIT Program was a success?

A. The FIT Program was a success, yes.

Q. Yes.

A. And it created jobs by the Ministry's own analysis.

Q. Right. It's own analysis two years later; right? Actually, slightly more than two years later; correct?

Isn't it a relevant question what the Ministry would have thought when it was signing the GEIA, not what it learned later about the success of the FIT Program? Don't you agree with that?

A. What the Ministry thought and what they privately thought and what the Minister thought, I simply can't say.

Q. So --

A. What we have is evidence that both created jobs. Both were designed to create jobs.

And they created jobs for the very obvious mechanism that both required demand for equipment.

Q. But you would agree with me that the only entity that had an obligation under a contract to be able to identify manufacturing partners, in order to get its contracts, was the Korean Consortium. I think you already agreed with me on that.

A. Right. But I also identified what that actually included, and the very low threshold of what that actually included. What did that mean under the GEIA?

I'm sure you're aware of it, so I don't know that we need to actually go back here. You had to identify manufacturing partners. They had to be people who manufactured. You had to identify them.

You did not have to say that -- prove that they were new jobs. You wouldn't have to prove that they were jobs that would not have existed anyway for any other reason; you had a commitment to identify manufacturing plans.

Q. Now, I want to understand the limits of that because you said this morning that you reviewed the amended and restated GEIA.

A. Right.
Q. But I just wanted to ask a question about your report here.
A. Uh-hmm.
Q. Your report analyzes the manufacturing commitments in the original GEIA and that's it; correct?
A. No. I referred to the amended GEIA as well, and I state that it added the job reporting requirement.
Q. But you don't analyze the sections of the amended and restated GEIA, do you? You analyze the sections of the original GEIA with the manufacturing provisions; right?
A. Well, remember, most of the definitions here are pretty -- are the same, so I actually did; right?
What's the definition of a manufacturing partner? Okay? What did you have to do to identify a manufacturing partner?
I did review those things, and I referred to the amended and restated GEIA, which is now the 2013 version, in my report.
Q. I understand you referred to it. I saw it in a footnote. My question was -- and in

a paragraph, paragraph 95, I believe.

My question is: In analyzing the economic development adder, did you analyze it as it was stated in the amended and restated GEIA with the conditions therein?

A. Yes. I'm able to analyze that too. Obviously, I mean, the document changed between the versions. But it did not change my fundamental opinion around the competitive circumstances.

And as I -- as I had stated early on, the original GEIA was the GEIA in place for a considerable period of time. But even after -- even with the restated and amended -- amended and restated GEIA, right, many of the same characteristics still hold.

Q. I'm not sure I'm understanding. If many of the same characteristics still hold and you were recognizing that there was an amended and restated GEIA, but you didn't analyze the actual amended and restated GEIA, you just looked at -- you looked at and thought, I don't think it changed, and so you decided to just discuss the original GEIA?

A. Well, the explanation of the designation terms, are -- are pretty much the same. So -- and that was the one I started with, so that's

the one I -- I didn't want to go back and repeat -- as I said, I didn't want to go back and repeat the entire thing?

But the amended and restated GEIA has really pretty much the characteristics, in my opinion, of the original. It's -- it's just plainly there.

Q. Now, I just want to clarify one thing because you said, I didn't want to go back and re-do. But the amended and restated GEIA, that was public before you began writing your opinion in this case; correct?

A. The -- sorry. Can you just repeat that?

Q. Well, you said you didn't want to go back, so I want to understand why you would have had to go back. I mean, the amended and restated Green Energy Investment Agreement was out there and available prior to your starting to write your opinion in this case?

A. Yes, and I reviewed both at the time, as I -- as we stated early on.

What I didn't -- when I said I didn't want to go back, I didn't want to go back and say, "I amended" -- go back in text and say, "I analyzed this term. I analyzed these provisions," and then go

back and repeat all of that with the -- basically the same provisions to the amended and restated GEIA, because they were kind of the same provisions.

I mean, when I said I didn't want to go back, it's not that I hadn't reviewed it the first time; it is just that I didn't want to go back and repeat all the text, which would have made the report very hard to read, because the analysis of those provisions in the GEIA and the amended and restated GEIA is very parallel. It would have been a very repetitive report, I would think.

Q. I guess I just don't understand why you wouldn't have just looked at the amended and restated GEIA, which was the one in force at the time you were writing your report.

A. Well, because it was also my understanding of what -- that it was also important of not just what had happened in 2013; right? I believe it was actually after the arbitration had already commenced, considerably after, and after there had already been a big stink.

But, also, what was the GEIA and, in fact, during the critical periods, time. And that was the amended one. And then I -- but I've looked at both. And I said -- I -- I noted that -- that there

were those changes, but that I didn't think that they -- they did not change my conclusion.

Q. Right.

A. I mean, I guess I could have photocopied all those sections or cut and paste and repeated it all with amended and restated GEIA each time, but that would have been rather duplicative.

Q. But you do understand that the -- or do you understand that the economic development adder which you analyzed in your report, that it hadn't been paid at the time that the amended and restated Green Energy Investment Agreement was signed? You understand that; right?

A. In 2013?

Q. In 2013.

A. No, I don't believe anything had -- there was -- there was nothing to have been paid.

Q. Right. And so, in fact, you've got -- I just want to understand why this is in your report. You analyze the terms and conditions that would apply to allow the economic development adder to be paid in an agreement -- the original GEIA that is no longer in force.

And I want to understand why you

considered that an appropriate approach as opposed to just looking at the amended and restated GEIA, which would be the one which you would have understood that the EDA would have been paid under.

A. What the one -- I think we're somewhat going in circles.

My understanding is that the original GEIA, the January 2010 GEIA, was the one that was in force at that time and the one that followed from the negotiations that had started as early as 2008.

2009 was a pretty important period in the market; right? Negotiations are leading up to the GEIA, launching of the FIT Program; right?

That original GEIA, which was at the time when many things are happening in the FIT Program as well, was in force, all the way until there was an amending agreement, which changed something, some -- swapped out some terms. And then in 2013, you now have a new public amended and restated GEIA.

So my understanding is that was the agreement in play during the -- a considerable period of time and a pretty considerable period of time of importance to what we're talking about here, which isn't only now, but was also about then.

Q. I understand that. I guess

I'm -- you've got, I think, an analysis in your report of the economic development adder from an agreement which you understood had been superseded before the economic development adder had been paid; is that accurate?

A. Well, but I also had an analysis of all other -- lots of other aspects of the original GEIA, not just the -- not just the economic development adder.

I noted that the economic development adder was later capped down to $110 million NPV instead of the -- well, actually there wasn't a cap on the original one; there was only the Ministerial statement that said it was a net present value of $437 million. But that number didn't actually -- wasn't actually in there as a cap.

But I did note in my report that there actually was a cap now in place in the amended and restated GEIA, down to $110 million.

Q. Which is a cap, but this terms of how the EDA would actually be calculated and paid and what the conditions for it were, which are in the amended and restated GEIA, you never analyzed that? Or you believed they were just the same?

A. I don't believe they're entirely

the same because, clearly, the dates shifted. Why don't we -- why don't we go do that?

Q. I'm loathe to spend more time on it, I guess. I think we're getting relatively late here. So let's -- I've got two small topics to ask you about.

You talk about the advantage of – in Section 7.3A of your report, you mention that the -- one of the advantages of the GEIA was that it -- there was a facilitation for it obtaining the necessary regulatory approvals and permits; paragraphs 97 to 100, I think.

A. 97 through 100?

Q. 97 through 100. And you've got a heading called -- actually, it's 7.3C, I believe:

> "Access to governmental resources just to surmount regulatory and citing purposes." [As read]

Do you see that?

A. Yes.

Q. But I just want to clarify one thing here. You did not actually do any analysis of whether, in fact, the Korean Consortium's projects under the GEIA have been delayed or have run into

regulatory hurdles. You are just looking at the text of the GEIA here; correct?

A. At that time I had not -- at that point, I -- as I state here -- I'm looking at the GEIA. As we now know, the Korean Consortium projects -- or we heard from Ms. Lo, they have been delayed.

Q. Faced hurdles?

A. Faced hurdles, which are some -- which I believe she stated were due to the environmental assessment points.

I mean, this analysis is based on the text. I mean, we now have heard that the GEIA wind farm projects, I believe is what she specifically referred to, have been delayed.

I note, actually, that there's more FIT wind farm projects -- there's more greater capacity of FIT wind farm projects actually in commercial operation by a large margin right now in Ontario than there are GEIA projects, despite -- despite the priority access. So FIT actually kind of made it to market first, despite not having a consortium.

Q. So you would agree, then, that it turned out that this -- whatever this was, didn't turn

out to the benefit of the Korean Consortium or didn't benefit them in a way that you say that it was intended to?

A. Well, we don't know that because we don't -- we don't know what would have happened otherwise. I mean, we don't know what the counter-factual case for the Korean Consortium would have been without this help, right, so ...

Q. One last topic, everyone will be thankful to hear. You have a section right at the very end, almost the very end: "Flexibility and adjusting target generation capacity," Section 7.D. It starts at paragraph 101.

I'd like to understand your opinion here because this is -- this is something that plays into other aspects. You say in paragraph 103 of your report:

> "Article 3.4 of the GEIA allowed." [As read]

What you say is 10 per cent flexibility, and you say in the first paragraph:

> "In project capacity."

Do you see that?

A. Can you -- I'm sorry.

Can you give me the -- I must have ...

Q. Paragraph 103.

A. 103. I'm sorry. I heard the -- I heard the wrong paragraph.

Q. Sure.

A. Okay.

Q. And you say that the GEIA gave them a 10 per cent flexibility in "project capacity."

Do you see that?

A. In 102 or -- in 102 or 103? Sorry. Just which one?

Q. In 103 --

A. 103.

Q. -- in the very first line of 103.

A. Yes. Okay. 103.

Q. You say:

"The ability to invoke the 10 per cent flexibility in project capacity." [As read]

A. Uh-hmm.

Q. (Reading):

"Was a unilateral right provided solely to the Korean Consortium." [As read]

Do you see that?

A. Yes.

Q. Now, let's go to our GEIA and look there because you don't quote the actual Section here. So it's at tab 17 again. It is Exhibit C-0322, Article 3.4.

A. Sorry. You said tab 17?

Q. Yes.

A. I'm going to use your...

Q. If you'll follow at 3.4, it says in the first line that:

"The Korean Consortium may adjust the targeted generation capacity for each phase." [As read]

Correct?

Of the project, each phase; right?

A. Yes.

Q. And then at the end of the paragraph, it says that:

"Such adjustments are..."

At the very end:

"... subject to targeted generating capacity of 2500-megawatts overall for the project." [As read]

Right?

A. Yes.

Q. So, in fact, this capacity expansion option that you talk about here, it doesn't allow the Korean Consortium to increase the overall size of its project, does it?

A. Let me just read this one time through.

Can you just --

Q. This doesn't allow them to increase the generation capacity of their project by 10 per cent, does it?

A. Well, it allows them to adjust -- adjust the phases.

Q. Right, but they still have only 2500 megawatts of generation overall for the project; correct?

A. It is a very complicated -- it is very complicated wording, and I won't offer a legal opinion on it. But it does say:

> "Subject to a targeted generation capacity of 2500-megawatts overall for the project." [As read]

Q. I want to understand this, just

to compare, because you conclude, you say, "This wasn't available to FIT proponents." But you are aware that in each phase the Korean Consortium was limited up to 500 megawatts of transmission capacity; correct?

A. The Korean Consortium was limited to 500 megawatts of, I believe, what's called priority access.

Q. Transmission?

A. Transmission capacity.

Q. So...

A. That may not -- sorry. Go ahead.

Q. Right. So, in terms of getting that priority access, FIT applicants, on the other hand, they could develop their projects to be as big as they wanted, couldn't they? They could do multiple projects for more than 500 megawatts if they wanted; correct?

A. They could make bigger projects; but then, again, they don't have the priority and guaranteed transmission access, which makes -- what really makes those projects viable.

Q. When you say "viable," you are aware that lots of developers got awarded FIT contracts without priority transmission access? I'm

not sure what you mean meant by --

A. Yeah, but, I mean, it may -- the lack of transmission access may prevent projects from just growing without -- individual projects from growing without limit.

Q. But there was no maximum size capacity for FIT proponents was there?

A. I'm not aware of one.

Q. So then, unlike the Korean Consortium, which had 500 megawatts of reserved capacity, FIT proponents could just bid for whatever their optimal size of their project, how many megawatts they could feel they could fit on their land, assuming they could get -- and assuming they could get access; correct?

A. Assuming they could get transmission access. Remember the constraint on the -- the constraint on the basic design of the FIT Program is, you set a price and then it's a question of getting -- it's a question of getting quantities into it; right? And the quantities were really set by the transmission availability; right?

Q. I'm just trying to understand because you've given a comment about value of this capacity for each phase. And so let me ask you this

question: So if a FIT proponent decided at the time that it had a 400-megawatt project and it wanted to put in 440-megawatt application, it could have done so at the time, correct, if that's what it felt was in its interest, right?

A. Yes, but I don't believe it could have, having already made an application of just what -- its capacity.

Q. But it could have put in another application; right?

A. It could have put in another application, but that might -- that would probably very likely have a different time stamp. A different time stamp helps drives -- drives you around transmission access.

Q. But there was no cap on what FIT proponents could do?

A. I don't believe there was a -- I don't believe there was a specific megawatt target around the:

"This project shall be less than X." [As read]

Q. Right. But there was for the Korean Consortium; correct?

A. There was for the aggregate part.

Q. There was for each phase too; correct?

A. Well, there was for the phase, although you did have the flexibility among the phases.

Q. Right, which, you would agree, essentially gave flexibility the Korean Consortium of the sort had already by FIT proponents who could propose whatever they wanted, would you not?

A. Well, again, the FIT proponents could propose whatever they wanted. But when you came in later, you are down -- you were later and later in the transmission evaluation process.

Q. But FIT proponents could have put in a bunch of applications for more than 400 megawatts at the same time, too; correct?

A. They could be, but there were a whole set of requirements about posting amounts and stuff, so it's not like costing -- so, I mean, you would have wanted a system -- I assume that the OPA would not have wanted a system, as well, where everyone just put in thousands of FIT projects that had -- that were -- that were -- that were made.

Q. But I'm just sitting here trying to -- FIT proponents could do that; correct?

A. FIT proponents could put in multiple -- could put in multiple -- could put in multiple projects and many did.

Q. Many did. And some of those projects could have added up to more than 400 megawatts of capacity; correct?

A. Yes.

Q. Yes. And the Korean Consortium, when it's doing its phases, to get that capacity, it's got a limit of 500 megawatts, 400 of wind; correct?

A. Yes, coupled with the, of course, the golden ticket of the guaranteed transmission access.

MR. SPELLISCY: Thank you. That's all the questions I have.

THE CHAIR: Thank you.

Any redirect questions on Mesa's side?

MR. MULLINS: We do. Could we just have five minutes for personal break for the rest room?

THE CHAIR: Yes. That's quite explicit.

MR. MULLINS: I appreciate it. Thank you.

THE CHAIR: I thought you would say

that you need to prepare your questions.

--- Recess taken at 4:56 p.m.

--- Upon resuming 5:01 p.m.

THE CHAIR: Mr. Spelliscy, can we start again? Yes?

MR. SPELLISCY: Yes.

THE CHAIR: Yes. Yes. Good.

MR. APPLETON: (Sotto voce.)

RE-EXAMINATION BY MR. APPLETON:

Q. All right, Mr. Adamson, I'm going to try to get my voice back. So I have a couple of questions for you, hopefully which won't take too long.

I'll try to make reference when I can to documents that are before you and probably with respect to the white binder to make it easier for everyone. And each time I'll talk about an exhibit number so we have it in the record. Okay?

Now, do you remember -- you've had a lot of testimony, so I'll try to give a reference and hope that you can remember what we've been talking about today.

A. I'll try.

Q. At the beginning, Mr. Spelliscy asked you about the TAT availability tables. Do you

remember there was a discussion about that?

A. Yes.

Q. Okay. And he suggested that you didn't look at a document back from November of 2009, when you were making your conclusions and your expert report. But he didn't actually take you to the TAT table that you said you looked at in your expert report. It's in the binder. TAT -- oh, it's in our binder? All right. Well, I am already wrong.

I thought maybe we might look at -- if you look at our binder that we gave you -- that's the first binder -- it's Exhibit C-166 and at tab 31.

All right. If we could just look at the TAT table. I'll just wait until you get there -- go to the front page, please. You see this is the transmission availability table circuit?

A. Yes.

Q. All right. Now, could you turn to page 2 of that document?

First, let's just get the date, which is right in there. Do you see where it says where the revision date is?

A. Revised June 3rd, 2011.

Q. Right. And does that date ring a bell here for any reason?

A. Well, yes. I think this is now the famous date. This is the -- this is the date of the announcement of the -- announcement of the window.

Q. Of what type of window?

A. Of the connection-point change window.

Q. What does the TAT table tell you about?

A. Well, the TAT table tells you -- I mean, in -- a TAT table tells you in simplified terms about availability of -- of transmission capacity in -- at specific points.

Q. Okay. So if you were going to do an interconnect change, it would be reasonable to presume you'd look at a TAT table; correct?

A. Well, yes.

Q. All right. Now, let's just go back down to those little notes at the bottom. So could you look at a section which we're just going to highlight for you over here? It's the line that I thought was going to be yellow, but it is coming out blue. Right here, sir. It's the information that my colleague will get the -- no, no, no. Please. You're going to -- all right.

Can you just -- no. You've done too

much. Could you start in there and read the section -- the second -- third line at the end, starts "the information." Just read that line.

A. (Reading):

"The information provided in the transmission availability tables is a result of collaborative efforts by the independent electricity system operator, transmitters, local distribution companies and the OPA." [As read]

Q. And just read the next line.

A. (Reading):

"Although the information has been developed with the best of information available at the time, the possibility of errors exists." [As read]

Q. Great. Thank you.

So if you were a FIT Applicant and you've just been told that there is a change of connection points and you've been given a limited time to be able to deal with this, would -- and you would

see from the TAT table here that it says it's been developed with the best possible information possible -- or, sorry, develop the best information available at the time, would you think that the entities identified here, the IESO transmitters, local distribution companies, and the OPA, would be the right types of people to give you the information that you might need?

A. I think they would be pretty much almost the only people because they run the transmission grid. The IESO is the operator of the transmission grid. The transmission company, Hydro One, I mean, those are the people who would have the information about the state of the transmission system.

Q. And if it was revised as of the day that they've asked for the changes, would that have any impact on your presumption of reliability of the table?

A. Well, it would certainly make me -- it would certainly make me think that that was very fresh data if it's from that day.

Q. So, would that perhaps have been a reason why you would look here rather than looking in other places?

A. Well, you had the information -- you would have the information here, which is stated to be the best available, as of the day. Literally the day -- the Friday before the Monday window opened. So, I mean, that, I presume, would be as late as they could have released this unless they sent it out over a weekend.

Q. I'm not going to go there. You've worked with a lot of the different energy regulatory bodies in different jurisdictions over your career?

A. I work with clients in regulatory proceedings, some of which are around transmission stuff; others are not. I tend not to work for the regulators.

Q. I'll rephrase the question.

Have -- you've been involved in regulatory systems in a number of jurisdictions dealing with energy; correct?

A. Yes. And as I -- as I mentioned, my firm even helped clients run like RFP processes, which are then subject to state regulatory review but -- so, yes.

Q. So would you normally expect a document like this to be relied upon?

A. Yeah. I mean, you know, in my experience from like an RFP-type process, that would be what people rely upon. You would have checked it a hundred ways to -- a hundred ways to the middle if you can, as many ways as you can.

I mean, that would be the information -- that would be the official information you're giving out, what other information could someone else use.

Q. Back to your personal knowledge, based as an expert in the field, have you ever heard of a rule change like this done with notice over a weekend?

A. No. I characterized it in my expert report as rather extraordinary, and I stand by that as rather extraordinary.

And I think we heard from other witnesses how unusual they felt it was, like Mr. MacDougall felt it was, not just after the lack of comment period.

It seems like even they were -- thought it was very unusual. And I've certainly personally never seen anything like it.

Q. Okay. We can take this slide down.

Would it be reasonable, in your opinion, for a FIT participant, during the interconnect change -- sorry. Actually, that's not -- scratch that. I don't need to worry about that.

You were shown an exhibit by Mr. Spelliscy. We don't need to go there unless we need to look at it again. It was a presentation at tab 7 of Canada's book about the ECT. And do you remember it was a large slide deck?

A. Yes, although, if you don't mind. I'm going to open it.

Q. Sure, and you could be my guest. I'm not going to ask you specific questions about the document. I just wanted to -- it's whatever you feel comfortable with.

A. Yes. Okay.

Q. All right. Now, just to be clear, was there ever an ECT run in the August of 2010...

A. No, and I believe we discussed that there was no ECT.

Q. Was there ever a province-wide one ECT?

A. No.

Q. So this PowerPoint that we were

talking about -- he took you to slide 23, if you'd like to see that.

A. Uh-hmm.

Q. So we just looked at that. This PowerPoint must be talking about something that didn't happen.

A. Yes.

Q. Okay. Now, Mr. Landau had asked you a question. I believe it is part of your "boots on" question. And if you were a developer in December 2010, that you might not think -- sort of that might -- you not be thinking about your strategy; do you remember those questions?

A. Yes.

Q. But if you were a wind power developer currently ranked in the region where your rank was within the capacity that was available, okay, so you've got this entrance --

A. Yes.

Q. -- would you have any reason to change your connection-point?

A. No, especially since you're now -- if you have -- if you have very up-to-date information. So, clearly, the need to change depended on where you were.

Q. And perhaps who you were?
A. Well, and when I say "Where you were," where you were both on the grid and where you perceived you might end up in terms of ranking.
Q. And, of course, if you were under the GEIA or you were a joint-venture partner of the GEIA or you were purchased by the GEIA, you would never have to worry about this, would you?
A. Well, no. Then you're -- then you're in the guaranteed "express lane" that no-one else can drive in, but that would be completely outside of this entire process so...
Q. Okay. Now, same question that Mr. Landau asked you: You are already here in the Bruce Region and your -- and your current connection-point shows that you are ranked 8th and 9th.
A. Uh-hmm.
Q. Okay. Would it be reasonable not to go look at some other region at that -- in that position if you're ranked 8th and 9th in the region and you are ranked within the capacity that was available?
A. Well, yes. I mean, remember, getting offered a contract is about capacity. It's

about being in -- that they can offer you a contract because capacity is there.

And if you -- if you -- if you had a strong sense that your capacity was going to be within the available transmission capacity at that point, then you wouldn't want to -- you wouldn't want to disrupt that. You'd want to keep that.

Q. Okay. Now, you were asked by Mr. Spelliscy about Mesa's FIT applications in November 2009. Do you know when Mesa actually began investing in Canada?

A. No, no, I don't. I -- I'm -- I would assume, just from knowledge of wind power development, that it would have had to have been before the -- certainly would have had to have been well before you made the application; but I don't have any knowledge of what -- when they actually started spending money.

Q. Well, were you here for Mr. Robertson's testimony when he talked about when they had started leasing lands?

A. I don't believe I was. I was here for part of Mr. Robertson's testimony; but, as I remember, he talked a lot -- he was up for a long time.

Q. He was up for a long time. I understand. But you would expect that this might occur before Mesa made its applications, which contained hundreds of wind leases. That's annexed to the application; correct?

A. Well, you had to secure all kind of inputs and land leases or control, that would be one of them. So, I mean, typically, in my experience, before a project comes close to being to an investment decision, sometimes that's literally years of work, in every jurisdiction I've heard of but ...

Q. Now, if you had an exclusive contract for which you did not have to compete to get guaranteed access to transmission capacity, would that make it easier for you to attract a well-known joint-venture partner?

A. Well, certainly. I mean, I think we -- we've all agreed that transmission capacity was the big constraint here. And if you had that, you could -- I suspect you could have gone to any numbers of participants in the equipment market or developers. And you would have -- would you have had a relatively easy time attracting anyone.

Q. And, by the way, did you know what company Mesa was intending to partner with when

it came in on this -- in its FIT applications?

A. Yes, I did, for example, hear that. I had heard that before, but that was through the partnership with GE.

Q. Who is GE, sir?

A. General Electric.

Q. Are they a well-known company?

A. Well, yes, I believe GE is one of like the 50 largest companies in the world. Probably a little more material to this, though, is that GE has historically been one of the largest manufacturers of wind turbine equipment in the world.

Q. So they actually have a track record of doing wind turbines, but they weren't -- but they weren't part of the GEIA, were they?

A. They weren't part of the GEIA. I mean, GE has been involved in the wind business -- I don't know when they started because it predated when I was ever involved in wind farm projects.

But I've worked on wind farm projects for which they were the equipment supplier. And I worked on, for example, the financing. But I believe they were one of the handful of largest wind -- wind farm -- wind turbine equipment manufacturers in the world.

Q. And we heard that Siemens was involved. Would you say that -- I don't want you to pick favourites. But, I mean, at least GE is as well known as Siemens?

A. Yes, and especially in North America.

Q. Okay. Now –

A. Siemens is quite well known...

Q. I'm sorry. I want to let you finish.

Mr. Spelliscy noted that there was a financial crisis in 2008. I think we have all taken account of that.

Did you have any evidence that Ontario analyzed that the Korean Consortium was going to be able to meet its commitments under the GEIA?

A. I don't have any personal information of that. The only thing I could rely upon in answering that was the evidence we have read and heard about the Auditor General's report, which said that there was not a substantive business plan analysis or economic analysis.

Q. Do you think it would be fair to rely on the analysis of the Auditor General?

A. I'm not an auditor. But

I would -- I would assume the Auditor General, which from the description, seems to have had a pretty detailed investigatory process, talking about the number of people they talked to and stuff. I would think that, had it been there, they -- I would assume they would have found it.

Q. And you saw that the Ministry had an opportunity to give comments to this?

A. Yes.

Q. But did the Ministry disclose that they had done independent analysis?

A. Well, the Auditor General concluded that no independent economic or financial analysis of this had been done at all.

Q. Okay. Now, in fact, were you here when Ms. Lo was testifying?

A. Yes, I believe -- I believe for all of it.

Q. Do you recall what she said about the Korean Consortium's ability to comply with its manufacturing commitments under the GEIA, at least the initial -- under the initial GEIA --

A. Uh-hmm.

Q. -- do you recall what she said as to whether the Korean Consortium was able to comply?

A. In terms of the timing?
Q. Yes.
A. I believe -- I believe she -- I believe she said that there had been hurdles. I don't want to put words in her mouth. I can't remember the exact...
Q. Would it be fair to say, just to summarize it, that they did not comply and that they needed to amend the GEIA?
A. Well, certainly the amended -- the GEIA was amended -- I believe she said that they did not comply because of -- I used the words "hurdles," but I don't think she used -- setbacks or delays.
Q. Let's go to another part that Mr. Spelliscy asked you about. You were asked about Samsung being an anchor tenant.
Do you remember that?
A. Yes.
Q. Doesn't an anchor tenant usually bring in other tenants?
A. I'm sorry. Could you repeat that?
Q. Doesn't an anchor tenant usually bring in other tenants to a mall or some other

facility?

A. Well, I think that's the whole concept he was speaking of.

Q. All right. So using that analogy, a tenant would be another developer?

A. Well, I think a tenant would be -- they would be developers. They might be other manufacturing entities. Based on what Ms. Lo said in her initial statement, it seemed to be a rather sweeping concept.

Q. Okay. Do you know how well the FIT Program was doing in terms of number of applications, when the Samsung deal was reached?

A. Yeah. Well, I -- I referred to -- I think later in my interaction with Mr. Spelliscy, that -- that by the time the FIT probe -- the time before -- before the GEIA was actually signed, we had already had the FIT launch and that they'd had a rather overwhelming number of applications.

I remember that number being around -- and I don't have it in front of me -- being around the order of 9,000 megawatts.

Q. And if I recall, I believe Ms. Lo might have said there was 10,000 megawatts up to

December of 2009 and it is roughly the same range. Is that within your recollection or --

A. Yeah. Well, I -- I remembered 9,000, but 9,000 and something.

Q. Now, Mr. Spelliscy said to you that there was no cap for FIT proponents, but didn't the FIT proponents have to compete for power purchase agreements?

A. Well, yes. I mean, and they more -- they had to compete with each other through the entire process, especially for the transmission access.

Q. Okay. Now, I'm going to ask you to go to one of the binders, but I don't know which binder it is. I know it's going to be to tab 24. It's the one with the FIT Rules.

MR. APPLETON: Is it the white binder? The white binder. Excellent.

BY MR. APPLETON:

Q. So we are just going to go to the FIT rules for a moment.

And when you get there, I'm going to ask that you turn to page 9 of the FIT Rules, Section 5.4.

MR. BROWER: Give us the tab.

MR. APPLETON: Pardon me?
MR. BROWER: Give us the tab.
MR. APPLETON: Yes. It is tab 24. And it is document R-003.
MR. BROWER: All right. Thank you.
BY MR. APPLETON:
Q. Let me know when you get there. Take your time.
THE WITNESS: I'm here.
BY MR. APPLETON:
Q. Now, would you agree with me that this section, Section 5.4 of the FIT Rules, specifically relates to the ECT process?
A. Yes. The heading, I mean, it starts with ECT.
Q. Okay. Now, can you tell me whether there's any language in Section 5.4 that says:
"All projects will undergo a connection-point change before an ECT is run"? [As read]
THE CHAIR: Is this a question for the witness?
MR. APPLETON: Yes.
THE CHAIR: Or is this a question for

us to...

MR. APPLETON: No. It's a question -- well, it's a -- I'm asking --

THE CHAIR: Article 5.4 of the FIT Rules which he...

MR. APPLETON: Well, he was taken through and asked about this question –

MR. LANDAU: It can be done in submissions.

MR. APPLETON: Pardon me?

MR. LANDAU: It can be done in submissions.

THE CHAIR: Yes, I think so.

MR. APPLETON: All right. Well, I still think it's --

THE CHAIR: It's clear to us --

MR. APPLETON: I'll just move along on that.

THE CHAIR: What the contents of 5.4 is.

MR. APPLETON: For the record, I just want to say I believe it's appropriate to take out of the examination that was done by Mr. Spelliscy because he took him through this part. But I'm happy to take it into the closing without any problem.

MR. SPELLISCY: To be clear, I did not take him to the FIT Rules at all.

MR. APPLETON: No. That was --

MR. SPELLISCY: But I don't think it matters.

MR. APPLETON: That was exactly my point. You asked him the question about the ECT without taking him to this rule, and that was exactly the problem, why I wanted to address this, because I believe it's appropriate to mark it, but I think everyone has my point.

THE CHAIR: I think so, yes.

BY MR. APPLETON:

Q. Let's go to the next tab, tab 11. That is Exhibit R-068. This is the press backgrounder.

A. Yes.

Q. Can you remember being asked questions about this?

A. Yes.

Q. Now, first of all, if you remember at the bottom of the press backgrounder, it says that there is an assurance of 2500 megawatts. That's assurance to the Korean Consortium of 2500 megawatts.

Do you see that?

A. I'm sorry. I think this is the wrong...

THE CHAIR: We're in the press release. And you wanted to refer to the backgrounder.

MR. APPLETON: I'm sorry. Maybe my colleagues can assist me while I get the right number.

It is the January 21, 2010 press backgrounder.

MR. LANDAU: It is tab 20.

MR. APPLETON: Thank you very much, Arbitrator Landau.

Tab 20. And, therefore, to correct the record, that means it is R-076. And if we could go there -- I know the document quite well. I just don't know where it's located.

THE WITNESS: Could you start again with your question?

BY MR. APPLETON:

Q. Of course. Of course. There was a section that you were taken to about assured transmission.

A. Uh-hmm.

Q. Let's see if I can find that. I believe it's near the end.

MR. LANDAU: On the second page?

MR. APPLETON: Yes. On the second page. Thank you.

BY MR. APPLETON:

Q. I believe it's the bottom of the second page under "More Renewable Energy."

A. Yes.

Q. Oh, yes, I've been over all this.

A. I remember this. Yeah.

Q. I've been impatient, and I've already highlighted it.

Okay. Do you believe that there is a difference between assured transmission and priority transmission?

A. I'm not even -- I'm not even quite sure what "assurance of transmission" exactly means. I mean, "assurance of transmission" isn't kind of a phrase that's been used in this as far as I know and certainly isn't a kind of a term used in the electricity industry.

"Assurance in transmission," I mean, it doesn't necessarily connotate (sic) what a -- the guaranteed access was. I don't -- I don't really know that assurance of transmission is really kind of a term of art.

Q. So this wouldn't tell you that -- this would give you the information that you would be able to go to the front of the line and -- is that what you're saying? Or are you saying something different?

A. I don't think it tells me -- I'm not sure it tells me a whole lot of anything, to be honest. But...

Q. Okay.

A. But from my reading of it, it certainly doesn't tell you the -- it doesn't tell you the details of what the Korean Consortium actually received.

Q. Now, you've read this before; yes?

A. Yes.

Q. You've commented on this?

A. Yes.

Q. Okay. Is there any mention in this press backgrounder that the Government of Ontario would establish a special procedure to facilitate government approvals for the members of the Korean Consortium?

A. Not that I'm -- not that I'm aware of. I don't remember that being in here. I'll

scan it again, but I certainly don't remember that being in here.

Q. Is there anything in here about the right of the members of the Korean Consortium to increase their project size by 10 per cent without any further government approval, within a phase?

A. No. That -- I don't see that in here either, and I don't remember that being in here.

Q. Does it say anywhere in this document that Samsung did not have to meet any special requirements for its first 500 megawatts of priority access?

A. No. It's completely silent on the Phase I.

Q. Does this document say anywhere that the Korean Consortium could use its preferred transmission access to buy out failed FIT projects and convert them into FIT contracts under the GEIA?

A. No, and I don't remember that ever being that kind of possibility. I never remember seeing it in any -- any OPA or Ministry document.

Q. So the public wouldn't be aware of that from reading this press backgrounder on January 21, 2010?

A. No. I mean, the only way I was

aware of that was, first off, from the deposition of Mr. Edwards from Pattern Energy and then through some research, looking at the -- looking at projects they had bought that I knew had been for FIT projects, because they had been listed as FIT projects, and then matching them up in -- matching them up in trade press articles as being acquired by Pattern.

Q. All right.

A. For example, like the ACCIONA wind farm, that I -- that I dug up. But that wasn't -- that I've never seen in a -- in any official document.

Q. All right. So, following up on Mr. Spelliscy's question about what FIT applicants knew in 2009 --

A. Uh-hmm.

Q. -- they didn't know that Ontario would limit capacity in 2010 with the LTEP, did they?

A. I don't think the LTEP had even -- had even -- that wasn't even released then. I mean, that was -- that -- there wasn't a -- there was no -- there was no LTEP as of that time.

Q. If I recall, I believe it's 2011.

A. I think that 2011 is when the LTEP, I think, came out.

Q. I think so.
A. I mean --
THE CHAIR: November of 2010.
BY MR. APPLETON:
Q. November 2010.
A. Late 2010. So I think there may actually -- there may have been a statement around a long-term plan being required earlier than 2010, but I don't believe that was in 2009.
Q. And they also didn't know, then, in 2009 that the Korean Consortium would pick the Bruce Region almost a year later, in 2010, did they?
A. I don't think that was -- that certainly wasn't disclosed in these documents.
MR. APPLETON: I don't think I have anything further. No.
Thank you. We're all done. Thank you.
QUESTIONS BY THE PANEL:
THE CHAIR: Thank you. Do my co-arbitrators have questions for Mr. Adamson? No?
And I just have one. In your report, if you look at paragraph 70 and following, you speak of the scale of the GEIA and the FIT Program and you say they are the same scale.

And then in paragraph 74, you specifically say:

"Both FIT and GEIA targets are the amalgamation of smaller individual wind farm projects."

I was surprised by this approach. Would you not make a distinction, due to the fact that the GEIA is one developer that is the consortium; and in the FIT Program, you have many developers?

I understand that some may have in their portfolios several projects. But overall, you have many developers, and would that not cast a different light on the comparison of the two?

THE WITNESS: Well, clearly with the -- with the GEIA, you had a single consortium tied to its JV partner. I mean you have --

THE CHAIR: It has a partner -- it has a partner, yes, but it was one consortium.

THE WITNESS: It was one consortium tied -- tied -- tied to its JV partner, as opposed to potentially a -- multiple sets of companies.

THE CHAIR: Yes.

THE WITNESS: And I guess, for the purposes of really, of comparing, that didn't really

seem to be a greatly distinguishing feature as far as I was concerned --

THE CHAIR: So you...

THE WITNESS: -- because -- I'm sorry. I didn't mean to cut you off.

THE CHAIR: No. You looked at that -- you took all the FIT operators or developers collectively?

THE WITNESS: Uh-hmm.

THE CHAIR: And you compared them collectively, when we speak about scale, with the consortium?

THE WITNESS: Well, yes, and that was partially driven around this idea of identifying -- we were trying to bring on megawatts. You were trying to develop equipment manufacturing. So one potential metric of what you were trying to do, I would denominate kind of in megawatts, right? It is kind of also --

THE CHAIR: But there's a difference in how you count the megawatts, whether you count it by project or by program.

THE WITNESS: Right, but some form of aggregation. The -- the other one -- remember, this is really an analysis tied to one thing, which is, are

these -- are these two parties similar in a market? Which is kind of like a competitive analysis, like -- sort of like you have -- like almost a competition policy or antitrust-type concept; right

And economically, you can have competitors of very, very different sizes, right, unless there is something that guarantees that, for example, like a natural monopoly-type situation. So I mean, economically, just even from a kind of a very basic theoretical basis, I mean, small competitors may be able to do what large competitors can do, unless, you know, like I said, unless there is some overwhelming market advantage to being the sole large competitor, like in a natural monopoly.

You've got to know that this industry doesn't fit those characteristics. Even Professor Hogan, who -- Bill Hogan, who is a Professor at Harvard and a very well-known guy. I mean, he did a report, and he said, you know, in his belief, which is also my belief, but that was a report done for Canada under a WTO proceeding, that there weren't really large economies of scale in here, in this industry --

THE CHAIR: I read that, yes.

THE WITNESS: Okay.

THE CHAIR: And I understood the -- I understood that part, yes.

THE WITNESS: Okay. So I shall not --

THE CHAIR: Yes. Thank you.

There is another question that I have. If you look at your presentation of today on slide 4, it may be linked to the -- what we just addressed or it may not. I'm not certain.

In the third bullet point, you highlight the fact that FIT projects could be counted as GEIA projects, Korean Consortium and Pattern Energy acquired lowly ranked FIT project and made them into successful GEIA projects.

I am not sure I understand what the relevance of this acquisition of low-ranked FIT project is in your analysis.

THE WITNESS: Well, in the analysis of competitive circumstances, it's just really demonstrating that these were very, very similar things; right?

I mean, so -- I mean, the heading here is "Analysis of Competitive Circumstances." These were clearly competing types of projects if -- if one could buy the other and transfer it into the other category. So that was kind of the first point.

The second point --

THE CHAIR: That arises from the mere fact that they're generating electricity from wind power; no?

THE WITNESS: Right, and they met all the other -- all the other general criteria around access -- connection to the grid, contract type, all that kind of stuff, right. So -- so that point is actually very simple.

The second point was really just an illustration of this -- of the value of this guaranteed transmission access. You had projects that were very lowly ranked; and then shortly after acquisition, could skip a queue, go around the top and suddenly you're successful.

So, that's just an illustration of that point.

THE CHAIR: Thank you.

No. That's fine.

MR. BROWER: It occurs to me that the emphasis is on lower -- acquisition of lower-ranked was also a price issue because if you've got a very low rank, your chances are not very good; and so as between sticking with that and selling out for a price which the acquirer would regard as a low price for

what it's getting, that's why the emphasis on lower price, because --

THE WITNESS: Because now the rank doesn't matter. Rank doesn't matter because transmission -- if transmission acts as a guarantee, rank doesn't matter.

So buy -- as you say, buy lower-ranked ones if people think that they have to sell them off, sell the projects off, and automatically they can be successful because they can go in the other lane.

MR. BROWER: Yeah, but they'll presumably sell out for lower prices than higher-ranked people because they're looking at probably nothing on the one hand and recouping at least some of their investment on the other hand.

THE WITNESS: Yeah. I mean, I definitely agree with you in theory. I don't have numbers about how they sold these projects out, because that's not public. But, I mean, that would be the obvious strategy. If you buy low ones, take them over into your other category; and suddenly they can be successful.

MR. BROWER: So that, arguably, could lower the consortium's cost of -- right down the line.

THE WITNESS: I suspect they -- I

would guess, just knowing how wind farm development works in some other jurisdictions, if you have projects that you think are relatively low-ranked -- you've sunk a bunch of money in into this, into leases and to studies and consultants and all the costs associated with developing a project.

If you then think you have a pretty low chance of being successful, I mean, I've literally sunk all the money; what am I willing to take? I suspect, you know, this was actually a rather canny strategy to, in effect, actually avoid a lot of costs. Because I -- those guys -- those guys had sunk it all, getting as far as they had. These were already projects -- FIT projects that had already been submitted; just buy them out. Right?

THE CHAIR: Fine.

MR. BROWER: That's it.

THE CHAIR: Thank you very much.

We have no further question. And that completes your examination, which lasted longer than what we actually anticipated. We thank you for your explanations.

THE WITNESS: Thank you, ma'am.

Thank you gentlemen.

THE CHAIR: So, now we're going to

hear Mr. Low? No. Now we are going to --

THE WITNESS: Now we're going to ...

THE CHAIR: Now we're going to address the question about the damage computation for article 1105 because we need to resolve this tonight for the expert examinations tomorrow morning.

Do you have the reference that the Tribunal asked for?

MR. APPLETON: Yes.

MR. MULLINS: We have a letter from Deloitte.

THE CHAIR: Thank you.

This is more detailed than what I had expected, which is, of course, not a blame. But I think it means that we should take -- well --

MR. APPLETON: It speaks for itself.

THE CHAIR: I think we need to read it. Yes.

But now I suggest we take a 15-minute break and so we can read it, and then Canada can read it as well. And we'll reconvene at six o'clock and take it from there.

MR. APPLETON: Thank you.

--- Recess taken at 5:42 p.m.

--- Upon resuming at 6:12 p.m.

COMMENTS BY THE CHAIR IN RELATION TO DELOITTE LETTER:

THE CHAIR: This took a little longer than what we expected, and I -- we apologize for keeping you waiting.

What the Tribunal suggests to do is give its proposed solution; and then obviously we will listen to Canada, which has not had an opportunity to react to this letter. But if you -- without wanting to curtail your opportunities, we thought maybe if we make a proposal, possibly everybody can agree with it.

It seems to us, from reading this letter, that the criticism in BRG-1 was about the assumption of same treatment between GEIA and FIT participants.

The idea that is expressed in BRG-2 is the same. It is expressed in, like in like circumstances. But if you look at the quotes that we are -- have here, it does not say anything different.

So, that is -- would lead us to say that the rules do not allow to raise this now.

At the same time, if we consider all the circumstances, we think we could proceed in the following fashion. And it also takes into account Canada's mention that we could possibly conceptually address matters.

What the Tribunal would propose is that we do proceed as follows. In direct -- and essentially there is two elements to this proposal. And direct examination, the expert could address these matters conceptually but, however, without going into details of calculation or supporting materials that are not in the record, but just in terms of concepts.

Then in cross-examination. Canada can, of course cross-examine the expert on this conceptual aspect, and the expert can answer. It goes without saying, to the extent that Canada feels it can do so, under the circumstances.

And the third aspect of the proposal is that if Canada feels it needs more in terms of evidence with respect to this issue, then it could apply for further procedures. And the Tribunal will, of course, consider the application and deal with it in a manner -- in consultation with the parties to find a solution.

So, that would be -- that would be the Tribunal's proposal in the hope that this is fair to everyone and allow us to make at least some progress tomorrow.

Can I give the floor, first, to Canada maybe this time, because you have not had

an opportunity to react yet on this letter.

MR. SPELLISCY: Thank you, Madam Chair. I don't think I need to react on the letter --

THE CHAIR: No.

MR. SPELLISCY: -- itself.

On the question of the proposed process, as you've noted, we said we are prepared to address these issues conceptually. And so while we regret they were raised at this late stage, we are prepared to do it.

On your last point, Canada feels it needs more in terms of evidence.

Is there -- not exactly sure what the Tribunal is thinking in this regard. And in terms of when we would have to make such an election.

THE CHAIR: Certainly not before the examination, and that's all I can say right now because we have not discussed it. But we would certainly tell you when you have to tell us.

MR. SPELLISCY: Okay. And would -- okay. Well, I don't want to push too far into the details. And you will have noted from our letter as well that there is a question whether, depending on the conceptual approaches, whether even further evidence would be necessary. Because obviously there

is a huge divergence here in the conceptual approaches.

And if the Tribunal -- and this is why I ask the question. Because I think if the Tribunal would agree with the conceptual approach of Canada's expert, then much of this in the need for other evidence becomes irrelevant.

If they were to agree with the conceptual approach of the Claimant's expert, then I think we would need that further evidence. And so I just want to make sure that in thinking about it, that we would somehow have the opportunity at some later point to say, if the Tribunal were to get there -- and obviously you've got to decide liability first, even.

So I don't want to say that we want, oh, to reserve another hearing date at this point. I don't think we're there yet. I think that that's far too far in advance.

But I'd like to make sure that the Tribunal understands that we would reserve our right to seek to examine Mr. Low on his calculations, if that became necessary in the future.

THE CHAIR: That is the type of application we had in mind, yes.

Mr. Mullins, you may speak.

MR. MULLINS: Yes. Just to follow up on counsel's comments, we did read Canada's concept about having some kind of idea where the Tribunal's headed.

I'm sure the Tribunal is experienced, as some of us are, about awards. And I think that nobody is going to want to get into an issue about whether or not there has been some kind of interim award or can this be confirmed or something.

I think we're probably -- at least when I'm an arbitrator, I've been told not -- to make sure that those don't happen, that there should be one final award.

And I'm concerned if there's some kind of indication about rulings, that we'll then find ourselves in a question about whether or not there's an award that can be confirmed or something.

I really would caution that the parties in a Tribunal avoid that. I think that what seems to make more sense to me is -- and we can talk later about whether or not we believe it would be appropriate.

But if he -- but if counsel for Canada feels that they need more time or something, if that

happens, it will be limited to the issues, very limited, not open up, you know, liability, not open up anything else, no other experts, the narrow issues and that that be closed; and then the Tribunal can issue the award, instead of having some kind of an interim issue.

Maybe that wasn't a concern. But when I read it, that's the first thing that was a red flag to me. Because I've been in these situations, and it can be very expensive causes litigation. And I think we want to avoid all of that.

THE CHAIR: But what I would like to know right now is whether you agree with the Tribunal's proposal.

MR. MULLINS: I think at this point, obviously we can live with the proposal.

If -- and we reserve the right to object to an idea of a further proceeding, if that's where Canada goes, but I did want to put on the record now my concerns about some kind of interim ruling.

THE CHAIR: That was not the idea? Yes.

MR. APPLETON: Thank you. And I just wanted to clarify in relation to what Mr. Spelliscy had to say, that, of course, if the Tribunal

determines that the valuation approach taken by Mr. Low with respect to MFN, for example, is correct, there is no impact whatsoever.

In fact, as I read it, there is no impact with respect to the Article 1103, the Article 1102 or the Article 1106 damages. There's only issue, as I understand it, that if, in fact, some of those damages were to be found, or those violations, then you would never actually have to worry about these issues because they would be double counting -- I'm sorry. I'll keep as close as I can -- double counting.

So in many respects, this may not actually be a practical problem. So that's why we're prepared to examine and attempt to try to find this, because I think that maybe the problem will go away. And so that's really the key thing here.

THE CHAIR: Thank you. So we've noted the comments, and for now what we need to know is that we will proceed along these lines tomorrow.

What the Tribunal would like to do tomorrow, as well, after we've heard the experts, is have a brief discussion on the post-hearing briefs. The Tribunal may have a few indications it wishes to give you, and obviously we need to discuss time

limits.

You will then be able to already take these indications up for your closing statements or keep them for post-hearing submissions, whatever you prefer. But I would -- if we could have this discussion tomorrow, it would -- we could close it. And then we have only the oral arguments left for Friday.

And I think we can now confirm that we will end on Friday night. And so we'll also give the -- tell the arbitration place that this is -- that this is so.

Are there any other comments, questions that we need to address now before we adjourn for the day on the Claimant's side?

No?

MR. APPLETON: I think not.

THE CHAIR: On the Respondent's side?

No?

Then I wish everyone a good evening, and we'll see each other tomorrow morning at nine o'clock.

Are we still on the record? Yes, I wanted to give you the floor. Are we still on the record for the time because it may be useful for

everyone to have it right now.

MR. DONDE: The Claimants have 4 hours and 53 minutes left, while the Respondents have 8 hours and 10 minutes left.

MR. SPELLISCY: One heck of a closing.

THE CHAIR: Good evening.

--- Whereupon the matter was adjourned at 6:24 p.m.

CERTIFICATE

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided Transcription and transcribed therefrom, the foregoing proceeding.

_____

Lisa M. Barrett, RPR, CRR, CSR

Computer-Aided Transcription

PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER
THE HONORABLE CHARLES N. BROWER
MR. TOBY T. LANDAU QC
held at Arbitration Place
333 Bay Street., Suite 900, Toronto, Ontario
on Thursday, October 30, 2014 at 9:04 a.m.

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Also Present:

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Saroja Kuruganty
Lucas McCall
Alex Miller
Harkamal Multani
Darian Parsons
Adriana Perez-Gil
Melissa Perrault
Chris Reynolds
Cole Robertson
Sejal Shah
Michael Solursh
Mirrun Zaveri

Teresa Forbes, CRR, RMR, CSR — Court Reporter

INDEX

Toronto, Ontario

--- Upon resuming on Thursday, October 30, 2014
at 9:04 a.m.

THE CHAIR: The silence shows that everyone is ready to start day 5 of this hearing. Good morning to everyone.

Good morning, Mr. Low. You have been with us for a few days already, so you know how this proceeds. Can you confirm that you are Robert Low?

THE WITNESS: Yes, I can.

THE CHAIR: Yes, good. You are executive advisor in evaluation district services group of Deloitte in Toronto; is that right?

THE WITNESS: That's correct.

THE CHAIR: You have provided two expert reports. One was dated November 18, 2013 and the other one April 29, 2014.

THE WITNESS: That's also correct.

THE CHAIR: That's correct. And you know that you're heard as an expert witness in this arbitration. As an expert witness you are under a duty to make only such statements that are in accordance with your belief. Can you please confirm that this is what you intend to do?

THE WITNESS: I can.

AFFIRMED: ROBERT LOW

THE CHAIR: Thank you. I will now turn to Mesa's counsel, Mr. Appleton, for direct questions.

EXAMINATION IN-CHIEF BY MR. APPLETON AT 9:05 A.M.:

Q. Testing. Excellent. That technology works. Good morning, Mr. Low.

A. Good morning.

Q. Mr. Low, as you confirmed to the president this morning, you have submitted two expert reports in this arbitration with Mr. Richard Taylor. Who is Mr. Richard Taylor?

A. Mr. Richard Taylor is a partner at Deloitte who leads the valuation practice in the greater Toronto area, and Richard and I have worked together for about 25 years at the various firms that we have both worked at.

Q. What type of qualifications does Mr. Taylor have?

A. Mr. Taylor's qualifications are virtually identical to mine, chartered accountant, chartered business valuator.

Q. Now further to the Tribunal's direction, can you confirm that your working file

has been brought with you to the arbitration?

A. Yes.

Q. Great. Let's talk a little bit about your qualifications and your curriculum vitae, which is in appendix D to your first report. You can look at, if you like. I am sure you probably know.

You are an executive advisor in the Deloitte financial advisory group, and before that you were a partner at Deloitte. Is that correct?

A. That's correct. And my principal function is I lead the dispute practice in the Greater Toronto Area.

Q. And the CV says that you have worked since 1978 fairly exclusively in the damages valuation area; is that correct?

A. Yes. That has been my practice since 1978, over 35 years.

Q. Is it safe to say that you have been engaged in a wide variety of damages and business valuation matters over the course of that time?

A. Very much so.

Q. Could you tell us the number

of dispute resolution matters in which you have given testimony about damages and valuation?

A. I haven't kept exact track, but it would be in excess of 60 times.

Q. You're a chartered accountant with more than 40 years of experience?

A. That's correct. I'm a chartered accountant.

Q. Could you give me an example, then, of a relevant dispute that you may have participated in where you gave testimony about damages and valuation?

A. One that comes to mind I will refer to as the Pearson airport case, the airport that you transited to come into Toronto. And it was over a 57-year contract for a consortium to lease terminals 1 and 2 at the airport.

The contract was terminated by the government, and there was extensive litigation over the value of that contract.

Q. What was the general quantum in dispute?

A. It was approximately $600 million.

Q. Often airports are the basis

of disputes, as the members of the Panel know. And if not, sometimes we all feel like they should be.

--- Laughter.

MR. BROWER: Could I ask, is that the Lockheed case, if you can say?

THE WITNESS: No, it was not.

BY MR. APPLETON:

Q. Mr. Low, I see that you are a chartered business valuator.

A. Yes.

Q. Can you tell us what this designation is?

A. A chartered business valuator is a designation awarded by the Canadian Institute of Chartered Business Valuators. It is an organization of people who are dedicated to the field of business valuation and damages, and they provide education leading to an examination, qualification process, and continuing education, publications and discipline of members.

Q. When I read your CV, just for my own interest, I saw that you have sat on the final examination committee for the Canadian Institute of Chartered Business Valuators. Can you just tell us what that means?

A. The final examination committee is -- I was appointed, effectively by your peers, to assist in the process of reviewing the examinations as have been written by candidates who are trying to get the designation of chartered business valuator, as well as the other information that they have to put forward in order to qualify in being awarded the CPV designation.

Q. And who is this Canadian Institute of Chartered Business Valuators?

A. It started back in the early '70s with a number of people who were devoted to that field, and it has grown. It is a fairly substantial organization, was underneath the chartered accountant organization for a while, but it is now independent of that.

In addition, currently I sit on the publications committee of the CICBV peer reviewing articles in the journal that is produced, and I sit on the discipline committee.

Q. So when I see on your CV it says CBV, that means chartered business valuator?

A. That's correct.

Q. And when I see it says CA, what does that mean?

A. Chartered accountant.

Q. I see. Now, you have served as an arbitrator in commercial disputes, as well?

A. I have, only a few times, and they have all related to a question of damages.

Q. All right. So as you have heard and as the president has explained to other experts as they come in, the Tribunal has permitted experts to give a presentation -- and we're always careful when we talk to experts, it is limited up to 20 minutes -- setting out the conclusions in their reports, their methodologies, and to explain the divergences between the experts.

In this case, that other expert of course would be Mr. Goncalves, who I expect that we will hear from later today, who has filed a number of reports.

Could you, please -- actually, do you have a presentation?

A. Yes, I do.

Q. I understand that the presentation is in the binders -- and someone will tell me at what tab -- at tab C. And we will also hand out a copy to make it easier for the members of the Tribunal and for Canada. Once we do that,

we will start your 20 minutes, okay?

--- Binder distributed

BY MR. APPLETON:

Q. All right. Could we put that up somewhere? All right. So your 20 minutes can begin now. Let's hear your presentation, sir.

A. Thank you. If I could have the next slide, please? We've prepared a report -- two reports with respect to economic losses that are assumed to have occurred as a result of breaches of NAFTA, NAFTA Articles 1102, 1103, 1105 and 1106.

The basic approach that we have used in all of these articles in determining the economic loss is the discounted cash flow approach, and we deemed that to be the most appropriate approach in this instance for the following reasons: That the revenues can be forecast with a relatively high degree of confidence.

There are wind studies, and we have taken a conservative approach or the typical approach to how to apply those. And the FIT contract, 20 years, with a designated price, with a partial inflation protector to allow that to be predictable.

The majority of the capital costs would have been contractual, and we refer there to the MTSA, which is for the turbines, one of the principal capital costs to be incurred, and the EPC, or the balance of plant construction costs, have been estimated by an independent consultant, Mortenson.

The operating costs are expected to be relatively stable, and in fact BRG has agreed or Mr. Goncalves has agreed with those operating cost estimates.

And there isn't any novel technology. It is not something new. It is really quite predictable. And, in fact, Mr. Goncalves basically adopts the same discounted cash flow approach and, indeed, the majority of the data that we have used, other than a few factors that I will discuss later in the presentation.

As a result, we believe that the discounted cash flow approach can be estimated in a reliable manner with a relatively high degree of confidence; that is, it is not speculative in this instance.

Next slide. Thanks. This discounted cash flow approach obviously was adopted

by us. Mr. Goncalves has applied the same discounted cash flow approach as Deloitte with, as I said, a few variables being different, and I will discuss those momentarily.

In addition, the OPA as, at least in this dispute, an independent body and before the FIT program was enacted, applied a discounted cash flow approach in establishing the FIT pricing. And, indeed, we heard the other day from Mr. Jennings that the OPA price or the FIT price was set and it was set using this discounted cash flow approach in order that the applicants could recover their costs and be entitled to a commercially-reasonable rate of return.

And so, again, the discounted cash flow approach, I think, is quite reasonable and appropriate in this instance.

We have approached the NAFTA Articles 1102 or the economic losses related to Articles 1102, 1103, 1105 and 1106 having regard to the benefits of the amended GEIA and that these should be reflected in the economic losses.

This principally takes the form in 1103 of the Most Favoured Nation-type of analysis and that the best treatment awarded should be

compensated to Mesa in this instance. So we have looked at the treatment provided to the Korean Consortium under the amended GEIA.

So principally what does this include? In our opinion, it includes priority access to the four -- I apologize, I have a little bronchitis -- priority access to four projects that Mesa had totalling 565 megawatts reduced risk to development for a couple of reasons, but largely due to the government assistance in the regulatory process, in that there was a group set up to assist the Korean Consortium with that process and that should have been available then to Mesa, as well. And the priority access, in addition, reduced the risk to development.

We then heard discussion of the economic development adder, and this has to do with the likeness. And according to the evidence of Mr. Seabron Adamson, really it equates what was in the GEIA to the domestic content requirements and that it was an ability to point to a manufacturer and say, Here's our partner.

The economic development adder is a payment, in addition, that would be received over the 20-year life of the project. So it's been

present valued on the discounted cash flow basis, as well.

In addition, we have looked at the 10 percent capacity expansion that GEIA provided for, plus or minus 10 percent, as the better treatment. We have determined the value of the plus 10 percent capacity expansion. And as indicated by Susan Lo in her evidence the other day, the Korean Consortium, in fact, did use more than 500 kilowatts in their first two phases.

The last point I would like to make is that we have used the timing under the amended GEIA to push back the timing that would have been in the Mesa projects, in that we think they would have been ready earlier, but we have moved these back in time to accord with the timing in the amended GEIA.

With respect to NAFTA Article 1106 related to domestic content, as you can see under the 1.6xle turbine the words "base case", all of the damages that we have determined in our calculations for 1102, 1103 and 1105 were based on the use of the 1.6xle turbine, and Mesa had to make a decision early on believing that contracts were going to be awarded, and in August of 2010 were

told that the 2.5xls would not be available to qualify for domestic content until 2012.

So the decision was made. The planning started to be undertaken, the development undertaken with respect to use of the 1.6xle.

Why are they different? The 2.5xle, while costing more, generates more power. It is a more efficient turbine. The effect -- and we have quantified this separately -- of the application of the 2.5 turbines into these projects versus the 1.6 results in a loss, due to the domestic content rule and having to qualify, of $106 to $115 million.

On the next slide, we have indicated in this circle -- the circle is equivalent to the entire $106 to $115 million loss. And what we have tried to demonstrate here is that indeed it is the revenue loss, the efficiency of the 2.5 turbine relative to the wind studies and the FIT rate, that is generating most of the loss.

There would have been more revenue in these four projects had they proceeded with the 2.5xl turbine.

The next largest component is the operating cost. And simply stated, a number of the

operating costs are determined on a per-turbine basis. The 2.5xl process involves fewer turbines. They are more expensive, but they involve fewer turbines, and, therefore, the operating costs, when determined on a per-turbine basis, would be lower, and that accounts for approximately 25 percent of the losses, as well.

Lastly, we have looked at the capital costs of using the 2.5 turbines versus 1.6. And over the four projects, while each 2.5 turbine is more expensive than a 1.6 because they use fewer of them, they virtually nil out the greater per-turbine cost offset by fewer turbines, and, in fact, there's a slight cost advantage to the use of the 2.5s versus the 1.6s.

That's the domestic content loss. In summary, then, our total economic losses that we have determined from our reply report are $704 to $768 million. All of these have been determined on this discounted cash flow basis and effectively are lost profits that have resulted from Mesa not being treated in the same fashion as the Korean Consortium.

The base case is separately identified from -- other than the risk advantage,

is built into the base case. The economic development adder, as you can see here, and the capacity expansion are quantified separately. And, in fact, in our report -- reports, you can see that we've separately identified these categories for each of the four projects, and then there is a very small economic development adder that would be applicable to the capacity expansion.

The sum of all of those is $358 to $406 million. To that, we have added NAFTA 1106, the domestic content damages, for $106 to $115 million, and I commented on the previous slides how that was determined.

So the total damages, on a lost profit basis, are $464 to $521 million. In the base case, we have deducted the entire cost of acquiring the turbines, including the amount that was put on deposit with GE. So that has already been deducted in coming to these lost profits that I have already talked about.

So we have added back here the General Electric deposit that was forfeited, and the basis for doing that is that our approach is that all four projects would have proceeded. All four projects would have required 347 turbines to

be used. The MTSA deposit and the MTSA itself related to 333 turbines and, accordingly, the deposit would have been applied to the purchase of all of those turbines and would not have been lost, and, accordingly, we have added $157 million to the damages as a sunk cost.

The other sunk costs relate to professional fees, acquisition costs of the properties, land rent while properties were being held and developed, and project development costs such as the wind studies and other things as Mesa was preparing these properties for development. And that amount is $8 million, and there is a table in our first report, schedule 1B, that provides an analysis of that by category and by property.

So the out-of-pocket costs are approximately $165 million for a total claim under NAFTA Articles 1102, 1103, 1105, and including 1106, of $629 to $686 million.

To that, we have added interest from the date of the claim to November 1, 2014, the end of this hearing, in the amount of $75 to $82 million. That was based on the prime rate of interest in Canada and was compounded annually.

That results in the total claim of

$704 to $768 million.

I would now like to touch on the principal differences between Mr. Goncalves' conclusions and my own. As indicated, our approach applies the benefits and the treatment accorded to the Korean Consortium to the discounted cash flow approach.

Mr. Goncalves's approach to the economic loss does not consider the application of NAFTA or, in fact, the articles that have been breached.

So on the left-hand side of this schedule, you can see a comment labelled "Deloitte" on the right-hand side, BRG or Mr. Goncalves.

As I have talked about, our economic losses are consistent with the NAFTA MFN, Most Favoured Nation, benefits or approach affording to Mesa the best treatment provided under Article 1103.

With respect to Mr. Goncalves's approach, in spite of indicating in his reports that he was instructed to assume that there were breaches of these NAFTA provisions, his economic losses, to use his words, "have been determined independent of NAFTA".

So what's the impact of that between the two reports? In my report, the four projects have been included and they reflect the benefits from the amended GEIA, the better treatment. In addition, the GE deposit would not have been lost.

Under Mr. Goncalves's approach, he has included only two projects, being TTD and Arran, and he has included no benefits of the amended GEIA. He has not accorded Mesa the benefits of the better treatment pursuant to, for instance, Article 1103. And, in addition, he has excluded from his conclusions all of the GE deposit.

The difference in this methodological approach of according the treatment under Article 1103 or 1102 versus Mr. Goncalves's approach is a reduction from my conclusions of $500 million solely attributable to this difference. And I believe that the difference -- the approach taken by Mr. Goncalves is wrong.

So the midpoint of my range from the previous analysis was $658 million. The $500 million reduction, which indeed I have taken from Mr. Goncalves's report, is $500 million, leaving

$158 million left.

The next largest difference between us is the cost of equity that was used in determining the weighted average cost of capital that has then been applied in the discounted cash flow approach over 20 years.

The cost of equity component that went into my conclusion was 11-1/2 percent to 12-1/2 percent. You might recall that you have heard this before. The OPA, in setting the FIT price, the recovery of costs and the commercial rate of return appropriate to investors in the FIT program, was determined as 11 percent.

Mr. Goncalves's rate of return on equity is 20 percent to 21-1/2 percent. I suggest that is not even in the ballpark of reasonable.

The difference, again, as quantified in his own report, is equal to $120 million. As I indicated before, he had reduced our claim, by virtue of the methodological difference, by $500 million. This further $120 million would reduce the damages to $38 million.

There's other minor differences to other issues that he has that account for approximately half of the 38, and he is left with

$19 million of losses that he believes is appropriate.

The two large items are this methodological difference of not applying the better treatment and the discount rate. They account for the vast majority of the differences between us.

That's the end of the summary.

MR. APPLETON: Thank you. We appreciate -- we know that I can commiserate with personally, trust me.

MR. BROWER: You make quite a team.

MR. APPLETON: Apparently it is what we require of all our experts now.

BY MR. APPLETON:

Q. Something that we have been very lucky with through the course of this hearing has been that experts and witnesses generally haven't relied on a lot of technical words, but you did rely on one word I just want you to clarify.

At the beginning of your summary, you talked about EPC, and I assume that you meant engineering, procurement and construction costs.

A. Yes.

Q. I just want to make sure we have a clear record for it.

Now, Mr. Low, thank you very much. Could you, please, advise the Tribunal if you have any observations to make in response to the comments arising since your last expert report was filed?

A. Yes. There are three items that I would like to address orally, and they deal with the calculation of the weighted average cost of capital at September 17, 2010. They deal with a change to the determination of damages under Article 1105, and a reference that we made in our report to a certain rate of return that I would like to clarify.

So with respect to the calculation of the weighted average cost of capital, in our reply report we did adopt a valuation date of September 17, 2010. We had, in our first report, used a valuation date in January 2010. And when we did our calculation of the weighted average cost of capital, in our reply report we did not go through the mechanics of adjusting that weighted average cost of capital calculation.

Mr. Goncalves, in his second

report, pointed out that we had not done that, and it was his view that the components of that calculation had changed sufficiently that our calculation was in error.

In that regard, I have updated that calculation to September 17th, put in the appropriate factors, some very similar to what he had done. Some are slightly different by virtue of either sources or however we have determined the data, but I have redone that calculation using a September 17th input date.

The effect of that is that the cost of equity increased slightly, and the weighted average cost of capital increased even less, because the interest component was still fixed and maintained the same. The effect of that was to -- I'm sorry, reduce the damages slightly.

With respect to 1105, my first report and the reply report included the benefits of the GEIA in the Article 1105 damages. And I had spoken with counsel before and as we were producing those reports, and, with the belief that the fairness was a fairly egregious breach in this instance, had concluded with counsel that the benefits of the GEIA should be included in 1105.

Subsequent to the second BRG or Mr. Goncalves' report, again sitting with counsel, it was determined that the benefits of the GEIA should not be included in the 1105 damages. And, accordingly, I went through a process of eliminating those.

And a couple of them are very easy to see, in that we simply take the economic development adder, which in our schedules is separately quantified, and the capacity expansion quantification out of the calculations.

However, removing the GEIA benefits also removes the government assistance benefit that reduced the risk to the project. And, accordingly, I would have increased the rate of return required on the equity component in the cost of capital to reflect that the government assistance would no longer be available.

And I then had to look at the four projects separately, and the first two, TTD and Arran, are slightly more advanced than are Summerhill and North Bruce and I would have added a further incremental increase to the cost of capital.

The effect of all of those is a

fairly significant reduction to the amount that I had quantified under 1105 to remove the benefits of the GEIA from that component of the articles that we have calculated.

The third item that I would like to refer was pointed out by Mr. Goncalves in his reply report, and we had referred, when talking about our conclusion with respect to the weighted average cost of capital, to the OPA 11 percent and to a Scotiabank article that included a pre-tax unlevered cost of equity amount.

Our reference to that cost of equity was not correct. It should not have been there. It wasn't relevant to the conclusion.

However, there is an important distinction I would like to make. All of the Bank of Nova Scotia rates cited in that presentation represented what is called an internal rate of return. By definition, an internal rate of return is the return that results in the net present value of the future cash flows being forced to zero, such that there is no value.

So it indicates what the total return on the project is, but it's not necessarily -- and, frankly, is not -- the

commercial rate of return on investment. It is simply -- which is the risk of the projects. It is: What is the return having regard to all of the circumstances?

But it forces the conclusion to zero. So Mr. Goncalves in his second report states that, from the same document, the after-tax levered internal rate of return of approximately 23 or 24 percent is the relevant proxy for the cost of equity, and because his return of 20 to 21-1/2 is lower, slightly lower, than that, he believes that that demonstrates his cost of equity is conservative.

Effectively, though, by being close to an after-tax internal rate of return, his calculation is close to forcing the conclusion to zero. He has not applied a commercial return on investment. He has applied an IRR or close to an IRR that forces the conclusion to zero.

I think this demonstrates that Mr. Goncalves didn't understand what that IRR was, didn't understand the valuation and financial or damages theory that go along with applying costs of equity to a damages claim. Those are my comments.

Q. Thank you. Thank you very

much, Mr. Low. One last question. Are your corrections to your expert report to the benefit of Mesa Power or to the benefit of the Government of Canada?

A. The last item with respect to the rate of return has no impact on my calculations.

The discount rate change to the proper calculation at September 17, 2010 and the 1105 removal of the benefits of the GEIA are both to, if you wish, the benefit of Canada. They would both reduce the damages under, for instance, Article 1105 that I believe are appropriate for Mesa to claim.

MR. MULLINS: Mr. Low, just for the record, because I am looking at the transcript and I don't know if you are accurately quoted, but you never said anything about the original date you used for the weighted cost of capital, because I think the transcript is telling January 2010. Was that accurate?

THE WITNESS: Yes. I think it was January 21, 2010.

MR. MULLINS: Okay, thank you.

THE WITNESS: What was in the

first report.

MR. MULLINS: Okay, thank you.

BY MR. APPLETON:

Q. All right. So just to come back to the answer before we got there, so just -- I am going to just restate my question so we're very clear.

To the extent that there is a change caused by your calculations here, those changes, to the extent there is any, would be to the benefit of Canada?

A. That's correct.

MR. APPLETON: Thank you very much. It is Canada's witness.

--- (Off record discussion)

THE CHAIR: So, we will proceed to the cross-examination. Is Canada ready? All right.

MR. APPLETON: Mr. Low, would you like this wireless microphone?

THE WITNESS: I think I am okay.

MR. APPLETON: It is coming through.

CROSS-EXAMINATION BY MR. WATCHMAKER AT 9:45 A.M.:

Q. Good morning, Mr. Low,

members. My name is Raahool Watchmaker. I will be asking you some questions today about your damages assessment. I understand you have bronchitis, so if you do need a break, do let me know.

A. Thank you.

Q. Now, I want to make sure you've got your materials before you. You've got our binder. You've got your reports. Do you also have the reports of Mr. Goncalves with you?

A. I do.

Q. Now, Mr. Low, you have been here all week, so you know how this goes. Counsel prefers a "yes" or "no" answer, but feel free to give whatever context you need after that.

We are both here to help the Tribunal in their deliberations. So it is important for the record, when they are looking at it in the future, to have a clear response to the questions.

A. I will endeavour.

Q. Now, obviously we will be dealing with some confidential information and if we do get into confidential information, I will make clear that the feed be cut, and then we will proceed once we have that confirmation, okay?

Now, your introduction, your summary, was quite helpful and I am hoping that it might actually cut out a lot of initial questions that I have. But why don't we start by confirming your instructions with respect to your reports?

Now, I understand that you were asked to prepare an expert's report quantifying the estimated economic losses suffered by the claimant as a result of the alleged actions of the Government of Canada; is that right?

A. That's correct.

Q. Okay. And so really that's the fundamental purpose of your report, to quantify the economic losses, if any, suffered by the claimant as a result of the allegations?

A. Correct.

Q. Okay. Now, as I understand it you, in appendix B of your report -- maybe you could turn there. This is your original report, and I believe it is on page 53.

A. Yes.

Q. I think the members are struggling to get there. I believe there is a lot of charts before the page numbering starts up again.

A. If I could assist, it is about six pages from the back.

Q. There you go. Thanks. So this appendix is your restrictions, major assumptions, qualifications, limitations.

A. Yes.

Q. And if we focus on the third paragraph, you say here that your report has been based on information, documents and explanations that have been provided to you; right?

A. That's correct.

Q. And I expect in this respect you mean information, documents and explanations provided to you by your client, the claimant; right?

A. They are the documents that have been made available in this process.

Q. Right. Okay. And a little further down in the paragraph, you say the validity of your conclusions rely on the integrity of such information.

A. That's correct.

Q. So you're essentially saying your conclusions are based on the assumption that the information, documents and explanations that

you have been provided are accurate and true; correct?

A. That's correct.

Q. In the last sentence of this paragraph you say you are not under any obligation or agreement to investigate the accuracy of any third party information, nor have you performed any investigative procedures to independently verify the accuracy of any third party information. Do you see that?

A. I see that. That's largely related to the independent research that we do on comparable companies, and as such. While we haven't audited, for instance, Mesa's information or the documents that have been provided, the third parties really meant not from the parties in this matter, but independent materials that we have obtained.

Q. So just so I understand your testimony, your testimony is that the claimant, your client, would be a third party to your report; is that right?

A. No. That's not how I interpret this and the way these are written.

The third parties are people

external to this process, meaning -- so the claimant and the respondent, the Government of Canada and Mesa, are parties to this. Third parties are people outside of that process.

Q. So then we can assume that you have performed investigative procedures to independently verify the accuracy of the information, documents and explanations of the claimant?

A. Most of the documents I have taken as, on their face, being reliable. I haven't -- to use an accountant's term, I haven't audited information here.

So, for instance, if I have two documents that are at variance, then I would look at that and try to assess that. But we haven't done an audit of all of the documents that are here. So we have relied on the documents largely as they have been presented to us.

Q. Okay. And we're not just talking about documents; right? We're talking about information and explanations, as well, and your answer is the same?

A. That's correct.

Q. Okay. Now I would like to

turn to page 3 of your report. It is actually the covering letter. Now, at the top of this page, it says "confidential", but I don't believe there is any confidential information. I believe it has actually been declared to be a public document.

It's page 3.

A. I think that's the case, but -- yes.

Q. And this is similar to the chart that you put up on the screen earlier, and I just want to confirm a few things about the subcategories and categories that you had up on the screen earlier.

So your base case scenario, you say that it's based on the assumption -- this is at -- sorry to jump around here, but you say this at page 23 of your report. You say that it's based on the assumption that Mesa would have obtained FIT contracts for the projects and would have developed the wind farms in accordance with the DCRs and operated the projects to the intent of their FIT contracts.

That's at paragraph 4.1(a)(i) of your report. Does that sound correct?

A. Yes, it does.

Q. And I think you explained earlier that you have included three separate categories under your base case, economic development adder, the capacity expansion and the economic development adder applicable to the capacity expansion, and these are all alleged incremental losses that derive from the GEIA; correct?

A. That's correct.

Q. These are all future losses; correct?

A. All of these losses are future losses.

Q. Okay.

A. Effectively, if you want to think about it this way, under our reply report these projects would be coming in to their COD start of true operation and providing power this year. So even today the cash flows are still in the future.

Q. That's true of the 1106 allegation there, as well; right?

A. Yes.

Q. Now, in your opening presentation, then, I just want to confirm, while

we're on the topic of Article 1106, you put up a pie chart?

A. Yes.

Q. Just to be clear, none of the losses in that pie chart represented losses that have already been suffered. Those are all future losses; correct?

A. Those losses are all future losses, yes.

Q. Okay. And so you also have a line item here for past costs incurred. So that is essentially just sunk costs; correct?

A. Those are sunk costs. They are, as I indicated, professional fees, rents on the lands and development costs.

To the extent there are development costs in there, we believe that there are amounts that could be attributed to NAFTA 1106, in that Mesa, because of the domestic content requirement, was using consultants and others who were more expensive than they believed they could have used in other circumstances, but we have not quantified that amount.

Q. Okay. So to be clear, you're saying that there could be sunk costs attributable

to an Article 1106 violation, but you haven't calculated what those are or separated them out. They are not represented here on this chart; correct?

A. We have not separated them out. We believe they exist, but haven't quantified them.

Q. So am I correct in saying the vast majority of these sunk costs are really the turbine deposit?

A. I was talking solely about the $8,100,000.

Q. Okay.

A. The GE deposit is a different question.

Q. But it is also a sunk cost?

A. It is a sunk cost, but it is effectively not part of 1106.

Q. Just let me confirm that you have claimant's reply memorial.

A. I don't have that in these documents.

Q. We will provide it to you.

A. Thank you.

Q. Can you turn to paragraph

886, please?

A. I have it.

Q. Okay. So here the claimant says:

"Under the 'but-for' test, once a violation has been established, the remedial objective of an international tribunal is to place the injured investor in its investment in a position they would have been in, but for the illegal conduct."

It goes on to quote the S.D. Myers tribunal, which said:

"Compensation should undo the material harm inflicted by a breach of an international obligation."

Do you see that?

A. Yes, I do.

Q. From an valuation perspective, I assume you agree with the claimant on such an approach?

A. This issue is, to use an

expression, the elephant in the room between Mr. Goncalves and myself.

The issue here -- if I was to express this, the "but-for" test under Article 1103 is not to put the investor into the -- back into the position of what it had, but the 1103 test is to provide the better treatment.

And so I disagree with this analysis. Effectively, this "but-for" test is where I am now with respect to Article 1105, but I don't believe that it is the appropriate analysis or method for determining the losses under Articles 1102 or 1103 that provide for the better treatment, is how I interpret those articles.

Q. So that I understand, I think you said you disagree with the claimant's approach to the "but-for" test stated here?

A. I don't think this is the claimant's -- this is your analysis of what the "but-for" should be. This is not my analysis of what the "but-for" should be.

Q. This is the claimant's reply brief; correct?

A. Oh, sorry, investors. Well, sorry.

As I said, the "but-for" test in the case of 1102 and 1103 is, I think, to put them in the place that should have been provided with the better treatment. So it is not exactly the way these words are, but can be interpreted, in any event.

Q. Mr. Low, are you a lawyer?

A. No, I'm not. I'm a damages person.

Q. Are you purporting to interpret Article 1103 of NAFTA?

THE CHAIR: Well, you have -- I'm sorry, but you asked the question about this paragraph. I think we understood the valuation expert's understanding that under 1102 and 1103, it is not just a matter of undoing the harm, but it is placing the investor in the position in which it would be had it been granted better treatment, and for 1105 it is undoing the harm. Is this a correct restatement of what you said?

THE WITNESS: That is a correct statement. Thank you.

THE CHAIR: Thank you.

BY MR. WATCHMAKER:

Q. That better treatment, as I

think you summarized this morning, is the GEIA treatment; right?

A. That's correct.

Q. And just to summarize the elements of that, that is the priority access to the transmission grid, facilitation services by the government, the economic development adder, and the capacity expansion option; is that right?

A. That's correct.

Q. Okay. And, again, to be clear, that assumption essentially supports your entire base case, which supports your damages valuation for Articles 1102, 1103, 1105 and 1106; correct?

A. That's correct, until the description I have given of the change to 1105, but in my reply report, yes.

Q. So then, in essence, to correct the harm to the claimant as a result of Canada's alleged discriminatory treatment, under your valuation base case you provide the discriminatory treatment to the claimant?

A. I provide my analysis of what the better treatment was and that should have been provided to Mesa, yes.

Q. So you're extending the wrongful conduct to the claimant; correct?

A. I'm not claiming that it is wrongful. I'm claiming it was a breach of NAFTA.

And if there is a breach of NAFTA, which is what I have been told to assume, then from a damages perspective, I believe that leads to a quantification of the better treatment.

Q. Would you agree with me that under the FIT program, no FIT applicant received GEIA-like treatment, did they?

A. That's correct.

Q. Okay. But in your "but-for" counter-factual world, you're extending that treatment to the claimant and no other FIT applicant; is that right?

A. I am extending it to the claimant on the basis that 1103 provides for the better treatment and, therefore, I have quantified it. It doesn't accrue to all other FIT claimants or FIT applicants.

Q. Would you agree with me that there are real and physical transmission capacity constraints in any electricity system, Mr. Low?

A. That's my understanding.

Q. So by definition, it would be impossible to provide priority transmission access to all FIT applicants; correct?

A. I think that's a fair statement. It would not be possible to do that. I'm not suggesting that it should be done. I'm simply suggesting that there is compensation due to Mesa for the better treatment provided to the Korean Consortium.

Q. So you're saying that your economic analysis is focussed only on Mesa's conditions?

A. My economic analysis is actually focussed on the Korean Consortium conditions as being the better treatment.

Q. But in your "but-for" counter-factual, you're not concerned at all with how other FIT applicants might be treated in that counter-factual world; correct?

A. That's correct. I don't think that's the analysis that's appropriate.

Q. So you think that it is probable that if GEIA-like treatment is found to be a violation of NAFTA, that the Government of Ontario would extend that violating treatment to

the claimant, but to no other FIT applicant?

A. If other FIT applicants had qualified under NAFTA and raised this as a breach, I presume they would be entitled to it, as well.

I am not aware that others have come forward, so this is solely applicable to Mesa at this point, to my knowledge.

Q. Would you accept that if the GEIA is not a breach of NAFTA, that you would have to go back and do a significant amount of revisions?

A. Ask the question again, please.

Q. Would you accept that if we assume that the GEIA is not found to be a violation of NAFTA by this Tribunal, that you would have to do a lot of revisions to your reports?

A. There would be revisions required. Basically, I have talked about that already this morning, in that the amendments to 1105 to remove the benefits of the GEIA largely reflect that issue of not reflecting the benefits of the GEIA.

And other than the discount rate amendment, the removal of the other benefits is

really quite similar.

Q. Would it not impact your inclusion of damages related to Summerhill and North Bruce?

A. Not necessarily, no.

The management of Mesa believed at the time that with the -- in 2010, with the belief that there was requirements for additional power in Ontario, that they would have been able to develop -- excuse me, develop all four. And effectively in quantifying the values that we have, the other alternative is that, as Mesa did with other projects, it could have sold these projects and realized the value at the valuation dates, and, therefore, realized effectively what's happened here before people -- before circumstances changed, power use declined and other circumstances such that we now find ourselves in.

Q. The Summerhill and North Bruce projects, they were ranked extremely low in the provincial rankings, weren't they?

A. They were ranked low, yes.

Q. Have you done any analysis to determine whether there was enough transmission capacity available in the Bruce region to actually

allow for those two projects to achieve FIT contracts, even excluding the Korean Consortium, set aside? Have you done any of that analysis?

A. I have looked at that, and at the valuation dates there was not sufficient capacity. But by 2018, there was a view that there was going to be sufficient capacity in the Ontario market, and there was a prospect that Summerhill and North Bruce would have been developed.

Q. What was the view that there would have been enough capacity based on?

A. I believe that we have heard that the expectation was that there would be an additional 10,700 megawatts of power required from renewable resources by 2018.

Q. You're talking about the LTEP cap or target of renewable energy generation in Ontario?

A. I believe that's where the number came from, and I think it was -- I think it was Mr. Jennings that gave some evidence with respect to that.

Q. Have you assessed how much of that generation capacity has already been committed?

A. No. No, I haven't.
Q. So you don't know, do you, how much generation capacity is actually available in the Bruce and whether or not the Summerhill and North Bruce projects could actually obtain contracts, given that capacity, do you?
A. Given where we are and the Bruce-to-Milton line coming into play, once that has been used, which it has, there was not sufficient capacity at that time.
Q. Okay.
A. If I could add, again, the way we have done our schedules of breaking out components and projects, should the Tribunal determine that for some reason there are only two projects going to be awarded, it is possible to get to those numbers with the analyses that are in our reports.
Q. Now, you do understand that damages have not been bifurcated in this case; correct?
A. I do understand that.
Q. So the Tribunal has to make its decision on jurisdiction, merits and damages at the same time; right?

A. That's my understanding.
Q. Your base case is based on the assumption that the GEIA is a violation of NAFTA; correct?
A. That's correct.
Q. So you've already --
A. For 1102, 1103 and 1106 and, in the reports, 1105 amended as I talked about this morning.
Q. Now, if the GEIA is not found to be a violation of NAFTA, you would also, I believe you said, need to adjust for the GEIA-based assumption, the facilitation services under the agreement would have a significant impact on completion and project risk, as well; correct?
A. It would have --
MR. APPLETON: Excuse me, sorry, Mr. Low. Stop. I have been listening very carefully to Mr. Watchmaker. He has asked the witness to make a legal assumption he didn't say. He gave him an answer to the question about whether or not the GEIA violated the NAFTA, and he said that it's the government's conduct that violates the NAFTA rather than the GEIA itself.
But Mr. Watchmaker has summarized

his comment and put it back into that question. I believe that is improper. I am sure Mr. Watchmaker could rephrase it to make it a proper question.

THE CHAIR: I have some issue with the way this question was worded, as well. It seems to me that what Mr. Low has done is assumed that not giving treatment according to GEIA was a breach of NAFTA.

It doesn't say anything about whether the GEIA in and of itself is a breach, or do I misunderstanding something?

MR. APPLETON: In fact, I believe he testified exactly directly on that question that the GEIA itself was known as a legal agreement, but it was the effect. So he has been asked that. He has answered that question. He has given his testimony, and I am afraid Mr. Watchmaker, I'm sure inadvertently, has misconstrued the answer in the question, and I don't think that is fair to ask any witness.

THE CHAIR: In any event, we will not rely on Mr. Low's testimony for these legal issues. It goes without saying. So maybe you could rephrase the question, because I'm unclear where we exactly stand now.

BY MR. WATCHMAKER:

Q. Sure. So my question is, simply: Assuming that there is no breach as a result of GEIA, you would have to update your work, as you have said you have already done with respect to 1105, specifically with respect to completion and project risk; correct?

A. That's correct. I have indicated this morning that removing the impact of the GEIA or the better treatment from 1105 would result in an increase in the discount rate cost of equity to reflect the lack of some of the benefits of government facilitation, and that that would have the impact of reducing the damages.

THE CHAIR: That is clear, and you have well explained it before and you have said also in what respect it would reduce.

What impact would it have on the 1102 and the 1103 claim?

THE WITNESS: Assuming that the GEIA was not a breach of 1102 and 1103?

THE CHAIR: The fact of not giving the same treatment, yes.

THE WITNESS: If one removed the treatment from 1102 and 1103, then you'd be in the

same order of magnitude as 1105 at that point, which is what I spoke about this morning.

Although I haven't provided the quantum of it, it is lower than what is in my reports as they are stated here. And one would have to assess whether at that point -- in my view, they still had the opportunity for four projects and/or could have sold all four projects, but the analysis could be done on the basis of two projects.

BY MR. WATCHMAKER:

Q. Well, I would like to come back to that point. Is that actually correct, Mr. Low? The violations of Article 1102 and 1103 deal with national treatment and MFN treatment, discrimination; correct?

A. Yes.

Q. So if there is no discriminatory treatment under the GEIA, there wouldn't be an 1102 or an 1103 damages valuation, would there?

A. There, I think, is still a breach of 1102 and 1103. If one removes the GEIA, because under 1102 it would still have the Canadian subsidies of the Korean Consortium, but removing

the GEIA entirely, then I think you are left with the other factors of either treatment that was provided to Boulevard as a subsidiary of NextEra -- so I think there still can be applicable breaches of those, but they don't provide you with the benefits of the GEIA.

So it effectively becomes similar to what I have called, if you will, my revised 1105.

Q. But Boulevard --

MR. APPLETON: Excuse me. It is the same type of issue, again. Now it is lightly different. Mr. Watchmaker has asked this witness, who is not a lawyer, about discrimination, which we do not believe is a part of Article 1102 or 1103. We have submissions to deal with that and we made submissions on that.

So I want to put it on the record formally. So I do not believe it is appropriate -- you can comment, but please just let me get it out there -- that it's not appropriate to make a damages expert give testimony about legal findings of international law obligations, especially when they are, at best, contentious and, in our view, completely wrong.

THE CHAIR: I understand. I don't think it depends on whether they are wrong or not.

There's part of the submission -- what I would like to understand is in terms of valuation and not in terms of law. If I look at the computations for losses due to 1102 and 1103, and I remove the fact of better treatment not having been granted, what remains in your computation?

I don't know whether I should go to page 7 of your -- that's the summary. There's a table there of your second report or there's the same table I think further down. Let me see if I find it.

THE WITNESS: If I might, Madam Chair --

THE CHAIR: Can you answer my question just conceptually?

THE WITNESS: Certainly. Conceptually, if I could turn you to the reply valuation report, so that is the one dated April 29, 2014.

THE CHAIR: Yes, yes.

THE WITNESS: And if you go to the page preceding the appendices, so right at the

back, this provides more detail.

THE CHAIR: Yes.

THE WITNESS: Rather than the summary.

THE CHAIR: I understand that this provides detail and, in particular, allows to see what is claimed per project, and that is, I think, what you referred to before when you said if you want to take only two projects, you can deduct.

But that does not give me an answer to my question, unless I misunderstand something, and my question is: If you remove the component of better treatment, in terms of valuation, from the claimed breaches of 1102 and 1103, what remains on the account of these provisions?

I understand your position on 1105.

THE WITNESS: Okay, okay. The answer on the face is, in first place, quite simple, in that you would take the numbers for the economic development adder on this page and the capacity expansion and the EDA applicable to the capacity expansion and simply remove them.

THE CHAIR: Yes.

THE WITNESS: So at that point, you would be left with the base case of $301 to $343 million.

However, those numbers are somewhat high, because, as I indicated, I would have to change the cost of equity to remove the benefit of the government assistance, and that has an impact. It would lower these damages, not by an enormous amount, but we're not talking amounts.

So it would have the impact of reducing the $301 to $343 million to reflect the benefit of the assistance under the GEIA.

The balance, the past costs, the GE contract penalties which are referred to here, would remain consistent.

In addition, NAFTA 1106 is added into that top schedule, and, what one would have to do, the details of 1106 are at the bottom. And, again, you would have to take only the base case, being the $96 to $104 million, instead of the total that is there. And that also would be somewhat reduced by the change to the discount rate.

THE CHAIR: Thank you.

MR. LANDAU: Just to follow up on that, I am just wondering -- I am not asking you

any question of law, but just whether you can articulate what it is you would actually be -- what you are valuing at that point in terms of the breach.

If you take out of the equation the GEIA and the alleged preferential treatment, what is it that is on your table that you're valuing at that point under Articles 1102 and 1103?

THE WITNESS: 1102 and 1103, or at that point 1105, would I think all be similar, in that they are the value of the projects as they would have existed under the FIT program.

MR. APPLETON: Excuse me. I'm not sure whether it started from Mr. Landau or if it came from Mr. Low. 102 is another obligation; I think you mean 1102 or 1105.

THE WITNESS: 1102, 1105.

MR. APPLETON: Just to make sure we completely understand.

THE WITNESS: My apologies.

THE CHAIR: But I understand your answer to be what you would then value is the fact of not having been granted a FIT contract. Is that the answer?

THE WITNESS: That's correct.

MR. LANDAU: That's fine, thank you.

THE CHAIR: Thank you.

BY MR. WATCHMAKER:

Q. Why don't we move on? I would like to take a look at the treatment of one of the sunk costs alleged by the claimant. You have included the entire forfeited $153 million GE turbine deposit as a sunk cost; correct?

A. That's correct.

Q. Now, I think we will need to go into confidential session at this point. So could the public feed be cut off?

--- Upon resuming confidential session at 10:22 a.m. under separate cover

--- Upon resuming public session at 10:26 a.m.

BY MR. WATCHMAKER:

Q. Can you turn to tab 12 of your binder, the big white binder there?

A. This one?

Q. Yes. This is Exhibit BRG 86. Are you there?

A. I think so. A news article?

Q. Yes. This is an article dated July 7th, 2009.

Just to situate you, Mr. Low, this is about three months before the FIT program was created, about four months before the signing of the amended MTSA and the claimant also incorporating its projects in Canada.

The article reports on the demise of Pampa project, and then in the second paragraph it says:

> "Pickens is considering six sites for smaller wind projects in Wisconsin, Oklahoma, Kansas and possibly Texas."

Do you see that?

A. Yes, I can read that.

Q. The article goes on to say:

> "He may build three or four wind facilities that each have 150 turbines."

Do you see that?

A. I see that.

Q. Then in the next paragraph, the report says:

> "Pickens needs to move relatively fast as turbines

have been ordered from GE and will be delivered in the first quarter of 2011, and Pickens does not have any place to put them."

Do you see that?

A. I can read that, yes.

Q. There is no mention of Ontario here; correct?

A. There is not. I believe the due diligence process had commenced, but they had not yet purchased the TTD project.

Q. Did you investigate --

A. -- in July.

Q. Okay. Did you investigate the claimant's involvement in trying to place turbines at any of these sites?

A. I'm not sure exactly which of these sites are being referred to or what happened to the four states that are referenced here.

I am familiar with some of the projects that preceded either coincident or after the Ontario projects.

Q. So you wouldn't know if the claimant succeeded in bringing any of these

projects into commercial operation; correct?

A. If you're talking about these references to smaller wind projects in Wisconsin, Oklahoma, Kansas and possibly Texas, it is my understanding that Mesa has developed and sold projects, but has not built out a project that would include any of these four.

Q. But you apportioned none of the GE deposit to any of these projects; correct?

A. No, I've not.

Q. Mr. Robertson also mentions a number of projects Mesa was involved in, and at paragraph 13 of his reply witness statement -- I am not sure if you've got it there, but he refers to projects in Minnesota, Michigan and Missouri.

Do you recall that? It is actually up on the screen.

A. Yes, I'm familiar with those -- or somewhat familiar with those projects and what the circumstances were.

Q. Okay. And you will recall from the other day Mr. Robertson noted there was no geographic limitation in their agreement; correct?

A. I believe it was intended as North America.

Q. So that we're clear, you haven't allocated any amount of the GE deposit to any of these projects either, have you?

A. I have not. Again, I think this is a fairly simple concept, in that assuming these four projects had proceeded in Ontario, the turbines would have been ordered. They would have been used. The GE deposit would not have been forfeit, and it's really quite that simple, that --

Q. Sorry, finish, please.

A. The assumption is that under 1102 and 1103 and the benefits of the GEIA, the four projects would have proceeded. Had they proceeded, these deposits would not have been lost.

I mean, it really is that simple a concept.

Q. Okay. But isn't it also the case that if any of these other projects had succeeded, the MTSA could have supplied turbines to those projects, as well?

A. That's correct. And my understanding is that Mesa, particularly once July 4th, 2011 came along, did its best to try to use turbines or allocate turbines to other projects,

and various circumstances resulted in their inability -- once these projects appeared to be terminated or not going to proceed, they attempted to mitigate their damages, but were unsuccessful.

Q. But in the period of time we're talking about right now, that article I showed you and Mr. Robertson's testimony, we're talking about a period of time prior to the FIT program's denial of the contracts to the claimant, are we not?

A. I can't much speak to the ones that came before. I'm not familiar necessarily with the states that were mentioned and the specific projects that were there.

Again, my view is simply that under the approach to damages economic losses that I have taken, that the GE deposit would not have been forfeit and that Mesa tried to mitigate that damage, which they are obligated to do by attempting to develop other projects, and for various reasons was not successful in doing that.

Q. Okay. Maybe we can go back in confidential session.

--- Upon resuming confidential session at 10:32 a.m. under separate cover

--- Upon resuming public session at 10:33 a.m.

BY MR. WATCHMAKER:

Q. So, again, this is a press report dated April 21st, 2010. This is about four months after the signing of the MTSA; correct?

A. Yes.

Q. The first paragraph, it says:

"All necessary approvals have been obtained for the Goodhue wind project in Minnesota."

Do you see that?

A. Yes.

Q. This article reports the Minnesota Public Utilities Commission had given American Wind Alliance, including Mesa Power, approval of the project's purchase power agreement. Do you see that?

A. Yes, I can see that.

Q. There is also reference to Mesa using GE turbines. Do you see that reference?

A. I see that, yes.

Q. Had Mesa's Ontario projects received all necessary approvals, Mr. Low?

A. They had not, no.

Q. Had Mesa's Ontario projects

received power purchase agreements?

A. No.

Q. My understanding is that Mesa eventually sold this project to a third party. Is that your understanding?

A. That's my understanding.

Q. And subsequent to that sale, the project actually failed to come into operation. Do you recall that?

A. Yes. It's my understanding that there were environmental or bird issues, I think, some form of problems with eagles --

Q. So you don't --

A. -- that prevented the project from proceeding.

Q. But you don't apportion any amount of the forfeiture of the GE turbine deposit to this project that had all necessary approvals and an approved power purchase agreement, do you, Mr. Low?

A. No. Again, I don't on the basis that that being factual, because it appears to have been and I think you have stated it fairly, the basis of the economic losses that we have quantified here is that the four projects would

have proceeded.

Those turbines would have been used in Ontario, and, accordingly, the deposit would not have been forfeited.

Q. Well, again, some of the turbines could have been used on this project; correct?

A. If that project had proceeded, yes.

Q. If we can go back into confidential session for a few minutes.

--- Upon resuming confidential session at 10:36 a.m. under separate cover

--- Upon resuming public session at 10:45 a.m.

MR. WATCHMAKER: Madam Chair, I am in your hands as to whether or not to take a break or continue.

THE CHAIR: If you have now closed this topic.

MR. WATCHMAKER: I have closed this topic, yes.

THE CHAIR: Fine. It may be a good time for a break. I am sure your voice will appreciate a break. And you know, because I have been telling this to every witness and expert, they

should not speak during the break to anyone during your testimony.

THE WITNESS: Absolutely.

THE CHAIR: Let's take 15 minutes and resume at 11:00 or 11:05? 11:05. Good.

MR. WATCHMAKER: It seems inevitable.

--- Recess at 10:46 a.m.

--- Upon resuming at 11:10 a.m.

THE CHAIR: Apologies. We are a little late, but we're ready now. So Mr. Watchmaker can start if Mr. Low is ready, as well.

THE WITNESS: I am.

THE CHAIR: Fine.

BY MR. WATCHMAKER:

Q. The court reporter has given me a mic, so I don't mean to shock everyone if my voice is now louder, but apparently I was dropping off earlier in the day.

Mr. Low, earlier you said that you had included the projected value of the claimant's ability to use the GE 2.5-megawatt turbine into your Article 1106 future loss valuation; is that right?

A. That's correct.
Q. And am I correct in my understanding that you use August 7th, I believe it is 2010, as your valuation date?
A. I think is August 5.
Q. August 5, sorry. Have you seen any invoices from the claimant, as of that date, showing any payments made?
A. Absolutely not. They hadn't ordered any, nor taken delivery of any turbines, so there were no invoices at this point. There were only contracts.
Q. Okay. And you've essentially assumed that those turbines were available for use and assumed that they were available at the prices that I believe Mr. Robertson and management provided to you; is that correct?
A. I believe they were available, but the pricing of the 2.5 turbines is based on a representation from Mr. Robertson in both the representation letter he gave me and his witness statements with respect to what he had determined with GE the pricing of the 2.5 would have been.
Q. Okay. But besides that

management letter and Mr. Robertson's testimony, there is no documentary evidence in the record confirming they were available for those prices; correct?

A. There are no documents in the record with respect to the 2.5 pricing.

Q. Okay. Could we turn to paragraph 4.4.1(b) of your first report, please?

A. Yes.

Q. Here you say that the US Export-Import Bank prepared a letter of intent indicating that they were interested in financing the claimant's projects; correct?

A. Yes, there was a letter.

Q. Okay. I would like to go into confidential session.

--- Upon resuming confidential session at 11:14 a.m. under separate cover

--- Upon resuming public session

BY MR. WATCHMAKER:

Q. Now, Mr. Low, I understand from your direct examination this morning you have updated your discount rate to reflect changes to your Article 1102, 1103 and 1105 and dates of breach; correct?

A. That's correct.
Q. So you now use for all of these claims the date of September 17th, 2010?
A. Yes.
Q. This is the date that the Minister of Energy directed the OPA to set aside 500 megawatts of transmission capacity in the Bruce region for the Korean Consortium; right?
A. That's correct.
Q. And you selected this date as your date of breach because the set-aside is alleged to be a violation of those articles of NAFTA; right?
A. In part, the selection of the breach date is that of counsel, rather than my particular selection of the date.
Q. Right.
A. But that is the basis of it.
Q. Okay. So from a valuation perspective, can you please explain what quantifiable losses were actually caused to the claimant on September 17th?
A. The reservation of -- excuse me -- transmission capacity on September 17th had an effect on the prospects for obtaining FIT

contracts by the Mesa projects, by virtue of that reservation. It reduced the available capacity in the Bruce region.

Q. So I think you said it reduced the prospects that they would obtain contracts; is that right?

A. That's correct. It's the first indication in a series of things that occur, that there will be an effect -- as I understand it, this being part of a legal point, there will be an impact on Mesa, and that was the first date that it was known.

Q. Okay. But the Bruce-to-Milton transmission line didn't even receive final approval until May 10th, 2011, isn't that right?

A. That's correct.

Q. And, Mr. Low, the Bruce-to-Milton allocation didn't happen until June 3rd of 2011; is that correct?

A. That's also correct.

Q. So the denial of actual contracts didn't happen until that time; correct?

A. That's correct.

Q. July 4th?

A. I believe that's the date. However, from September 17th, 2010 on, that was foreseeable.

Q. Foreseeable. But my question was: What quantifiable losses were actually caused as of that date?

A. As of that date, from a value perspective, the expectation for FIT contracts on the part of Mesa had to have been significantly diminished because of the reservation of capacity in the Bruce.

So in a value sense, it's determinative at that date that there was an impact on the prospects for these projects, and, accordingly, a decrease in the expected value of those projects.

Q. And it's your testimony that the decrease in value is the entire valuation that you have conducted based on September 17th being the valuation date?

A. Effectively that ends up being the result. There are subsequent events that happen that crystallize it, but to my understanding, September 17th is the first date that Mesa became aware, and that's the reason that

the date is selected, and the infringement on its value occurs on that date.

Q. You say that the infringement on its value occurs on that date, but I am still not quite understanding what specific losses. Could you enumerate some of the specific losses that occurred on that date?

A. Sure. It's on that date that Mesa becomes aware of an impact on its projects specifically, and it's on that date -- and I am treading into legal ground here -- that it becomes aware of a breach of Article 1103.

Article 1103, as I understand it, then entitles Mesa to the better treatment accorded the Korean Consortium, and, accordingly, then the value on that date, had Mesa been accorded that better treatment, is reflected in the economic loss conclusions that I have determined.

Q. But on September 17th, you will agree with me there was still a possibility that the claimant would have received FIT contracts; correct?

A. I think at that point, as I understand the availability of transmission capacity, that was significantly affected.

However, I'm not sure that that's really the relevant point. I think the relevant point, as I understand it, is that that is the first date on which Mesa became aware of the impact of the breach of 1103, and that it was at that point entitled to the benefits -- the better treatment under 1103; and the better treatment, therefore, gets you into all of the issues that we've talked about of the four projects, the government assistance, transmission access, and that becomes the damage.

Q. Okay. Well, you used an interesting word earlier on and I think it is -- and I don't think it's a term of art. But you said "crystallize".

I think it is probably important from a valuation perspective. When did losses crystallize? And I would suggest to you, did losses not crystallize when they failed to get contracts?

A. I'm going to try to answer your question strictly from a damages perspective, and I will try to avoid the law.

Q. Yes.

A. And I think I am treading

fairly close here. So my understanding of Article 1103, for example, is that it entitles the claimant, if it is found to have been in breach, to the benefits under the GEIA, the better treatment afforded the Korean Consortium, and the first date on which that became apparent to Mesa was September 17th, 2010.

And that then crystallizes the damages pursuant to 1103. The fact that it may have taken subsequent events to determine that it impacted all four, we know, for example, at July 4th, 2011 they weren't awarded any contracts.

Let me make a hypothesis, that if on July 4th, TTD and Arran had been provided contracts under the FIT program, then I still think there would have been a loss under 1103 for the other two projects due to the better treatment to the Korean Consortium, but part of the loss would have been mitigated by virtue of Mesa receiving the contracts.

So they didn't receive the contracts, so the loss is the entire piece.

THE CHAIR: Can I ask just one follow-up question? Sorry for the interruption.

Your answer was focussing on the

better treatment. You say that in September 17th, 2010, it became obvious that the better treatment -- that they were entitled to the better treatment and that is how you justify this valuation date.

Now, let's assume we do not adopt the idea of the better treatment and simply adopt a view that what matters is the fact that they have not been awarded FIT contracts. How would then your answer be to the question of: What loss occurred on September 17th, 2010?

THE WITNESS: I think, on that basis, the loss at September 17, 2010 would be the loss of the four projects without the benefits of the GEIA.

So it would become -- if there is no breach of 1103 by virtue of the better treatment to the Korean Consortium, then you would be back into the loss of the projects without the benefits of the GEIA.

THE CHAIR: I understand that, but September 17, 2010 Mesa would not know whether it will be awarded the contracts, or not.

THE WITNESS: I think if you look at -- and there's some charts in the -- I believe

it is the first report of Mr. Goncalves. And it shows the rankings of the projects and puts Mesa out at eight, nine, and then the high 30s for the other two.

The September announcement, at a minimum, cuts off the award that may have been possible for the other two, and then it takes a continuing action of the change point window, access point change, and that in combination results in the fact that TTD and Arran are not awarded contracts, as well.

THE CHAIR: Yes.

THE WITNESS: But I think the starting point is still September 2010.

THE CHAIR: Thank you.

BY MR. WATCHMAKER:

Q. Okay. Now, you have also changed your Article 1105 valuation date; correct?

A. That's a complicated question. There was -- I'm not sure where I should be going with this, because it's been the subject of debate for the last three or four days, in that it was -- the date of 1105 was December 21, 2010. We had wanted to change it to September 17, 2010, had proposed that.

That was among the things that were initially rejected, and I think in the last round of what I was allowed to speak to, that change of valuation date to September 2010 was not included. There was only the calculation of discount rate.

THE CHAIR: No. But unless I am mistaken, the valuation date issue that we debated over the last few days related to 1106, and it was the question of whether that could be moved from September to August. And if I am wrong, of course counsel will correct me.

THE WITNESS: The 1106 date was a move from August 5th to July. It was moving --

THE CHAIR: Then it was confirmed that it was August 5th.

THE WITNESS: Yes. So we did not change 1106. Although it is not in evidence, because it was withdrawn, the so-called "correction letter" was also going to change 1105 from December 2010 to September 17th, 2010.

THE CHAIR: Right.

THE WITNESS: And I think as this progressed during the hearing, that was one of the items that kind of fell off the table.

THE CHAIR: It was not revived in your last letter?

THE WITNESS: Right.

THE CHAIR: Yes, that's clear.

MR. WATCHMAKER: My apologies, I think I misspoke.

BY MR. WATCHMAKER:

Q. You have adjusted your discount rate?

A. We have.

Q. Okay.

A. To reflect the actual calculation at September. The valuation date didn't change. It's the calculation of the weighted average cost of capital components that changed.

Q. You have also removed the economic development adder and the capacity expansion option?

A. Two different questions. One is the calculation of the weighted average cost of capital, that affects 1102 and 1103, and 1106 as it relates to 1102 and 1103.

The second question relates to my suggestion that 1105 should not include the

benefits of the GEIA, and so the change in the discount rate is then to reflect a difference, rather than the calculation, if you will.

Q. If I recall the numbers in the chart, they were still quite high. You're continuing to include the Summerhill and North Bruce projects under that claim; correct?

A. That's correct.

Q. And on what basis --

A. On a higher risk -- excuse me, a higher risk of attaining those, we suggested there should be an incremental risk, first of all, to the overall cap rate -- sorry, capitalization rate or discount rate, cost of equity, to reflect the removal of the benefits of the GEIA, and then a further increase to the risk reflecting the state of those projects when there's no benefit of the GEIA, that you could absolutely move them forward.

Q. Okay. Well, we've already talked about how much capacity might be available in the Bruce, so I don't intend on going back on that.

I've just got a few more questions. Could you please turn to page 22 of your original report? This page has confidential

information on it, but I want to look at a non-confidential paragraph. It is paragraph 4.1(a)(3). I don't know if there is a public version we could use?

It is at page 22 of the original report. You see here -- Mr. Low, are you there?

A. I believe I am, yes.

Q. So you say here:

"The additional 10 percent of capacity is considered to be an incremental loss that has been quantified based on the assumption that the claimant would have the ability to increase the capacity of its projects by 10 percent that was offered to the Korean Consortium as part of the GEIA."

Do you see that?

A. Yes.

Q. Now, I would like to actually look at the GEIA provision dealing with this, and I don't think it is in your bundle, but it is Exhibit C-322. I would like to look at section 3.4

specifically.

A. In this binder?

Q. I don't think it is in that white binder. Maybe we could try to find that. It is section 3.4 and it is claimant's Exhibit C-322. So it is section 3.4.

So the first part of this provision says:

> "The Korean Consortium may adjust the Targeted Generation Capacity for each phase of the Project, specified in Articles 3.1 and 3.2, within the range of plus or minus 10 percent."

Do you see that?

A. I do.

Q. And then the phrase at the end of this provision limits its scope by adding "subject to Targeted Generation Capacity of 2,500 megawatts overall for the project."

Do you see that, Mr. Low?

A. Yes, I do.

Q. So would you agree with me that this provision deals with a 10 percent

adjustment to the generation capacity of a phase of the entire Korean Consortium's project, but that the generation capacity of the entire project is capped to the consortium's overall total of 2,500 megawatts?

A. I would agree that that is how that reads, yes.

Q. And that means your additional damages for this capacity expansion option, that's not really appropriate, is it, Mr. Low?

A. No. I believe it is appropriate, and there's a combination of things that have to be taken into account to consider that.

One is that the Mesa projects effectively could be considered a phase. They are pretty close to being a 500-megawatt phase. They have 565 in combination.

Mesa has indicated that if it had known that this type of arrangement was possible, that they would have been prepared to undertake the kind of obligation that was in the GEIA, at least as interpreted by us with the manufacturing commitment being point to a supplier, and would

have been prepared to undertake 2,000 or 2,500 megawatts.

So within that context, these projects would have been a phase of that entire commitment, if the -- if Mesa had been aware of the opportunity of this better treatment.

Q. I would like to stay on a valuation perspective, though.

The provision says that the entire project is capped to the consortium's overall total 2,500 megawatts. Now, wouldn't you agree that that means that they cannot generate -- pardon the pun -- any additional revenues for their project overall?

A. That's correct. What they can do is advance the revenues and the profitability of the project by moving capacity from later projects that won't be ready for several years to projects that are currently available and ready.

And, effectively, that's what we've done in our calculation, in that relative to the Korean Consortium projects, it would appear that TTD and Arran, at least, if not all four, were certainly advanced further than where the Korean

Consortium was.

Therefore, this advancement would be attributable to this phase or these four projects.

Q. But, sir, even if we were to treat the claimant's projects the way you're suggesting, okay, wouldn't they be capped at their total nameplate capacity? There's no additional 10 percent to the nameplate capacity that the Korean Consortium gets here, is there?

A. No. But the piece that I think you're missing is that one could have attempted to determine what the balance of the benefit or better treatment under the GEIA was of, say, okay, Mesa could develop 2,000 or 2,500 megawatts of power. So the difference between the 565 megawatts with the 10 percent adder would simply have come out of that residual.

But we didn't do that, because there's simply not enough factual basis on which to determine effectively all of the benefit that accrued to the Korean Consortium under this agreement.

So there's a very significant piece of future value that could have accrued to

Mesa that we haven't dealt with at all. Therefore, I still think is appropriate to advance this 10 percent into what effectively could have been the first phase and, as we heard from Susan Lo, was effectively done by the Mesa -- or the Korean Consortium.

Q. So if I understand your testimony, it's that if the claimant was afforded this capacity expansion, you are treating all of the claimant's four projects as a single phase, and you're increasing the generation capacity of that single phase by 10 percent and calculating the value of that future revenue; is that right?

A. That's correct.

Q. Okay.

A. And subsequent phases, if Mesa had been permitted, the benefits, the total benefits of this agreement would have been reduced, and we haven't dealt with that second piece at all.

MR. WATCHMAKER: Madam Chair, Members, those are my questions.

THE CHAIR: Yes. Thank you.

--- Cross-examination concludes at 11:46 p.m.

THE CHAIR: Any re-direct questions? Mr. Appleton, do you need a few

minutes?

MR. APPLETON: I think just a couple of minutes. Do you want to take a mini break?

THE CHAIR: No, preferably not, but you can take a few minutes, because if everybody leaves, then it is going to be much longer.

MR. APPLETON: I will hook everything up. Sorry, Mr. Low, we just have to hook up to the microphone. You can hear me?

RE-EXAMINATION BY MR. APPLETON 11:50 A.M.:

Q. All right. Mr. Low, thank you. We have a few questions for you, but I thank the Tribunal for providing us with a short minute to get organized. I have been able to reduce the re-direct questions as a result.

Now, I am going to ask you to just recall some of the testimony. It was a full morning. Mr. Watchmaker asked you a lot of questions and we have a lot of information here.

First of all, he had asked you a question at the very beginning about some of the standard practices that you might do. He took you through some letters and asked you about whether

you had gone back to sort of audit or check certain information.

Would you traditionally do an audit in calculating lost profits within the 60-plus testimonies that you provided as a damages expert?

A. I cannot recall one circumstance where -- in any of my actual testifying cases, where I undertook an audit of the information provided.

Q. So what you did in this case would have been the standard practice?

A. Absolutely.

Q. I see. Now, Mr. Watchmaker asked you about Article 1106 damages. Do you remember he was asking you about some of the slides you talked about today, the pie chart?

A. Yes.

Q. Now, in your answer to him, you said that the Article 1106 damages were all future losses.

Now, I would like you to look at your report, section 4.1. Is this the first report or second report? Second report. That's what I thought. Your second report.

Do you see that in front of you? I don't know what tab that is, sir, in the binders.

A. I have my copy of the report.

Q. Tab B. Tab B. So I am going to ask that they put section 4.1 up of the report, because I am a little confused, for a minute.

Do you have the portion I want to focus on? So can we just put it up?

So if you look here in 4.1, you can see near the bottom, it says:

> "We note that prior to the time Mesa Power would have obtained FIT contracts, it incurred higher costs due to the domestic content requirements."

And so I am just confused, and perhaps the Tribunal would be. Was there incurred damage, as you have said here in your second report with respect to 1106, or were all of the damages future-related?

A. I believe I tried to make this clear in my evidence, but there are incurred higher costs at the dates of the breach that relate to the past costs incurred, in that it is believed

that those costs were higher by virtue -- in order to get the local domestic content up, that, for example, Canadian consultants were used rather than perhaps people that Mesa had dealt with before where they believe the prices would have been lower.

So in our analysis of the past costs at schedule 1B of our first report, there is an indication of a number of consulting costs, pre-development costs, in the order of I think $5 million. And some portion of that represents an increased cost incurred.

What we have quantified in Article 1106 are the future damages that would result from actually finishing out the construction of the project. But there are past costs incurred that are the result of the domestic content requirement.

Q. So these incurred costs are because of the requirement to have to obtain local content that would require that you change what you were doing. Is that what you're saying, or did I misunderstand?

A. Yes. The domestic content requirement had to be met and you could meet it in a number of ways.

It wasn't necessarily that the turbine, for instance, had to be 100 percent local content. It didn't. But in aggregate, you had to build up to meet the domestic content requirement.

Since, for example, the turbine -- so 1.6, even though it was proposed to meet the domestic content requirements, there were still other costs that had to be supplemented for Mesa to attain the entire domestic content requirement.

So having local consultants, local people installing the towers, et cetera, you would build up, and part of that was in the past costs.

Q. The reason, Mr. Low, might be because there is a cap on what you are allowed to quantify within the domestic content by component category?

A. By component, that's correct.

Q. So, therefore, you would have to make it up in other areas. You can't just get it in one?

A. That's correct.

Q. I understand, okay. Now I get this.

Now, you were asked by

Mr. Watchmaker that if the FIT program had been launched -- sorry, if the FIT program had not been launched, would the General Electric deposit have been lost? And I believe that you said that if things had played out the way they had, it would have been lost. That's my recollection.

I have a couple of questions arising from that. Is it true that Mesa was in the FIT program between November 2009, when they applied, to July 4, 2011, which is at least a 20-month period?

A. At least, yes.

Q. Yes. And wasn't it important to the FIT program that the applicant could demonstrate they had an equipment supply contract?

A. That was a requirement, yes.

Q. Then wouldn't it be reasonable for Mesa to allocate the turbines under the MTSA to the Mesa FIT project during this time period?

A. That is certainly my view, yes.

Q. So do you think it is really possible to determine what the effect would have been if there had been no FIT program?

A. It's a very extreme hypothetical. I mean, it takes it out of the entire context of this hearing, frankly.

Q. Okay. Mr. Watchmaker also asked you a series of questions about a letter from the Ex-Im Bank. Do you remember that?

A. Yes.

Q. Did you rely on the Ex-Im Bank letter to set your debt rate?

A. No, we did not.

Q. Did you rely solely on the Ex-Im Bank letter to determine the interest rate on debt in your report?

A. No. The --

Q. Sorry.

A. What we did was we had reference to the Ex-Im Bank letter. It was available.

We had information through our own practice in Toronto of what reasonable interest rates were for project finance at the time, and these are referred to in my report.

And the actual rate that we adopted for, if you will, the Ex-Im Bank portion was, frankly, considerably in excess of what was

quoted in the Ex-Im Bank letter. And in combination with the project finance piece and the term piece of the financing, we ended up for an aggregate interest rate of 5.38 percent.

And there is evidence in the market at the time, through reference to quotes of participants in the wind market and actual transactions that occurred, that suggest that that 5.38 percent was absolutely reasonable in the context of what was happening in the marketplace at the time.

And those are referenced in our report.

Q. Do you know where?

MR. LANDAU: This is your paragraph 4.4.1.

MR. APPLETON: Thank you, Mr. Landau. Of the second report?

MR. LANDAU: First.

THE WITNESS: The first report.

BY MR. APPLETON:

Q. First.

A. Thank you. So specifically -- thank you for pointing the place. Specifically, the Ex-Im Bank letter suggested the

3.66 percent interest rate. What we effectively used was 4.75 percent, and then the balance of the required financing based on a term limit, seven.

In the following paragraph, you can see that we have had reference to a transaction -- this is February 2013 -- which is about the time that Mesa would have had to raise financing under the term of the projects pursuant to the GEIA, that the rate for -- $450 million raise by Brookfield Renewable Energy Partners on a Canadian wind farm project was 5.13 percent.

And as I indicated, our average was 5.38 percent. Accordingly, the market would suggest that that was -- our conclusion was reasonable of what the interest rate should be. But it did not rely on the rates in the Ex-Im Bank. We put it into a Canadian context in what we believed was available in the market.

Q. Okay. Now, Mr. Low, are you prepared, right now, to discuss with the Tribunal what the quantum of damages would be if the losses were limited only to the failure to obtain each of the four projects? Don't answer. I am going to ask the Chair whether I can proceed to ask those questions.

A. Could you just --

THE CHAIR: I was reading.

MR. APPLETON: Sorry. I am happy to rephrase.

THE CHAIR: Can you please repeat?

MR. APPLETON: Yes. I was asking Mr. Low if he was prepared right now to discuss with the Tribunal what the quantum of damages would be if the losses were limited only to the failure to obtain each of the four projects.

MR. BROWER: Take out the GEIA.

THE CHAIR: That means taking out the better treatment aspect, what we discussed before in conceptual terms.

MR. APPLETON: It was your question.

THE CHAIR: Yes. Is there an objection with asking the question?

MR. SPELLISCY: Well, I guess I am a little confused, because I think if you were to do so, if you were to do so, he would essentially be giving the calculations that he arrived at for his 1105 valuation, which the ruling was we can discuss this conceptually, but that we were not going to get into calculations.

It seems to me now, if I am understanding what he is being asked to do right now -- I might not be, but if I am, he's essentially providing the calculation that the Tribunal said he shouldn't provide.

THE CHAIR: Yes. I have asked myself whether I should ask the question of a range of reduction, and then I refrained from doing so.

Obviously we cannot go into the actual calculations, but it would be useful to the Tribunal to have the range. Obviously we cannot award damages on oral testimony about a range without having gone into the calculations, and if we were to reach this point, we would have to get more input from Mr. Low, but then of course also from Canada's expert.

Having said that, is it acceptable that the expert answers what the range of reduction will be?

MR. SPELLISCY: I think as long as there is no ability to put similar questions about what he's about to say to Mr. Goncalves, who will not have had the ability to assess the calculations, then that would be fine.

THE CHAIR: Thank you.

MR. APPLETON: What do you think?

MR. MULLINS: Madam Chair, we're fine with that. I do think, based on what the Chair has just, we would like to revisit the procedures going forward.

We could have Mr. Low continue to testify, but I think we do have comments now based on the ruling from the Tribunal.

THE CHAIR: Which ruling?

MR. MULLINS: We can do this in front of Mr. Low or do this on break, but if the Chair is saying that we are -- if the Chair is simply said they cannot award damages based on the testimony of Mr. Low, then I think it would be best at this point to have a later hearing to allow the Tribunal to have the full testimony. We're prepared now to --

THE CHAIR: Yes. What I was saying is if we reach this issue. I'm not saying we will dismiss the damage claim because we don't have the calculations.

I'm just saying that if we reach this issue, which I do not know right now -- I am just making assumptions, but then -- and we would not follow Mr. Low's calculation as it is now in

his reports and we would rather go with the oral testimony, then we need substantiation for that. And you would certainly get a chance in providing this, if it is needed, as would Canada be in a position to respond. And if that requires a hearing, then so be it.

MR. MULLINS: And that's fine to the Tribunal. I had raised earlier that I am concerned about how that might be communicated.

THE CHAIR: You have raised --

MR. MULLINS: And I would have thought it would be more practical. You may come to an internal decision amongst yourselves about where you are headed, but once you communicate that to us, and then now there could be an argument, well, is this a ruling or a final award or award that could be confirmed or sought?

And I thought what might be more practical -- again, because I want to be most efficient as possible and respectful of the time of the Tribunal - that as long as there is an outstanding issue and you have internal discussions, it might be more efficient at this point to let you have all of the evidence before you, and then you can decide where you are going to

go.

But if you start saying, Look, I don't need to go that now because I'm not going to reach that issue, then there will be an argument if that is a ruling or not.

I think given what the Tribunal said, and I fully respect what you're saying, it might be best at this point, with all of the testimony from the experts, to have that latter hearing to support all the evidence you need, and then can you take that evidence and decide what you want to do and how any award is to be given.

I respect efficiency, but I am also concerned that any interim rulings might cause more inefficiency as we will end up fighting in some court somewhere about what the effect of that is. That is my thought.

THE CHAIR: Would you like to react now or later?

MR. SPELLISCY: I guess on a couple of points. I am not sure what the concern is here. We are under the UNCITRAL arbitration rules here, which provide for partial awards. Partial awards are not an issue if the Tribunal needs to have a separate hearing. I don't know

what the exact concern is being raised.

My bigger concern is one of, Why are we here now, because if we're now talking about we're going to need a separate hearing and we're bifurcating, this was our whole point weeks ago, that if you wanted to do this, you should have bifurcated weeks ago?

I fully subscribe to what the Chair has said, which is you can come to your deliberations, and if -- which is what we wrote in our letter. If necessary, we can schedule another hearing, but I would object to scheduling that hearing and spending that time and resources having another hearing before we're at that point. I just don't think that it is a good use of time.

THE CHAIR: I think the Tribunal has heard you all discuss this. There was no indication of a partial award.

I mean, when I go into deliberations, there may be issues that come up on this topic, but not on others. The Tribunal could at any time go back to the parties and say, I'm missing information for this point. I did not realize before it was really relevant for my deliberation, and, therefore, please provide it in

one way or another.

That was more the idea. But I think what we should do now is simply continue with this examination, because we still have another witness to hear today, and then at some point the Tribunal will have a discussion during a break and come back.

MR. MULLINS: I appreciate that. I appreciate it sounds like if the communications are more, 'we need more information on the following topics', that might be a different issue than an award.

I appreciate the education on that.

THE CHAIR: I'm sorry if I was not clear.

MR. MULLINS: No. I may have over-complicated the issue. I have dealt with this before and I am trying to avoid the problem.

THE CHAIR: No, I understand where you are. That was not what I had in mind, absolutely.

MR. MULLINS: Sorry for the interruption.

MR. APPLETON: That's why we were

seeking procedural guidance to know where to go. So I am unclear as to what we have decided, if we decided anything. That is my ---

THE CHAIR: We have not decided anything. The Tribunal has just given an indication that if we were to reach this issue in our deliberations, like other issues that we may reach and that we require more information from the parties, we would require it, certainly.

Having said that, I thought that it would be acceptable that Mr. Low gives a range of what the reduction is. It's a range and it's not more than that.

MR. APPLETON: Okay, great.

THE CHAIR: I think that is -- it was accepted, yes.

MR. APPLETON: Excellent. Okay. Well then --

THE CHAIR: So, Mr. Low, can you give us a range?

THE WITNESS: Removing the impact of the GEIA from 1105 would be approximately a $125 million reduction to my previous conclusion, which was $657 million before interest. So the amount is approximately $530 million on a

non-GEIA-included basis.

If I could ask Mr. Appleton for a point of clarification, you asked a question about each project, I think, but I am not sure you want to go there or if the total is sufficient.

THE CHAIR: I think for the time being, the total is sufficient.

BY MR. APPLETON:

Q. So I think what would be best here would be to ask the Tribunal. If they want more information, they should ask you, rather than us, because we're really in their hands in any event. And now that we have the procedural guidance, I think we can turn it back over. Thank you.

THE CHAIR: That means you have no further re-direct questions?

MR. APPLETON: I only had that procedural question to get some procedural understanding from the Tribunal, which is not part, in essence, of my re-direct. And now that that is resolved, we're finished. Thank you.

--- Re-Examination concludes at 12:11 p.m.

THE CHAIR: Do my colleagues have questions for Mr. Low?

QUESTIONS BY THE TRIBUNAL AT 12:11 P.M.:

MR. BROWER: I will begin just by observing you apparently have sat as arbitrator and it is much better, isn't it?

--- Laughter.

THE WITNESS: It's an easier task.

--- Laughter.

THE WITNESS: On a damages perspective, only. I think the law is a little more complex.

MR. BROWER: You testified earlier in your testimony this morning that you have calculated damages which are assumed to have been incurred or assumed to have occurred.

Now, that embraces to me two things. One, you have made it clear that you're proceeding on the assumption, which is part of your instructions, that there has been a breach of these various articles of NAFTA which have been referred to. That is one; right?

THE WITNESS: Yes.

MR. BROWER: But you are also assuming that these four contracts would have succeeded?

THE WITNESS: That's correct.

MR. BROWER: So you have not been asked to do any analysis of whether the alleged breach in each case would, in fact, have caused damages. You have calculated what the damages would be had losses been caused by the breaches, and your take-off point for that is the FIT contracts for which applications have been made would in all four cases have been won.

THE WITNESS: If I might, I think I would express it a little differently. Under Articles 1102 and 1103 --

MR. BROWER: Right.

THE WITNESS: -- the assumption that has been made is that there is a breach of those NAFTA articles.

MR. BROWER: Right.

THE WITNESS: From a damages perspective, once that assumption is made and if the Tribunal found that were to be the case, then I think the damages result from that breach and attributable to that on the basis of the better treatment to the Korean Consortium.

And I think it's been reasonably demonstrated through the evidence of the various parties, whether put forward by Canada or Mesa,

that the Korean Consortium has been able to put forward a number of projects that were low-ranked, whether they picked them off in the market because people were about to forego them anyway or whatever, how they've done it, they have managed from virtually a cold start of having no projects of being able to develop at least the first two phases of 1,000-some-plus megawatts of power.

Had Mesa been provided with that better treatment, I don't think there's any question that these four projects would have been developed under that kind of circumstance.

The circumstance -- if I leave that for a minute, because my own view from a damages perspective is I think that's fairly definitive.

The second question is for 1105 and particularly as I have amended my views of how that should be interpreted. And there could be some question of whether two or four projects should go forward and something for the Tribunal to consider.

Again, I think under 1105, to me there is virtually no doubt that at least two were going to be put forward and succeed. And I think

there is a good probability that all four could have proceeded. And we've taken that probability factor into account in the discount rate by increasing the discount rate for the last two projects.

But the last comment I would like to make, as far as trying to explain the probability, if you will, of the projects proceeding is inherently built into the discount rate that we've selected.

So whether it be the OPA sitting back at the beginning of this whole process and saying somebody coming into this and developing a project should be entitled to an 11 percent rate of return, some projects are going to go forward, some projects aren't. But they are saying that's the reasonable rate of return to be earned on those projects, and therefore they set the price or they believe they set the price to try to drive that kind of rate of return.

So the prospect of whether any of these projects goes forward is considered in the rate of return that we've chosen.

So that's a very long answer to a question, but I think there's various levels. It

depends on which article you're in, and I think that the prospect of the projects going forward is affected by which article, but is compensated for in the discount rate.

MR. BROWER: Well, then I understand you to be saying you actually have done two things. One is to calculate the damages, assuming damages have resulted, have been caused by the breaches.

But you are also dealing with the issue of whether or not -- and, if so, the extent to which -- there is a causal connection between the breach and the experiencing of damages. You have used the word "probability" with respect to two versus four, and you have taken the view that, on your analysis, it is certain -- under some of those articles it was inevitable, it was unavoidable -- that the breach caused the damages that you are calculating.

THE WITNESS: I think, sir, that under Article 1102 and 1103, the better treatment afforded the Korean Consortium indicates that these projects would have gone forward.

They've demonstrated that it could be done and would be done pursuant to the treatment

that they were provided.

However, when I said that the prospect of them proceeding is, in part, dealt with in the discount rate, we still applied that discount rate.

So it's not a virtual certainty. An 11 percent cost of capital has relatively a fair amount of risk built into it. It's not a certainty, but we think that the contingencies are fully taken into account in that discount rate.

MR. BROWER: But these projects were still competing with other projects which were not covered by GEIA and were not brought up by GEIA. So there's a competition factor there.

THE WITNESS: There is a competition, unless you are under the better treatment accorded the GEIA.

The GEIA projects did not have to compete with the FIT projects. 1105, sir, I absolutely agree with you, it is a different circumstance. 1102 and 1103, I think, are -- have a different thought process behind them of awarding the better treatment, rather than assessing the projects within the FIT program.

The better treatment under the

GEIA is outside of the FIT program.

MR. BROWER: But wouldn't every other project, at least in this Bruce area where the applications were made, be entitled to be considered on the same basis, that they also get the better treatment? So you are just on a different plane of competition.

THE WITNESS: I think I'm heading towards legal territory there.

MR. BROWER: Okay.

THE WITNESS: But I don't think that's the case. I don't think the analysis is that the same treatment is afforded everybody who was in the FIT program.

I think the treatment is that pursuant -- if there's a breach of 1103 under the NAFTA --

MR. BROWER: Right.

THE WITNESS: -- then the compensation for that breach is the treatment. And it doesn't extend to everybody should get that treatment. It is particular to this claimant and the nature of the damages that arise from that breach.

1105, I would agree with you, is

different, in that --

MR. BROWER: Right.

THE WITNESS: -- Mesa is still in the competitive FIT pool under 1105.

MR. BROWER: Okay. Now, with respect to two-and-a-half, whatever it is, MW, kW, and the --

THE WITNESS: 2.5xl versus 1.6xle.

MR. BROWER: 1.6.

THE WITNESS: It is easier just to use the numbers.

MR. BROWER: Okay. So the point you made is that the 2.5s were not available with sufficient local content?

THE WITNESS: In 2011.

MR. BROWER: At the time that acquisition need --

THE WITNESS: At the time Mesa believed they had to commit to the projects.

MR. BROWER: Right.

THE WITNESS: The one factor that I think has to be remembered is that -- and it's a bit of an anomaly here because of the moving valuation dates and construction timetables.

If, in actual fact, Mesa was

accorded the GEIA and fell into the GEIA timetable, the 2.5s would have been available with the domestic content requirement, and the 1106 claim really would then become part of the base case. It's not that it falls off the table. It just changes character.

MR. BROWER: Right.

THE WITNESS: And would be part of the base case, in that rather than the base case being built off the 1.6 with the lower efficiency, lower revenues, we would have built the base case off the 2.5s.

But given the timing of the breaches, we believe that the 1106 claim stood on its own at that point in time.

MR. BROWER: And the GEIA timing you just referred to is the timing under the amended and restated agreement?

THE WITNESS: That's correct.

MR. BROWER: The delayed date.

THE WITNESS: Yes, sir.

MR. BROWER: But going back to the situation as it was at the time turbines were ordered or required, did any company other than GE, do you know, offer at that time 2.5xl that would

have had sufficient Ontario content?

THE WITNESS: Not that I am aware of.

MR. BROWER: All right.

THE WITNESS: There are projects that have used a Siemens 2.3. So my understanding is they are different, but they have some similarities. But that has happened post-2012.

MR. BROWER: Right.

THE WITNESS: Which is when the 2.5s were supposed to be available with the domestic content requirement.

MR. BROWER: But is it your understanding that Mesa was bound to make its acquisitions from GE rather than from any other source, had such a source been available, for 2.5xl with the required amount of Ontario content, either because they were contractually bound not to deal with anyone else or because effectively they were prevented by the fact that they had invested 150-some million in the contract with GE?

THE WITNESS: I believe those two things go together. The MTSA has an exclusivity provision in it.

MR. BROWER: Right, yes.

THE WITNESS: But there was an investment of $150-odd million that Mesa was trying to use in addition.

MR. BROWER: So they were locked two ways?

THE WITNESS: They were locked two ways.

MR. BROWER: Can you explain to me why there would have been a revenue increase? I understand the cost situation, but why would there be a revenue increase if 2.5xls were used rather than the 1.6?

THE WITNESS: Yes. I can try to explain that. The wind studies that were prepared had both analyses for the 2.5 and the 1.6 turbines.

The wind analyses with the characteristics of the wind in that area indicated that the 2.5s were more efficient, that on the basis of the amount of power that they would drive per hour per day, because of the wind, was greater than what could be derived from a 1.6. And it is simply that increment of efficiency and power that drives the incremental revenue.

I can get into some numbers and stuff, but, conceptually, that's what it is. It is

the nature of the specifics of the site, the wind characteristics as was determined in these wind studies, that indicated that there was a benefit to use the 2.5s.

They were more efficient, without being significantly different in capital cost.

MR. BROWER: Well, the next question may explain my total ignorance of electrical engineering and power supply. But if there is a limited transmission line and there is a limit on the amount of megawatts that the system will accept, how can you increase your output? How will it be accepted?

I mean, there is not sort of an endless capacity to absorb, as I understand it.

THE WITNESS: No. And that's correct. I'm not an electrical energy expert.

MR. BROWER: Welcome to the club.

--- Laughter.

MR. BROWER: There's a lot of us here.

THE WITNESS: Let me explain it this way in the context of wind.

Wind is not like, say, hydro power where you have a relatively constant stream of

water that flows by a dam, absent rain storms or whatever.

MR. BROWER: Right, yes.

THE WITNESS: The wind is going to vary. It's going to go up and down. These, therefore, have variability in them anyway.

The revenue projections that we have used are based on the 50 percent probabilities in the wind studies. So there's a 50 percent probability the wind will be higher; a 50 percent probability the wind will be lower. That's the standard methodology that's used.

So to the degree that the turbine can be more efficient, it's going to generate somewhat more power, but it will still fall within the range of what has been contracted, that the -- that variability will absorb that difference.

And we're talking about -- because it varies by which of the projects, but the maximum variance is 8 percent, and I think one of them could be as low as 1-1/2 or 2 percent different.

So it is relatively minor in the scheme of how much incremental power is driven, but because there are no extra costs, the revenue

virtually falls to the bottom line. There's no incremental cost. It is simply that the turbine is turning and generating power.

MR. BROWER: Well, it sounds to me like you really mean greater net revenue, because the emphasis is on the costs being lowered because of whatever the characteristics are of the 2.5xl, not that there is a lot more money coming in.

THE WITNESS: It actually is that there is more money coming in. The incremental power that you can sell virtually has no costs against it, because all of your costs are already fixed. The maintenance per turbine is already fixed.

So if you can increase the revenue that, call it, 5 percent increase in revenue, rather than being diluted by cost down to the bottom line, is literally going to go to -- that 5 percent revenue increase is going to go right into your income.

MR. BROWER: That I understand, but you're putting out more power than what you have been permitted contractually.

THE WITNESS: It is actually not more than what you have been permitted. It still

falls within the required capacity. It is just they do it more efficiently, such that you will get more power within that scope of when the wind is blowing.

MR. BROWER: Well, I think I have done as well as I can on that.

--- Laughter.

THE WITNESS: I think I have, too.

THE CHAIR: Do you have anything?

MR. LANDAU: There is only one issue I want to go back to, and that is on your choice of valuation dates.

It may be that the answer to this is, in the scheme of things, what's driving this is the instruction you have been given by counsel as to what valuation date to use. If that is the case, then that's fine and that's the position, and it becomes simply a legal issue to debate.

But what I wanted to ask you is, if that is not the case, if in fact there is an economic analysis you have done that has driven you to the choice of valuation date, what is the significance in economic terms -- from your perspective, valuation terms, what's the significance about the date that a party becomes

aware of something?

I mean, the easiest way is to look in your chart. I'm looking, for example, in your second report, paragraph 7.11, where you summarize dates of breach. And granted this has gone through other developments since, but here you articulate your reasoning.

So if you look under 1102, on this day Mesa Power became aware of the better treatment and 1103 is consistent; you say consistent with that. 1105, to an extent, is also along similar lines, because it's about when something perhaps becomes available.

But can you explain to me, from your valuation perspective, why the date of becoming aware, which might be a fortuitous event, is serving it in terms of incurring of loss?

THE WITNESS: Two responses, sir. The selection of the date of breach is a legal issue.

MR. LANDAU: Right.

THE WITNESS: From a value -- this is largely a valuation exercise. From a value-cum-damages perspective, the day that something happens has an impact on the future

prospect. It may not be the entire impact because, as I said, you effectively had to wait until there were no contracts awarded to know whether the impact was only on two or on four of the projects.

But the effect on value can happen when you find something out, even if the impact is going to be in the future.

So let me take a different example. If you are operating a manufacturing company that produces paper bags for the grocery industry, the day -- and you're in the City of Toronto somewhere. The day the City of Toronto says, You know what, we don't want -- actually, I should probably go the other way, because it has come back again.

You're manufacturing plastic bags for the grocery industry. The City of Toronto says, We're either going to charge you for every plastic bag that's going into the -- effectively that's going into the landfill, or we're going back to paper.

The day that is announced, it has changed the value of that business. So I see that kind of impact happening here.

But the circumstance under NAFTA

1102 and 1103 I think is different, because it is not that "but-for" scenario that's been talked about. It's an award of better treatment, and that is why I think it links to when you have a knowledge of when that better treatment is.

But that's where I begin to get into the legal side of it.

MR. LANDAU: Right, right.

THE WITNESS: I think.

MR. LANDAU: In which case I won't ask you any more questions.

--- Laughter.

MR. BROWER: You can still belong to the club.

--- Laughter.

THE CHAIR: May I ask you to go to your first report, paragraph 4.18?

THE WITNESS: Certainly.

CHAIR: Page 28.

THE WITNESS: I have it.

THE CHAIR: That is where you have set out the assumptions on which you have established your valuation.

I was asking myself: What happens if one assumption fails in the Tribunal's judgment?

And you will correct me if I misunderstand the assumptions, but it seemed to me that assumption (A) to (C) must all -- (A) to (D), sorry, must all be cumulatively met for there to be a loss.

Now I am speaking in economic terms, at least I am trying.

THE WITNESS: Yes.

THE CHAIR: And I am not looking at the legal aspects.

THE WITNESS: I understand.

THE CHAIR: By contrast, assumption (E) if it is not met as set out there, would simply reduce the loss; is that correct?

THE WITNESS: With respect to (E), the time line would impact the loss depending whether you advance it or delay it.

THE CHAIR: So that's a question of amount?

THE WITNESS: Yes, that's correct. So with respect to the other assumptions here, we have effectively tried to put -- I think I have tried to put Mesa into the position that it would have been had it been provided the better treatment under the GEIA. And I think it has been proven out.

So (A), the projects would have obtained a FIT contract. Well, they would have obtained a GEIA contract that looks like a FIT contract, but we've stated would have obtained a FIT contract.

I think it's fair to say that the Korean Consortium has been able to do that, and so we're simply saying that we had four projects that look like, feel like, may have been better than some of the Korean Consortium projects and should be accorded, then, the same benefit of the GEIA, the better treatment.

With respect to the next one, all environmental and associated approvals are received, this is a two-step one.

Number 1, at the time that this was occurring, there was nothing known by Mesa that would have suggested they were going to have any difficulties in this area of approvals. TTD was well advanced in this process, and the others are not that far away. They are not located where there are native issues, as some of the other projects have had issues. And the government was required to assist with this process.

So, again, while it is stated as

an assumption, I think it falls within the context of what the benefits of the GEIA were.

The fact of financing, that is a risk that financing can be secured. Given what we know from our research was happening in the industry -- and that's the paragraph that Mr. Landau referred to before -- where there is interest in funding these projects, we're past the recession. People do have money. They are looking for what are effectively infrastructure projects to finance.

So I don't think obtaining the financing is a particular issue. And that Mesa had the financial capacity is more of a factual question, and I think Mr. Pickens indicated that he had the money. Not all of us can write $150 million cheques to GE, so...

But the second thing I want to say about all four of those is, while we indicated here they are assumed, they are all part of the "risk" of getting a contract, whether it be GEIA or FIT, and are all part of the risk rate that we assumed was reasonable here.

So I will go back to the --

THE CHAIR: So my question was

relatively simple. If one assumption fails, does it mean there are no damages, or now are you telling me something different by saying there is a risk incorporated in the discount rate?

THE WITNESS: There is a risk incorporated in the discount rate that deals with each and every one of these, because each and every one of these would have been built into the risks that the OPA looked at when they said -- because when they are looking at this, they know that not everybody who starts into this process is going to come out the far end.

So they are saying, We think that the commercial rate of return for getting into this venture, starting through it and getting to the end, is an 11 percent rate of return. And that effectively takes each and every one of these into account.

So I don't think it is as simple as saying, What if one of these fails? I think they are all reasonable in the context of the GEIA and the benefits, but I also think they are all encompassed in the rate of return, anyway.

THE CHAIR: Thank you. Then --

MR. LANDAU: Sorry, can I just ask

one follow-up?

THE CHAIR: Yes, of course.

MR. LANDAU: Why do you say that all of these are covered by the OPA 11 percent? Is that to say that the OPA itself was building in the possibility that proponents might not have sufficient financial capacity themselves? Do you think the OPA was looking at that?

THE WITNESS: I wasn't part of the process, so...

MR. LANDAU: You're asserting that this is an important point for your analysis, because you're asserting the 11 percent OPA, in a sense, that discount factor, for you, is encapsulating these assumptions. So it is your analysis.

THE WITNESS: Yes, it is an important factor, I will agree with you.

I think it is effectively an arm's length benchmark here independent of the parties, and that was done in advance of any of this actually happening.

When I look at what went into it -- and they have various factors. So the amount of financing that they believed might be

appropriate, there are a number of factors that go into their determination.

The risk -- the return on investment that I think that they put forward had to encompass the fact that there were risks of undertaking these projects, that -- let me take it to an extreme.

Somebody who gets through the process and has an up-and-running facility, wind project, that wind project becomes worth an incredible -- relatively incredible amount of money, because the risks are then all behind them. The risk, once you are up and running, of operating that facility is no longer 11 percent.

It's probably down around 7 or 8 percent, like a utility rate of return, at that point, because that is really what it is.

So I think the 11 percent encompasses the risk of getting to that stage.

MR. BROWER: But it doesn't get you to that stage. The whole point is that that is the reward for someone who has taken all of the risks and succeeded, but it is no guarantee to anyone that they are going to get the contract.

I understand it is built into the

rate, but, as a matter of causation, did the breach cause this person not to win that FIT contract? That's a fundamental issue.

THE WITNESS: I agree that's a fundamental issue, particularly if you're in -- I apologize -- particularly if you're in 1105.

Under 1102 and 1103, I think it is not the same issue, because awarding the same treatment I believe is far different than but for these acts these would have been -- these would have proceeded.

And so you almost need two different mind sets to think about these, because I think they are very different circumstances.

MR. BROWER: Okay, I understand. I understand that. I mean, that's a basic issue, frankly, whether the failure, if that were the case, of Canada to accord, let's say, Most Favoured Nation treatment means that the resulting -- that you have to progress from there to say, Ah-hah, the fact they should have been treated -- that they shouldn't have been -- that they shouldn't have had to contend with the GEIA agreement pre-empting a substantial amount of the available capacity that was in the FIT program necessarily, I think that is

a legal issue as to whether the result is that the damage to that unsuccessful applicant has to be calculated on the basis that you have to sort of assume causation, because if Canada had not breached the agreement in that regard, they would have had guaranteed access. I mean, that's something that we have to think about.

THE WITNESS: If I might comment, and I will try to stay away from the legal interpretation.

MR. BROWER: That's what you're here for.

--- Laughter.

THE WITNESS: Under 1105, I believe you're absolutely correct that that causation issue is much more directly linked.

Under 1103, from a damages perspective, as I read it, Canada's obligation is to provide the better treatment, period.

And, therefore, I think you can look at the Korean Consortium and what it did and say, then, Mesa should be accorded those same benefits in treatment. And, therefore, it was guaranteed access; subject to meeting the qualifiers of bringing jobs, it was guaranteed

access to the transmission system.

And that -- so that's where I think these 1102 and 1103 become very different than 1105 and...

MR. BROWER: In this respect, you're operating on the basis of your own expertise and not on the basis of instructions from counsel to make that assumption?

THE WITNESS: With respect to that view of how to interpret from a damage perspective 1103 --

MR. BROWER: Yes.

THE WITNESS: -- that is my view.

MR. BROWER: Right, thank you. Okay.

THE CHAIR: Can you then turn, please, to your second report, page 6, where you have the summary, and page 7?

I must say -- and you will forgive me if I missed something during your examination or in your reports -- I am not entirely clear how you compute the amount of losses for under Article 1106.

If I look at paragraph 1.3 on page 6, close to the bottom it says: Consistent with

your initial report, the losses related to Article 1106 are included in the losses for Articles 1102, 1103, 1104, 1105 and are not additive thereto.

Then I turn to the next page, and then I see that on the first top-half I have the damages for 02, 03, 04, 05, and then I have a line that says NAFTA 1106 with an amount.

THE WITNESS: Yes.

THE CHAIR: And it says below, and I believe, if I understand, that below is a breakdown for the amount on this line above, but you have added it to the damages in 02, 03, 04, 05.

THE WITNESS: Yes. Let me explain that. I believed that the benefit of the 2.5 versus the 1.6, is the domestic content rule, should be included in the damages for 1102 or 1103 or 1105, but we wanted to separately quantify the amount, which was determined on the basis of the difference between the 2.5s and the 11.6 and what happens.

So the bottom part of this page that says NAFTA 1106 and below are the net differences from using a 2.5 versus a 1.6.

And what we were trying to communicate is we've included it in the upper

portion. We think it is appropriate to be inside NAFTA 1102, 1103 and 1105, and, therefore, we would not want the Tribunal to take the total for 1102, 3, 4 and 5 of, give or take, $650 million, and then add 1106 to it again.

We were trying to be clear, and I guess weren't very, that we didn't want additive things. We've already included it up above, but here's the detail of how it was determined.

THE CHAIR: So what you're saying is if there was a breach of 1106, we should take into account the loss that you have established for 1106?

MR. BROWER: You just said "1106" twice.

THE CHAIR: Sorry, I misspoke.

If there is a breach under 1102, then we should consider the amount that you have established for 1106 as part of the loss for 1102?

THE WITNESS: That is correct. That is how I have dealt with this, yes.

THE CHAIR: Yes, yes. So it was the additive that was misleading in my reading, but it is clear now. Thank you.

THE WITNESS: Thank you.

THE CHAIR: I have no other questions. No follow-up questions? So that means we can adjourn now for lunch, and that ends your examination, Mr. Low. Thank you very much.

THE WITNESS: Thank you.

THE CHAIR: Should we start again at two o'clock with Mr. Goncalves? Yes. Good.

--- Luncheon recess at 12:56 p.m.

--- Upon resuming at 2:05 p.m.

THE CHAIR: Everyone ready? Mr. Goncalves, you're ready?

THE WITNESS: Yes.

THE CHAIR: So can you please confirm to us that you're Christopher Goncalves.

THE WITNESS: I am.

THE CHAIR: You're director at Berkeley Research Group's energy practice in Washington, D.C.?

THE WITNESS: That's correct.

THE CHAIR: You have provided two expert reports, the first one dated February 28th and the second one June 24, 2014.

THE WITNESS: June 27th, correct.

THE CHAIR: June 27, yes. I misread my notes. Absolutely. You are here as an

expert witness. As an expert witness, you are under a duty to make only such statements in accordance with your sincere belief. Can you please confirm that this is your intention?

THE WITNESS: Yes, of course.

AFFIRMED: CHRISTOPHER GONCALVES

THE CHAIR: Thank you. So we will first proceed with direct examination, Mr. Watchmaker.

EXAMINATION IN-CHIEF BY MR. WATCHMAKER AT 2:06 P.M.:

Q. Good afternoon, Members. Mr. Goncalves, my name is Raahool Watchmaker, counsel for Canada. I only have a few questions for you in direct examination.

Could you please summarize for the Tribunal your qualifications?

A. Well, I lead the energy practice at BRG. I have been in the energy and financial industries for approximately 25 years.

I began my career as a banker in corporate finance at a large global bank, where I initially learned valuation and financial analysis.

I have been advising energy companies, governments, state entities, banks on

project finance, due diligence, and other entities in the energy sector ever since, including a variety of what I call business advisory, development advisory, transactional advisory, strategic advisory regarding energy projects, values, prices, commercial terms and conditions, as well as more recently, over the last ten years or so, providing expert testimony in dispute resolution proceedings.

Q. Okay. And I understand you have prepared a summary of your expert testimony in this matter for the Tribunal?

A. That's correct.

Q. Would you like to present that summary, please?

A. Sure. Copies are coming.

--- Copies of expert report distributed

A. So this is a summary of the analysis that I provided, focussing particularly on the second report, of course, because it is the most current, but really for both reports throughout the arbitration. Next slide.

There are four sections to the presentation: First, just a quick overview of how we view our responsibilities in this matter;

second, a summary of our approach; third, a summary of our analysis of causation; and, finally, a summary of the analysis of quantum.

With respect to responsibilities, next slide, we were asked -- focussing first on instructions, we were asked to provide an independent analysis of the alleged causes of harm and applicable damages to Mesa Power.

In doing that, we were asked to assume that the alleged violations were in fact inconsistent with Canada's treaty obligations. And in relation to that, we were asked to provide independent analysis of the damages evaluation prepared by Mr. Low and Richard Taylor from Deloitte.

Next slide. Our view of our responsibilities in providing this work are that we act with independence, be as transparent as possible, strive for accuracy wherever possible, and be realistic.

I won't read every bullet on the slide, but it is there in front of you.

Next slide. With respect to our approach -- and this is a section I think is very important given what Mr. Low described as the

elephant in the room. I thought it was a very apt characterization.

We have taken very different approaches in our approach to damages, quantum on this matter. So I just wanted to highlight how we see that in the flow of analysis and process that we go through.

We both assume from the outset, under liability, that the NAFTA was breached, and that the various allegations are correct and that Canada is liable.

With respect to causation, as far as we can tell, there is really no apparent analysis in the Deloitte report. A lot of the statements regarding causation that we see in the reports talk about the breach, and then they say, as a result, the damages due are the following. But the causation seems to be limited to that statement about "as a result".

So in Deloitte's counter factual, they assume that all of the Mesa projects get FIT contracts because of the KC treatment, of course, with the GEIA terms and benefits embedded.

I should quickly qualify I am not referring here to the statements Mr. Low made

regarding 1105. I am referring to what was stated in his reports before, so I have not updated this to reflect the new statements, although I did hear them.

Then with respect to damages, I think they all get the GEIA terms and assumptions about access to the grid, about the risk embedded in the DCF calculations -- that's the discount rate -- the cost of equity, as we heard earlier today, for all of the valuations.

So those assumptions, in our view, are pervasive throughout the Deloitte analysis. Looking at the bottom, assuming liability, as well, we then look at causation case by case, and we look at the cause of harm. We focus on the GEIA, the connection change and domestic content, and we conclude that the GEIA and/or the connection change caused TTD and Arran, only, to lose transmission access and FIT contracts, but the domestic content had no impact.

With respect to our counter factual to establish the harm created but for the violations, we then look for the most probable scenario of the Mesa projects as they would have existed without the GEIA terms in the market.

So we're not ascribing to the Mesa projects the GEIA terms, but trying to put them back in the position they would have been in, but for the breach. We interpret the GEIA to be the breach, not the source of damages. And that's the summary there.

Next slide. Why did we do this? By conflating the cause of harm and liability, we were concerned that Deloitte wasn't providing enough information to the Tribunal to make decisions. So we sought, instead of an all-or-nothing approach with respect to the GEIA, what I would call an à la carte approach, where even if the GEIA is not a breach, you could ascribe damages for the other alleged violations. And, also, even if the GEIA is considered a breach, the damages don't incorrectly include the terms of the GEIA in the calculation of damages. They are truly based on a "but-for" scenario that is designed to put Mesa back in the situation it would have been if there had been no breach.

Next slide. This is just a quick summary. This comes from our first report. You can find it there, but it is just intended to be helpful to the Tribunal about how we organize our

delivery. I don't talk a lot about NAFTA articles. This will map the NAFTA articles and the way Deloitte does it to the way we do it.

I refer mostly to the breaches themselves, GEIA, the connection change point window and domestic content in my analysis.

But we do understand the Tribunal needs to get back to the NAFTA articles, so we provided this as a reference tool.

Next slide. Okay. With respect to causation, next slide, I have brought in here a series of charts from the attachment to our first report where we sort of lay out how we look at the problem and determine the harm caused to Mesa.

So the first point gives you the provincial rankings. I have heard in the hearings there's been some confusion about this, whether the rankings were provincial or were at the regional level.

Here we give you the provincial rankings the way they were actually performed, and then I am going to switch in the next slide -- sorry, go back, please. What I wanted to emphasize here is this TTD and Arran were number 91 and 96, I believe, and North Bruce and Summerhill

were 318 through 322 or thereabouts. There were four projects associated with those.

And now I will look at it in the Bruce so we can understand what Mesa has alleged about being ranked number 8 and 9, and so forth.

Next slide. Okay. This is the Bruce region application of the provincial rankings. So at the bottom, I keep the provincial rankings numbered as they were at the provincial level, but take out all the projects that weren't in the Bruce region.

So you can see on the left you see the orange projects are the west of London. The blue projects were FIT-contracted capacity. You have some other projects there, and then you have TTD and Arran showing up down the chain a little bit, and then Summerhill and North Bruce.

You see in the actual scenario, with only 750 megawatts of transmission, none of the projects obviously got FIT contracts.

Next slide. Turning to the GEIA counter factual, we then take away the breach, which is the 500-megawatt allocation of transmission capacity to the Korean Consortium. So you now have, at that dotted brown bar, a

1,250-megawatt available transmission capacity. And as you can see, TTD and Arran make the cut and get FIT contracts in that scenario, but Summerhill and north Bruce did not.

Next slide. In the next scenario, for the connection point change window, we don't adjust the transmission capacity, because we're not assuming that breach, but we do remove the west of London projects that came in and, as we've heard, allegedly bumped out TTD and Arran and the Mesa projects.

So what happens there, when you remove the connection change projects, is that TTD and Arran fall down below the 750-megawatt available capacity and get contracts, but Summerhill and North Bruce do not.

Next slide. Finally, we've then combined both of those breaches, the GEIA breach and the connection point change window, so that you have the additional transmission capacity, as well as the removal of the west of London projects, so you now have 1,250 of transmission.

And in that scenario, as well, TTD and Arran both get FIT contracts, but it is not quite enough to get contracts for Summerhill and

North Bruce, which are still well above the cut.

Next slide. With respect to domestic content and the use of the allegedly more efficient turbines, we simply couldn't get comfortable that those damages were not speculative. We did a fair amount of independent research and evaluation on this, and what we found is there were a bunch of assumptions built into the assumption of damages.

Those were that the turbines were economically less efficient, that the turbines were available at economically beneficial prices, that the turbines were not compliant with domestic content -- sorry, the larger turbines were not compliant with domestic content.

And, therefore, Deloitte concludes the economic impact should be factored into the base analysis, which includes the GEIA terms and benefits.

In our analysis, counter factual removement of the domestic content requirements does not confer FIT contracts without other violations.

So standing alone, it doesn't matter if you have these domestic content

requirements on their own, because there is no FIT contracts. That's the actual scenario that I showed earlier.

But if you assume other breaches, as well, and then compound with the alleged domestic content violation, we had some other concerns about whether there was actually, in the real world, any caused harm, harm caused. And those were because the smaller turbines may have been more efficient economically, and more appropriate for the local wind regime.

This gets fairly technical. I am sure we can talk about it. The larger turbines, in our research, may not have been available at beneficial prices. We haven't seen any evidence that they were. And the larger turbines may have actually complied with domestic content. Again, we talked about that somewhat in with the fact witnesses.

So those were the kinds of information we reviewed. As a result, we conclude there was no harm caused and the damages would be speculative.

Next slide. With respect to the GE deposit, just to summarize, this is a chart that

comes from our second report, I believe it is. But the bottom line -- and I won't go through it, because this is something that's been talked about at great length in terms of the history of the MTSA and its various amendments. All this does is put this on a chronology, map it against some of the various projects we have been talking about in the Mesa portfolio, and look at the impacts.

But the bottom line is that we didn't find that the Mesa MTSA -- sorry, that the Ontario breaches caused Mesa to sign the original MTSA to incur the turbine deposit or to forfeit the deposit. So we couldn't establish in our minds a direct causal link between that alleged harm and the breaches in Ontario.

Next slide. Finally, turning to quantum, there's been a lot of discussion of valuation dates. I won't repeat the Deloitte assumptions. Those have been summarized very well by Mr. Low in the prior session.

Just a few comments on those. Regarding Articles 1102 and 1103 and the September 17th date, our view was that publicly reserving transmission for the Korean Consortium in accordance with the terms of the GEIA caused no

immediate or direct harm to Mesa.

And as you see, in our assumption we assumed July 4th, the date that the FIT contracts were not awarded, is the date the harm was actually crystallized and became apparent to Mesa.

For Article 1105, the December 21 date -- and I think there was some discussion about that and which day should be appropriate, but, anyway, the lower ranking did not result, in our view, in the loss of a FIT contract, and, as a result, no harm was caused.

It was the beginning, perhaps, of the harm, but the harm was actually crystallized on July 4th, in our view.

Then finally, with 1106, as I've said, we were unclear there was actually any harm caused at all, so certainly not on August 5th, 2010, because there was no harm, in our view, or at least the harm would be speculative to conclude.

Next slide. There's been a lot of discussion of the cost of capital in an effort to be helpful and sort of put the major components of this down on paper. We have mapped ours against Deloittes' and provided some comments on the

differentials.

There are differences both in the cost of equity and the cost of debt. That's a little more complicated than I can summarize in an introduction, but I would only say that it does come from my experience working with development projects that are in the early stages of development or the middle stages of development, and valuing development projects that had been bought and sold between developers, that I assume that a higher discount rate, and particularly a higher cost of equity, is appropriate at this stage of development.

Again, I'm not assuming, in my calculations, any benefit from the terms of the GEIA. So the lower-risk profile that Mr. Low referred to, the various facilitation benefits and so forth, don't factor into my calculation here at all.

And I do believe these are reasonable figures in light of where the Mesa projects would have actually have been on July 4th, 2011 had they received FIT contracts.

This, I should emphasize, is only focussed on TTD and Arran, of course, because we

don't value Summerhill and North Bruce for the reasons discussed.

And next slide, last slide. This is a summary from our second report of the differences between us and Deloitte in the final results. There are a lot of footnotes -- we can talk about those -- simply to clarify some of the points.

But the main points I would draw your attention to are -- and I should also say this table does not include any sort of interest damages. We understand that's a matter of dispute, and we're not calculating those at this time.

Deloitte's number was on the order of $657 million for all damages. As Mr. Low said correctly earlier, the difference between us on the matters of causation is about $500 million, so that is the MOE substantial difference. So our damages without the causation problems would be about $156 million.

The discount rate accounts for about $120 million of damages. The GE turbine treatment -- this is not the turbine agreement itself and the causation issues, but some things about how the payments work under the turbine

agreement -- was about 12 million, and the valuation date it was about $42 million.

These are not additive, because we're running each of these individually through the pro forma, through the project models, to determine damages. So it doesn't lend itself to a strict calculation on the right-hand column.

And I will leave it there for now. We can go into the details in the rest of the time. Thanks very much.

Q. Thank you, for that summary, Mr. Goncalves. Do you have any corrections to make to your report at this time?

A. I do. There are two that I would like to make to my second report. First, on page 12, paragraph 40(b) we mistakenly wrote -- this is something of a typographical error -- the economic development adder of 0.27 percent. That is obviously incorrect. It should read 0.27 cents per kilowatt-hour. So that is a correction we wanted to make.

And the next one regards what Mr. Low discussed earlier at paragraph 154(e). We referred to -- in an effort to correct something Deloitte had done in its reply report previously,

we referred incorrectly to the pre-tax unlevered cost of equity, but the words "cost of equity" in the second and third lines of that paragraph, and actually the second, third and fourth -- no just the second and third, should be changed to IRR. He's correct the reference is to IRR.

I would also like to note that this is -- I think the error arose -- it was our mistake, that the error arose, because he referred at paragraph 7.4(e) and 7.6 of his report to the Scotiabank numbers and called it the return on equity, and we picked it up and incorrectly switched to cost of equity, because that is, after all, what we're discussing, and didn't look carefully back to the fact that it references an IRR.

I heard his comments earlier today. I will be happy to address them. He's correct an IRR is different than a cost of equity, and I don't have any issue with those comments.

Q. Okay. Do you have any specific responses to make as a result of Mr. Low's testimony this morning?

A. Well, there's a number of things that I would like to address, but I

think -- how much time do I have?

Q. Well, you can -- we've got time, but we do have to get to cross-examination.

A. Let me just maybe -- there's a lot of detail in this discussion. So let me maybe just focus on what I think are major points and those would be -- I think I've addressed causation adequately in my summary, so I won't repeat that, but I do think that is the biggest difference and a very, very important distinction.

I think with respect to the discount rate, which is the second-biggest issue in terms of differences between us in quantum, I know that we're different kinds of experts, and I don't have the credentials he has as a CPA, but what I have is a lot of experience in the trenches or in the field, if you will, dealing with developers and business people on valuing assets, arranging transactions, doing due diligence for banks regarding transactions.

So these issues are familiar as an energy expert. And what I would say is that an 11 percent cost of capital, at this stage of a project where I think the Mesa projects would actually have been on July 4th, 2011, is far too low.

And the reason is because developers who buy projects at that stage of development or value projects or evaluate returns at that stage of a project are looking at all of the risks that are ahead of them for permitting, financing, construction, to get to the point of operations, and that's really -- I have written a fair amount about that.

I have provided some background in my reports on that. But that's really the core of the issue between us on the discount rate.

I also have several more technical issues with the proxy group he selects to calculate his cost of equity. His statements that Mesa Power would have been less risky than that proxy group, I view it as exactly the opposite. I think Mesa Power would have been more risky than the proxy group he selects for a variety of reasons.

Those have to do with the geography of the other parties being largely in Europe, the regulatory environments and the benefits they enjoyed, the debt-to-equity ratios on their balance sheets which were better than 80/20. Cost of equity of course also reflects somewhat the leverage in the project. At 80/20 for the Mesa

projects, the leverage is quite high, at least compared to the proxy group.

It is also high compared to -- he cited the OPA analysis. It is high compared to the 70/30 debt-equity ratio assumed in the OPA analysis. Additionally he focusses on their cost of equity, but doesn't take into account their cost of debt, which was 7 percent higher than ours and far higher than his. He doesn't look at their WACC, which would have been higher still than his.

And, finally, on the OPA analysis, he doesn't -- I heard what he said about that it would have taken into account all of this development risk, but I fully disagree. That was essentially the equivalent of a regulated rate of return for an operating project to determine the price that they would get from the FIT contract escalated for inflation over a period of time.

And that presumes that the project is in operation. It would be applicable from the first date of operation through the end, presumably, or until regulatory change.

Whereas when you're valuing a project two or three years before operation, at least a couple of years before operation, there's

several risks ahead that the equity investor needs to take into account. And I have tried, in the analysis we did, to capture those kinds of risks, the fact that the equity was only 20 percent of the capital structure, therefore having greater risk than on a 70/30 or 60/40 capital structure, and I think this is the other main area of difference between us.

Q. Okay, Mr. Goncalves, I just have two things mostly for the record. You mentioned the word "WACC". Can you just for the court reporter spell out that acronym?

A. It is simply a reference to the weighted average cost of capital.

Q. Okay. And I think I saw the Members struggling a little to write, so I would remind you to slow down a little bit.

A. I will do my best.

Q. With that, I will present this witness for cross-examination, Madam Chair.

THE CHAIR: Thank you. Can I give the floor to Mr. Appleton?

CROSS-EXAMINATION BY MR. APPLETON AT 2:32 P.M.:

Q. Okay. Let me check the technology before we go. You see the challenges we

have? We're on? Can you hear me? Yes? No? Can you hear me now? Yes. Excellent.

Well, good afternoon, Mr. Goncalves. You know that we don't have a lot of time today, so let's just get started. There should be a binder in front of you that we have provided.

Let's talk a little bit about qualifications. With respect to this claim for Canada, it's fair to say you're the only damages expert witness?

A. That's correct.

Q. Yes. And you're just a damage witness, sir; right? You didn't go beyond the area of damages in your report?

A. I frequently serve as both damages and/or industry expert. Certainly in some of my analysis on causation and discount rate, there is an element of my industry expertise coming through, but I am functioning here as a damages expert, yes.

Q. Right. For this report you're a damages expert, not something else; correct?

A. Correct.

Q. Right. Now, your full CV is attached to your report; correct?

A. Correct, mm-hm.

Q. So I am going to run through a few points?

A. Sure.

Q. You have a BA in international relations and a master's from the School of Advanced International Studies at Johns Hopkins; correct?

A. Mm-hm.

Q. You mentioned you were a different kind of expert from Mr. Low; right?

A. Correct.

Q. Right. You don't have a degree in business?

A. No. I have a degree in international economics.

Q. I like the School of Advanced International Studies. Many people at the American Society of International Law go there. We train many great diplomats there. It is a wonderful program, but your degree is not in business, as I said.

Are you recognized as a member of

any organization that certifies business valuators?

A. No, no certification in that regard.

Q. Do you have any articles in economics journals?

A. I've written for several publications. I wouldn't call them economic journals. I have an article coming out in the Energy Bar Association.

Q. I understand, but my question was about economic journals?

A. No.

Q. Are you a qualified accountant?

A. No.

Q. Do you have an accounting degree?

A. No.

Q. Do you have a law degree?

A. No. On those last two questions, let me add although there's no degree, I was trained in all of these matters at an investment bank as a part of the training program for financial association.

Q. So I see that the training

program gave you training in law?

A. No. I didn't say that.

Q. You said the last two. I will check that.

A. Okay, sorry.

Q. I asked you about law, sir, and accounting.

A. I was trained in accounting, analytical accounting, corporate finance, financial analysis. We had various modules in our training program that included professors coming in from what Harvard, Chicago, Rice, and various universities to train the bankers on the job.

Q. How does that answer my question if you have an accounting degree? Did they give you a degree?

A. I was simply adding information to answer your question.

Q. I can see that, but you didn't answer my question.

A. I answered your question. I do not have an accounting degree.

Q. Thank you.

MR. SPELLISCY: Just to interject, and this can come out of my time, he did answer the

question. It is clear. It says "no" in the transcript. I think Mr. Appleton needs to respect the right of the witness to give some context and some qualifications since he is asking about qualifications.

MR. APPLETON: That is completely improper. The question was quite direct. He was capable of answering it.

MR. APPLETON: Do you have -- are you a lawyer? Do you have an accounting degree? And he told us that he went to --

THE CHAIR: I don't think we need to belabour this. We understand what your background is.

BY MR. APPLETON:

Q. Okay. So you haven't been recognized by any professional body that certifies damage valuators and business valuators; correct?

A. Correct.

Q. In how many hearings have you testified where you personally have calculated lost profits?

A. A couple.

Q. Would you tell us?

A. I haven't counted them, but I

have been involved in six different hearings, and I think there were two where there were damages.

Q. But I didn't ask about whether there were damages. I asked where you personally calculated them, sir.

A. There were actually others where I calculated damages, but I wasn't involved in giving the testimony.

Q. Yes?

A. So does that answer your question?

Q. No, my question was quite specific. How many hearings have you testified in in which you have personally calculated the lost profits?

A. Two.

Q. Two. Do you normally do damage valuations, sir?

A. It is a part of what I do in both commercial and investment disputes.

Q. Okay. I will try this again. Do you normally do damages valuations?

A. What do you mean by "normally"?

Q. For example, we heard from

Mr. Low that he's done -- I can't remember -- 60 was the number? There were 60 disputes.

A. I heard that, yes. I've worked with many individuals like Mr. Low in my career, and I am aware there are people who do it a lot more than I do. As I stated, it is something I have done more recently in addition to the other things I do in my profession.

Q. Okay. Let's talk about your experience in the energy sector. It is set out in your CV; correct?

A. Absolutely.

Q. Is this a complete listing?

A. I am sure there is a few things missing, but it has several of the -- it certainly has a complete listing of my employment history, and it must also have a relatively complete history of projects I have worked on.

I'm always aware that there are some that I forget to put in there, but they should be mostly be in there.

Q. Before you were engaged by Canada on this Mesa claim, did you have any specific experience with wind power or the FIT program?

A. The FIT program, no. With respect to wind, and I think this actually might be one that is not in my CV, but I was an advisor to a California wind company years ago in their efforts to set up a joint venture in eastern Europe, in the early days after the wall came down, and there was a lot of change in the eastern European market.

So I attended several trade conferences with them. I helped them negotiate the terms of a joint venture with the east European company for the manufacture of wind turbines and development of boutique wind farms in and around central and eastern Europe.

Q. Did they have a feed-in tariff program?

A. They didn't at that time, no.

Q. Which country were you involved in, sir?

A. That was Germany.

Q. In Germany?

A. Sorry, Germany had a feed-in tariff program. The markets they were aiming at in eastern Europe did not.

Q. It's very important that you listen carefully to my question so we get a very

clean transcript.

A. Sure.

Q. All right. You agree with me about that?

A. Sorry, agree with what?

Q. You agree it is important?

A. Please restate so I know what I'm agreeing with.

Q. You would agree with me it would be important to have a clean transcript?

A. Yes, I agree with you.

Q. We wouldn't want people to misunderstand us, what we're both talking about.

A. I agree.

Q. Are you an expert on regulatory systems in Canada?

A. No, I'm not.

Q. Are you an expert about regulatory systems in Ontario?

A. No.

Q. Okay. Now, sir, you had a section in both of your reports about disclosure. Do you remember this?

A. Vaguely, yes.

Q. Okay. So have you made all

of the disclosures to the Tribunal in the disclosure section, sir?

A. As far as I know.

Q. Isn't it true, sir, that you're acting as a valuation expert in another NAFTA case for Canada?

A. Yes, that's correct.

Q. And did you disclose that in your report, sir?

A. No.

Q. You did disclose this on your website, didn't you?

A. I don't think so.

Q. We can take you to it if you --

A. It's possible.

Q. Wouldn't you think it would be relevant to disclose to the Tribunal if you have repeated engagements from the same party?

A. It didn't cross my mind, honestly.

Q. But you said in your disclosure statement, sir, the first time that you had no relationship prior to this with the Government of Canada.

A. Well, this is the first one. I think -- let's go, please, to the statement.

Q. Sure. Let's look at your first report. That's fine. Your first report, and let's look at the disclosure section. It's right at the front. It's your report. I am sure you can find it. Then we will go to exactly the same section in the second report.

A. Yes. So what this says is that:

> "I confirm I am not aware of any issue that would constitute a conflict of interest or detract from my providing a wholly independent opinion in relation to this matter. Additional disclaimers or disclosures are provided in attachment 2."

Which is where?

Q. Okay. Perhaps you might look at the section below that, sir, on page 15, which is started disclosure of interests. You see the numbers 3, 4. 5. Number 3 you see it says that you

confirm you're not aware of any issue causing a conflict. You see that?

A. Right, correct.

Q. Number 4, what you didn't read out, you can confirm --

A. Sorry, where are you looking? I see 5, 6, and 7.

Q. You do not see 3, 4, 5 and 6?

A. Those are very different paragraphs. Sir, are we talking about the same report?

Q. Perhaps I am looking at the second report. Let me just -- I'll take it back. So the attachments to the February 28th report. That's the first report, or is that the second report? Let's just look. That's the first report in the attachments.

I'm sorry, I find your numbering system quite confusing, sir, just so you understand, because you have three reports. You put various things in various sections.

It is called "disclosures", and the first page is called "attachments", and it should be in tab B of the binder. Why don't we

just go to the binder?

A. Page 15; correct?

Q. Yes, sir.

A. Yes.

Q. It says here, number 4, that "he", and I assume "he" is you, sir:

"... can confirm he has not previously been instructed or retained by either the claimant or respondent."

A. Correct.

Q. And, in addition, he has not had previous engagement by Appleton & Associates?

A. Correct.

Q. And you have not been instructed by any member of the arbitration tribunal, including Professor Gabrielle Kaufmann-Kohler, The Honourable Charles M. Brower, or Toby Landau, Q.C., but you have appeared before Judge Brower before?

A. That's correct.

Q. You have made that disclosure because you thought it was important that everyone that sees your report understand your relationship; correct?

A. This is standard feature of our reports, yes.

Q. So let's turn, then, if you don't recall what you said in your second report. We will go to your second report. And in the same section, in the same type of report -- so I believe it will be at tab -- I imagine it would be at tab E in the section called "Disclosures".

It might be in the first one. Sorry, I thought we were going to just get some agreement on this. There is a section on disclosures. It is actually in your second report. It is in the -- which is at tab D. It is on page 2 under the title "Disclaimer and Disclosure", and this is June 27th of 2014.

A. You're talking about 1.3 on page 2 of my second report?

Q. Yes. We'll make sure the Tribunal members can get there, sir. So let's give them a moment.

THE CHAIR: Second report?

MR. APPLETON: Page 2. It is tab D of the binder. Tab D, page 2, 1.3, disclaimers and disclosure.

MR. BROWER: There is 1.1.

MR. APPLETON: No, 1.3 at the bottom of the page, disclaimers and disclosure. We will wait for Judge Brower to get there and I will be turning to 1.3. You can read that while we're waiting. You're there, Judge Brower?

MR. BROWER: I've got it.

BY MR. APPLETON:

Q. So here, can you show me where you disclosed this new engagement with the Government of Canada?

A. Of course it's not there.

Q. Did you not think that would be important, or would you like -- or were you not engaged at that time?

A. You know, I don't recall the date of engagement. It is possible that between the first report and the second report we became engaged on the second matter.

It is probably an oversight not to have put it in there, in hindsight, that there was something that had come up. I would have been more than happy to disclose it, and I do not view it as a conflict of interest.

Q. Okay. So the answer is you didn't disclose it, and we know you put on your

website the following information, and I can take you there if you don't believe me, but it says: Confidential matter:

> "Lead damages and industry expert for two investment disputes regarding wind power investment projects in North America. Each of the UNCITRAL disputes was argued under Chapter Eleven of the investment provisions of the North American Free Trade Agreement and concerned allegations regarding fair and equitable treatment amongst other matters under the treaty."

So you thought it was important enough to go on the website?

A. I think that might show up on a CV.

Q. Does it show up on your CV here, sir?

A. Well, there is a timing issue; right?

Q. But --
A. This was submitted at the very beginning, before --
Q. We will move along. We all know why we're here.
Now, Mr. Goncalves, let's look at the foundation of your report, sir. You have stated in paragraph 3 of your second report that you were asked to assume that the alleged violations were in fact inconsistent with Canada's treaty obligations; correct?
A. Which paragraph? That's correct, though.
Q. All right. So, in fact, actually before we go there, I think we should probably turn to your instructions. Are you in the second report?
A. I am.
Q. So let's look at section 1.1 in the second report.
A. Yes.
Q. This sets out all of your instructions in this matter, sir?
A. Say again?
Q. I'm sorry. It's going to be

hard to hear. Does this set out all of your instructions in this matter, sir?

A. That's correct, yes.

Q. Now, but in your engagement letter, sir, you were instructed differently, weren't you?

A. I don't recall that.

Q. Did you look at your engagement letter before you came today?

A. No, I didn't.

Q. I see. Well, we'll go show you and maybe that will refresh your memory.

Now, you just told us you're the lead damage witness; correct?

A. Sorry.

Q. You told us you were the lead damage witness?

A. Yes.

Q. You told us you didn't go beyond damages in your report?

A. No, I didn't say it exactly that way, but...

Q. Did you go beyond --

A. I said I'm the lead damages expert.

Q. Did you go beyond the area of damages in your report?

A. I stated earlier that I have industry expertise and that that informed my view of damages, damage assumptions and causation, and so forth. Is that going beyond damages? I think it is part and parcel of estimating damages.

Q. The reason I ask, sir, is that your website says you're an industry expert in this dispute. That's what raises this question. It says you're damages and industry expert.

A. I just said the same thing.

Q. I see. Well, that's not exactly what you said. Now, doesn't your original engagement letter also engage you as a damages and industry expert?

A. I don't recall, as I said, but it would make sense that it does.

Q. Can we go into confidential mode for a moment, please? I am going to put something on the screen. There are two versions of the engagement letter. One is confidential and one is not.

--- Upon resuming confidential session at 2:50 p.m. under separate cover now deemed public

BY MR. APPLETON:

Q. Can we pull up the confidential version of the engagement letter? It is in the binder, I believe at tab G. Let me make sure I am right. Yes. And, actually, if you can just look at page 1. You can look at it, too, sir, page 1 in the binder in front of you.

A. In the binder?

Q. Yes, in the binder at tab G. And if we look at the bottom of the page, it says that you have been compensated up to $1 million for this engagement. Do you see that, sir?

A. Yes.

Q. I am going to go back to the public so the public can hear, and we're going to turn to tab H. So tell me when we can go public?

Q. Now we're going to go back to tab H, which has some of that material that has been removed.

Now, sir, weren't you required to provide alternative views as part of your engagement?

A. What are you referring to?

Q. Well, we can look directly, actually. I need to pull up the next book here.

If we look at -- I believe it is on page 7. Here, page 7. If we look at that, it says -- you can pull it up on the screen, if you like:

> "The contractor must also present an alternative view, if any, and must present a written final report with its findings which is to be included in Canada's counter memorial and rejoinder as an expert report."

And your report was put into both the rejoinder report and in the counter memorial, wasn't it, sir?

A. Correct. Yes.

Q. Do you see that?

A. I see, yes. I am reading the language there.

Q. Is this not the document that instructs you?

A. Yes.

Q. Canada provided it as it was required to here, sir.

A. Say again?

Q. Canada was required to provide it here. That's why we have it.

A. I understand.

Q. Yes. It also says:

"The contractor will also be required to advise on and will provide expertise on the regulatory side of the Ontario power market."

Correct?

A. Correct.

Q. What you told us is you had no expertise in that; right?

A. I did.

Q. Yes. And it says -- oh, this is very interesting. Just while we're here, it has a little note at the bottom of that paragraph:

"Please note that if this case were appealed, called a set aside proceeding under NAFTA, then this would likely take place in an Ontario court on very narrow grounds for which our expert witness would not be required to

appear."

That's a legal matter. You don't have to comment on that. I just found that surprising. Let's go to part (5) below, "Tasks/technical specifications".

Can we look at (b) here? It says that your job here, (a) says you are to provide an expert report.

A. Where are we?

Q. Let's go to (a)?

A. Sorry, (a) where?

Q. Five; at 5.1(a).

A. 5.1(a)?

Q. Do you see it?

A. Yes.

Q. It says that these are your technical specifications for this report. You are to prepare an expert report commenting on the claimant's expert reports and addressing the conclusions and presenting an alternative view, if any, of the damages valuation. Do you see that?

A. I do.

Q. And then it says in (b)

"Advise Canada and provide expert evidence on Ontario's regulatory

system with respect
respect to electricity and
the FIT program."

A. Yes. I need to comment on this. I believe at the time we were -- when we signed this contract, we were discussing a subcontract with an Ontario expert who was going to be a part of our team on this.

And that changed along the course of the engagement, but that's --

Q. So did you receive other instructions, sir, that we haven't seen?

A. Did I what?

Q. Other instructions that haven't been produced?

A. Not that -- subsequent to this?

Q. Yes.

A. There were discussions along the way about the work and the scope, just like with any client at any time. But I'm just referring back to when we set this up, we were talking about engaging a subcontractor in Ontario.

Q. I understand. I'm just trying to understand the nature of what you have

been engaged to do so the Tribunal understands; right?

A. That's fair.

Q. Of course it's fair. It is absolutely essential that we disclose this information. So the question here is: You didn't disclose this information that is in this engagement letter in your report? We see that, correct? Can you show me where you talk about those points, the requirement --

A. No. We summarized the --

Q. You didn't say alternative views, did you?

A. We were asked to provide an alternative view of damages from the view that Deloitte prepared as independent experts in the matter.

Q. And you were paid up to a certain sum to do that, weren't you?

A. Sorry?

Q. You were paid up to a certain sum to do that alternative view, weren't you?

A. Well, if you read the contract closely, we were paid on a time-and materials basis for the work we did, just like with every other client.

Q. I am trying not to refer to the confidential information is what I'm saying.

A. I see.

Q. So let's talk about your alternative view. Let's turn to that.

A. Absolutely.

Q. Okay. So let's go and look at paragraph 42 of your second report.

A. Sorry, I didn't hear your paragraph.

Q. Actually, let's look at paragraph 3. Paragraph 3 says that you were asked to assume that the alleged violations were in fact inconsistent with Canada's treaty obligations.

Does that sound about right to you, sir?

A. Yes. Correct.

Q. And then at paragraph 42, if you go down to 42, it says:

"We were asked to assume that the treatment of the KC and Mesa Power breached Canada's MFN'S obligation under the NAFTA."

A. Mm-hm. Yes.

Q. Okay. Now despite this -

let's turn to paragraph 28. Is this the first report or second? Let's check 28 of this report to see if it says, "Our analysis of the cause and quantum". Is that this report or the other? Sorry, I find it a little confusing.

A. That's correct.

Q. Same report. So it says:

"Our analysis of the cause and quantum of damages is independent of NAFTA and based on standard practices for assessing damages in international arbitrations." Do you see that, sir?

A. Yes.

Q. All right. How do you make an expert report on damages in a NAFTA case that is independent of NAFTA?

A. Can you repeat that, please?

Q. How do you make an expert report on damages in a NAFTA case that is independent of NAFTA?

A. It's very simple.

Q. Hmm.

A. Simply put, I look at this

and I have understood from my client, and from everybody in this room virtually, that the alleged breaches of NAFTA or the alleged violations constitute breaches of NAFTA.

That's an assumption that we make. And based on that assumption, we set about trying to determine a counter factual to put the investor, Mesa Power, back in the situation it would have been in but for those violations, not to give it the terms and conditions in the violations, but to put it back in the condition it would have been, but for the violations. That is the core difference here.

Q. I understand what the core differences are.

A. And that is my view of the appropriate counter factual for determining damages based on experience in an international arbitration.

Q. And you prepared your damage report on what you said were standard practices. Yes?

A. Yes.

Q. And these are based on standard practices in the NAFTA claims?

A. No. I said in international arbitration.

Q. But this is a NAFTA claim. This is international law arbitration, but it is a NAFTA claim?

A. I understand that.

Q. So your understanding of standard practice in a NAFTA case is to do a damages analysis --

A. Right.

Q. Let me finish the question, and then I will wait and listen to your answer.

A. I'm listening.

Q. So your understanding of standard practices in a NAFTA case is to do a damages analysis independent of the NAFTA; is that correct?

A. That doesn't sound right.

Q. It doesn't, I agree.

A. I am not sure I understood it fully.

MR. SPELLISCY: Would counsel -- counsel should let the witness finish his answer.

MR. APPLETON: I thought the witness was finished, but -- and I have asked the question. I have got an answer. I think we can

move along on this.

MR. SPELLISCY: I'm sorry, you didn't get an answer. He started his answer.

THE CHAIR: I think we got back to the question of what the damage compensation should do, whether it should give better terms or give the terms of better treatment or whether it should undo the harm.

And I understand when you say "independent of NAFTA" you are having in mind the idea of the objective of undoing the harm. Is that what you were saying?

THE WITNESS: That's correct.

THE CHAIR: So then we can move on.

THE WITNESS: Possibly --

MR. APPLETON: But I need to understand what he's doing with this, because it is a very significant assumption and divergence between the parties.

THE CHAIR: Fine.

BY MR. APPLETON:

Q. So, for example, you made no effort to determine what the most favourable treatment under NAFTA Article 1103 is in this case, did you?

A. Not for purposes of calculating damages.

Q. And if we were to assume for the purpose of damages that Mesa was entitled to this most favourable treatment, then your results would have to be different, wouldn't they?

A. If you were to assume that the proper approach to calculating damages for the breach was to give Mesa the terms embedded in NAFTA, then I would have to recalculate damages, yes.

Q. Yes. You can't deny that Mr. Low's analysis of MFN damages is correct, in the event that the Tribunal determines the MFN treatment required the same benefits to be given to the claimant as those given to the Korean Consortium; correct?

A. For those NAFTA articles -- we heard a lot of discussion today about 1102, 1103, 1105, et cetera. For those NAFTA articles that convey the MFN treatment, if the Tribunal concludes that the proper remedy is to give the benefit of the KC terms to Mesa Power, then the conceptual approach that Mr. Low takes is the appropriate one for that calculation.

But I wouldn't go so far as to say

it's correct because, as we've discussed many times and you see in my report, we have identified several significant technical quantitative differences between our reports, including principally the discount rate. So I wouldn't go so far as to say the actual numbers are correct, if you see the distinction.

Q. But the conceptual approach would have to be different. That's what you have just told us?

A. I have.

Q. Yes. Now, at paragraph 42 of your second report, where we just were before, you say you were asked by Canada to assume that the treatment of the Korean Consortium and Mesa Power breached Canada's MFN obligations under NAFTA; correct?

A. Yes.

Q. But then you say at paragraph 43 that this interpretation is not relevant from a damages perspective?

A. Correct.

Q. Now, I just asked you if you looked at NAFTA Article 1103, and you said "not for the purpose of calculation of damages". So why did you look at NAFTA Article 1103?

A. Well, we wanted to understand the general provisions, and of course when you read -- part of my scope was to respond to the report of Mr. Low, and his report is organized, and so forth, around the NAFTA articles. So I wanted to understand what it says.

But I didn't spend any time trying to interpret it, and I think I can help you with the prior question by simply saying we were not asked to assume at any point that -- a legal interpretation.

We were not asked by counsel at any point to assume that a legal interpretation of NAFTA requires that the GEIA terms, or the terms for MFN, should be ascribed to Mesa Power.

It is our view, from common practice, that the "but-for" scenario for Mesa Power is to be back in the position it most probably would have enjoyed but for the breach.

Q. But you heard from Mr. Low, in his professional opinion, that that is not correct, from his --

A. I understand his perspective, yes.

Q. Yes. All right. And you'd

agree with me the treaty obligation in NAFTA Article 1103 says that Mesa, as an American investor in Canada, is entitled to treatment equivalent to the best treatment provided to a non-NAFTA party investor like a Korean --

MR. SPELLISCY: That's a legal question.

THE WITNESS: I can't say. That is really between you and counsel.

MR. SPELLISCY: It is obviously a legal question that this witness is not able to answer.

MR. APPLETON: Let's parse it, because he actually makes determinations about issues that are just like this in his report.

THE CHAIR: We understand that the expert said his instructions did not include an assumption that Mesa would be given the better terms of the Korean Consortium. So he has not addressed this, and if I am -- if I am not right, you will correct me.

MR. APPLETON: I believe he said, We weren't asked to assume. So, therefore, it is his judgment, he says, based on standard practice. I am trying to ask him what the nature of the

standard practice is, and so that's what I am trying to understand.

BY MR. APPLETON:

Q. And so you haven't disclosed any basis for your standard practice in your report, have you?

A. No. I've stated it based on experience.

Q. I see. All right. Now, you agree with me that Samsung started to receive treatment from Ontario, as pleaded by Mesa, under the GEIA when it was signed in January of 2010, at least by that point.

A. Depending on what you mean by started to achieve -- sorry, started to receive treatment, I don't actually have a working knowledge of when they started to receive the benefits of the GEIA, but from the point it was signed, they had access to benefits.

Q. You have been here all week, I believe?

A. I have, yes.

Q. You have seen that there were various directives, including a directive in September of 2009 --

A. Correct.

Q. -- before this was signed? They gave certain priority access. You saw that there was an MOU?

A. Mm-hm. I am familiar with this.

Q. I am trying to stay away from the controversial issues. In any event, by the time the GEIA is signed, it would be fair to say Samsung started to receive some treatment in Ontario?

MR. SPELLISCY: I don't think that was a question for an expert witness. It is a question for a fact witness or it appears to be a submission by counsel, but...

MR. APPLETON: No, Mr. Spelliscy, the witness has said that he has industry expertise, and his engagement talks about industry expertise and he says he went beyond this. So I believe it is fair for him to answer that question.

MR. SPELLISCY: I think I will ask the Tribunal here. Industry expertise is not the same as saying he knows when Samsung started to receive treatment, which is a question of fact. This is not a fact witness.

MR. APPLETON: Well...

THE CHAIR: What was the question?

BY MR. APPLETON:

Q. Would you agree with me that Samsung started to receive treatment from Ontario, as pleaded by Mesa, under the GEIA when it was signed in January 2010?

A. And I said in response I believe they had access to the benefits as soon as the agreement was entered. When they actually started to receive those, I just couldn't say.

Q. Okay, fine. Have you seen the Toronto Star article?

A. I recall that.

Q. Would that give you the information to answer this?

A. I don't know. Let's look.

Q. Okay. How about the press backgrounder? You saw that?

A. I recall that.

Q. That was January 21, 2010. Would that give you enough information to be able to answer that question?

A. It might. Let's look at it.

Q. If you like. We can pull it up.

A. Sure.

Q. I will pull that in a moment. Let's go through, because it is not in the binder and I don't want to break the binder flow.

THE CHAIR: Yes, absolutely, it is quite the binder flow. I know that you are acutely aware of the time that passes.

MR. APPLETON: I am quite aware.

THE CHAIR: Fine.

MR. BROWER: That's why he's talking twice as fast as normal.

MR. APPLETON: Thank you, Judge Brower, for noticing.

--- Laughter

BY MR. APPLETON:

Q. Assuming that...

You told us that you're relying on experience for only using a "but-for" MFN calculation, but didn't you just say you had no NAFTA experience, Mr. Goncalves?

A. I did.

Q. Yes. Okay. So how can the assumption that MFN applies and has been breached be consistent, then, with what you say in paragraph 12? We can look at paragraph 12. You say:

"Mesa would not have had access to the GEIA items for any of its projects, but for the violations."

A. I say this assumption presents -- sorry, we have to refer to what we're talking about. I think this is an assumption Deloitte makes that they get the benefits.

This assumption presents an inaccurate counter factual scenario for damages analysis, because Mesa Power would not have had access to the GEIA terms, but for the violations. There is no realistic or probable counter factual scenario in which that would have occurred, as detailed in section 3.2.

Q. But you told us that --

A. That is my view.

Q. You told us if Mesa was entitled to the better treatment under MFN, then --

A. Oh, and I will comment on that.

Q. Why don't you let me finish my question?

A. Please.

Q. Then we would be happy to

hear your comments, okay.

So you told us that if Mesa was entitled to the better treatment under the MFN obligation, then wouldn't Mesa have had access to treatment equivalent to that under the GEIA?

A. No.

Q. I see.

A. I think -- I understand that the fact that Mesa didn't have access to the better treatment is a breach of NAFTA. That's my understanding from counsel.

Based on that, I take a standard approach to damages to put -- as I've said many times, put Mesa back in the realistic probable scenario it would have enjoyed but for that breach.

Q. I see. So --

A. That's the bottom line.

Q. So under your theory, then, Mr. Goncalves, Canada can violate its MFN obligations to those who did not receive the MFN treatment to which they were entitled, and yet they are not damaged under your theory?

A. Say that again?

Q. Under your theory, Canada can violate its MFN obligations which is owed to

investors and investments and those who did not receive the most favourable treatments to which they were entitled are not damaged?

A. I didn't say that. If they didn't receive treatment that counsel or the Tribunal determines they should have had, in my view, Canada would have breached NAFTA and, therefore, damages would be due.

Q. So do you think MFN is for to put the person back, but putting them back means not giving them the most favourable treatment at all; right?

A. Putting them back in the scenario they would have had had there been no harm caused.

Q. But they were required to have the most favourable treatment. That is what the treaty required that they have. That's what they were supposed to do. So just to make sure we understand.

You say you put them back to breach. You don't put them back to where they were entitled to be. Is that what you're telling us?

A. It sounds like I need to be a lawyer to answer that question.

MR. SPELLISCY: I am going to say the question of where they are entitled to be by the MFN clause is a purely legal question.

Mr. Goncalves has explained again and again what he did, and I don't know. Maybe counsel isn't concerned about his time, but we're going over the same ground again and again and again.

MR. APPLETON: Mr. Spelliscy, this is the essential question that leads to $500 million of damage.

MR. MULLINS: I would ask counsel to quit trying to coach his witness while we're trying to ask questions.

MR. SPELLISCY: I am pretty sure I can object. When it is a legal question the witness is not entitled to answer, counsel. So this can come out of my time. I have about seven hours, I think.

So the reality is that we're trying to push through this. We're trying to get this done and we're spending time again and again coming back to legal questions that this witness has said he did not address.

Counsel is testifying into the record as to what he thinks the MFN clause means.

That is not a question for Mr. Goncalves. He has explained what he has done. Counsel can spend the time as he wants, but every time he asks a legal question I am going to speak up.

MR. APPLETON: Mr. Spelliscy has confused that the expert has given his view as to what the damages result is on the MFN clause, and to this expert, he says that you don't get the most favourable treatment; you get the least favourable treatment.

And that is the fundamental difference between these reports, and I believe it is appropriate that this expert answer the question so that the Tribunal understands the basis upon which he has come to this fundamental conclusion upon which everything else sits. That is the question.

THE CHAIR: Was this a conclusion of yours, Mr. Goncalves, or was this an instruction?

THE WITNESS: I would like to clarify exactly how this discussion occurred between me and counsel for Canada.

THE CHAIR: Yes.

THE WITNESS: I looked at this

case independently, both before and after we were retained on this second matter, because I always look at everything independently, and it does not matter that I was retained on another matter for Canada, because it doesn't change my view.

THE CHAIR: That's a different issue. Let's put that aside.

THE WITNESS: But I wanted to say it.

With respect to this specific issue, I looked at this scenario. I developed a view, based on my experience with UNCITRAL proceedings and other international arbitrations under ICC, about how to look at the proper counter factual and seek to put Mesa back in the realistic position they would have been in but for the breach.

I discussed it with Canada, counsel for Canada, and I said: Is there anything about NAFTA that I am missing that I need to know? Because this is my first NAFTA case. My other experiences are in different types of matters.

And they said, No, you don't need to assume anything different about NAFTA than other

cases.

So that was an instruction, but it was also my theory to begin with, that they verified with the legal instruction.

THE CHAIR: So you applied as a standard for your valuation the rule that you should place the party that is harmed back into the position in which it would be had the breach not occurred?

THE WITNESS: Correct.

THE CHAIR: That is what you did, and you did not attach weight to the type of breach, whether it was 1105 or 1102 or 1103 or 1106?

THE WITNESS: Exactly correct. My approach is the same for all of the alleged breaches.

THE CHAIR: Fine. I think that is clear, and the rest is legal and we will have to assess it.

BY MR. APPLETON:

Q. So just to confirm, then, so when you say that your approach is independent of NAFTA, as you answered President Kaufmann-Kohler's question, you have told us you provided no support

for this in your report other than your statements; is that correct?

A. Say that again?

Q. You provided no other support in your report other than your statements?

A. For that assumption, correct.

Q. Yes. Can you refer me to any generally accepted accounting principle that tells us not to follow the terms of the treaty?

A. No, I wasn't referring to generally accepted accounting principles.

Q. I can see that. Can you refer me to any text that tells us where to ignore the terms of a governing contract or the treaty in the calculation of damages?

A. Not sitting here today.

Q. And you have told us you were not instructed by your client to take this position?

A. My view of the appropriate way to calculate damages was confirmed by the client based on their interpretation.

Q. So this was just your decision?

A. Sorry?

Q. This was just your decision?

A. It was my view, and I checked it with counsel to make sure that it was not at odds with what NAFTA requires. So I did ask the question, to be clear.

I did ask the question: Is there anything different about this treaty or NAFTA that would require me or cause me to calculate damages differently than I'm accustomed to in other matters that are not under NAFTA? And the answer was, No, there's not.

Q. So if the Tribunal comes to a different conclusion, then the calculations in your report would have to be wrong, wouldn't they, sir?

A. With respect to 1102 and 1103, as I have said before, the conceptual approach would need to be changed.

With respect to 1105, I have heard a lot of discussion here this week about what it does and doesn't require. I will leave that alone because, again, there is a lot of complex legal interpretation involved there.

So I would say there would be some parts of the conceptual approach that would need to be changed if you draw a different conclusion -- if

the Tribunal were to draw a different conclusion than I was instructed, and some parts that I think, from what I heard this week, would stand.

THE CHAIR: Just to clarify this, does that mean that what relates to damages arising out of breaches of 1102 and 1103 would have to be changed conceptually if we were to go along with the idea that better treatment must be accorded? However, the part of the damage computation for damages arising out of 1105 would stand according to -- in your approach? Is that what you're saying, or is it something different?

THE WITNESS: I think so. But as I indicated, I think I would need to think through a little bit more and receive a little more clear legal instruction than I have been able to divine from the discussions this week to answer you clearly.

THE CHAIR: Fine.

MR. APPLETON: We're done with this witness.

THE CHAIR: Oh, you're done with this witness?

MR. APPLETON: We're done. We have nothing further now.

THE CHAIR: Fine. Any re-direct questions on Canada's side?

MR. SPELLISCY: No.

THE CHAIR: No? Do my co-arbitrators have questions?

QUESTIONS BY THE TRIBUNAL 3:20 P.M.:

MR. BROWER: My first question is totally irrelevant to these proceedings, but since you have -- as was pointed out on page 15 of the attachments to your first report under disclosure of interests, it is on the attachments, which is tab B in my book here. See page 15? You were taken to it before, disclosure of interest, and down in (6) at the very bottom, it says you have appeared before me previously. Can you refresh my recollection as to which case it was?

--- Laughter.

MR. BROWER: Sorry about that.

THE WITNESS: As I recall, you were on the Tribunal for El Paso v. Macae I correct on that.

MR. BROWER: No. El Paso versus?

THE WITNESS: Petro Brass.

MR. BROWER: Well, I am happy for the credit, but I did not sit on that.

THE WITNESS: Then I am mistaken, but I was trying to remember where it was. If I am wrong I apologize, but I think -- I thought it was that one.

MR. BROWER: Maybe you dreamed it.

--- Laughter.

MR. BROWER: Okay, good. Well, that relieves me of any embarrassment on my part.

--- Laughter.

THE WITNESS: The embarrassment is entirely mine.

MR. BROWER: If I could take you now to, where are we, tab D in the binder in front of you, which is your second expert report.

Now I am looking at the confidential copy, but I don't think what I am looking at is confidential.

MR. APPLETON: Which tab?

MR. BROWER: "D". It's the second expert report, confidential version.

MR. APPLETON: If I can assist you, Judge Brower, the version, if it is marked confidential, this would be Canada's designation. That is on the cover page. Then they want the page with confidential information. So if the page

doesn't have "confidential" marked on it, I believe that page might not be confidential.

MR. BROWER: It does not.

MR. APPLETON: Would that be right, Mr. Spelliscy?

MR. SPELLISCY: That is consistent with the Tribunal's procedural order. So if it doesn't have the word "confidential" on the top and there is no gray boxes in it, then there is nothing confidential on that page.

MR. BROWER: Well, if you can follow me in the binder on the same document, you can confirm for me that "confidential" is not on the page, Mr. Spelliscy?

MR. SPELLISCY: Sorry, I missed the page number. Did you give it?

MR. BROWER: Sorry?

MR. SPELLISCY: I missed the page number that we're looking at.

MR. BROWER: That's because I didn't give it yet. Page 2. This is tab D, second expert report, confidential version.

MR. SPELLISCY: Anything on page 2 is fine.

MR. BROWER: Okay, thank you.

Now, I am looking at paragraph 3. Are you there with me, Mr. Goncalves?

THE WITNESS: Yes.

MR. BROWER: Before the A, B, C, the next previous sentence reads as follows:

> "The focus of our analysis was and remains to analyze the cause and quantum of harm to Mesa Power, if any, that resulted from the alleged violations."

Then you continue with:

> "We focussed on analyzing (a) whether Mesa Power was harmed."

Which considering the foregoing seems to embrace both cause or principally cause, because (b), which follows, refers to the way in which Mesa Power was harmed.

There is one other page in this which is not marked "confidential" in mine. This is page 9. We're okay?

THE WITNESS: Yes.

MR. BROWER: Okay. Paragraph 28, right at the beginning, you write:

"Our analysis of the cause and quantum of damages is independent of NAFTA..."

Et cetera, et cetera, et cetera.

So I deduce from this that you have dealt not just with quantum of damages, but also the issue of causation as between the assumed breach leading to damages.

THE WITNESS: That's correct.

MR. BROWER: Right, okay. Now, let's take your initial presentation that was on the screen and turn to slide 12. Are you there? It is slide 12.

THE WITNESS: I am.

MR. BROWER: I understood your testimony to be, but please confirm or disaffirm it, that if the GEIA was found to be a breach of NAFTA, then you conclude that Arran and TTD would have won their contracts?

THE WITNESS: Correct.

MR. BROWER: Okay.

THE WITNESS: That's right.

MR. BROWER: So that takes care of causation, as it were, with respect to those two?

THE WITNESS: Mm-hm.

MR. BROWER: But you exclude any causation with respect to North Bruce and Summerhill?

THE WITNESS: That's correct. I hope it is clear that that brown dotted line is the available transmission –

MR. BROWER: Right.

THE WITNESS: You got it.

MR. BROWER: Yes.

THE CHAIR: Just to clarify on this, I understand this to say: If the transmission capacity reservation for the GEIA is a breach, because that -- it's not the contract it was the consortium such that is at issue here in your analysis.

Here it is only the transmission capacity, or do I miss something? What are you doing here?

THE WITNESS: I wouldn't say that only the transmission capacity access was a breach. I would say that all of the treatment was a breach.

If you find that all of that treatment was a breach, then what happened to Mesa --

THE CHAIR: No. My question is a

different one.

THE WITNESS: I'm sorry.

THE CHAIR: Do you here discuss the reservation of capacity for the Korean Consortium?

THE WITNESS: Yes, yes.

THE CHAIR: That is the only issue that is dealt with here on this slide.

THE WITNESS: Correct. That's the only thing I think would have impacted Mesa --

THE CHAIR: Absolutely, yes.

THE WITNESS: -- is the lack of access to transmission capacity, and I hope that it is clear -- I know I was moving fast when I introduced this -- that the difference between the prior slide, 11, the actual scenario where you have 750 megawatts of available transmission and this one on slide 12 is the additional 500 megawatts of capacity.

So you lift the available capacity back to the total by removing the Korean Consortium's 500 megawatts, and when you make -- when you lift that available capacity, TTD and Arran would have gotten FIT contracts.

MR. BROWER: Okay. So as --

THE WITNESS: Is that clear?

MR. BROWER: Your testimony basically is, as an expert appearing on behalf of Canada in this case, you have no doubt but that if GEIA were found to be a breach, we may proceed on the basis that Arran and TTD were home free; they got their contracts?

THE WITNESS: Or in other words that they were harmed, yes.

MR. BROWER: Yes, okay. Let's go to the next one, slide 13. Now, this is an interesting addition, as well, because confirm or disaffirm my understanding from this chart and your testimony that if the only breach were the connection point change window -- let me pause there, because what do you mean by connection point change window?

THE WITNESS: That's a very good question. This was -- this relates to the allegation that there should have been no connection point change. There was a lot of discussion in the last few days about the timing of the change, and so forth. But I think the allegation -- and I have to confess here I am now a little confused what the actual allegation is.

The way I understood it before --

THE CHAIR: Whatever the allegation is, what we must understand is what you did on this chart, so explain that to us and don't worry about the allegation.

THE WITNESS: Okay. What I assumed is that the breach would be or was the implementation or the fact of the connection point change that was implemented.

And based on that, what happened in fact is that several projects from the west of London region were allowed to change their connection point into the Bruce.

So if I can clarify the impact by going back to, again, slide 11, the actual scenario, what really happened before the counter factuals, if you focus on the orange bars, the west of London projects far off to the left.

MR. BROWER: Mm-hm.

THE WITNESS: Those projects are the ones that changed into the region.

MR. BROWER: All right.

THE WITNESS: And there are some other impacts that are a little technical about smaller-sized projects that got allowed to connect

because they fit, but that is not a major point.

Going back to slide 13, I have removed those. So that if the connection point change had not been implemented, if it had not happened, then those projects wouldn't be in the Bruce. The transmission capacity would still be 750, because I'm not making the GEIA adjustment here.

MR. BROWER: Right.

THE WITNESS: And TTD and Arran also in this scenario would have gotten FIT contracts. They would have been harmed.

MR. BROWER: So --

THE WITNESS: But not Summerhill and North Bruce, of course.

MR. BROWER: But your slide 13 assumes also that the GEIA agreement was a breach?

THE WITNESS: No.

MR. BROWER: Because that's how you get to 750.

THE WITNESS: This was in isolation.

MR. BROWER: Isolation.

THE WITNESS: That assumption comes up on the next slide, slide 14, the

combination.

MR. BROWER: Okay. So if the only -- let me make it clear here. The allegation of the claimant, as I understand it, with respect to the connection point change window is twofold: One, that the opportunity to change your connection point was announced pursuant to a direction of the Ministry on a Friday to be available Monday through Friday of the following week to apply for a change. That's one aspect of it, and the other is that that kind of change should not have been permitted at all.

So if the connection point change window on either of those bases or both of those bases were found to be in breach of the treaty, then, again, as a matter of causation, you say Arran and TTD were home free. They would have gotten their contracts?

THE WITNESS: I wouldn't say it just that way, and there is a reason. I'm glad you brought that up, because that is what I was referring to earlier that I've become a bit confused about this week, is if you assume that the implementation of the connection point change or the fact that it occurred is the breach, then I

come to this conclusion, because you remove the west of London projects.

MR. BROWER: Right.

THE WITNESS: There was a lot of discussion this week about the timing and the way in which it was implemented and the fact that it was at the last minute and it wasn't adequately transparent, and so forth.

MR. BROWER: Right.

THE WITNESS: From my perspective, if you allowed more time with more notice, but you say that the connection point change was actually appropriate, then you could have had more projects coming into the region from other regions, and almost certainly if even one more project came or maybe two, TTD and Arran would not have had -- in fact, even without more projects coming, we conclude they would not have had contracts.

So I think the only breach that would lead me to this conclusion is the one that the change point connection should not have happened at all.

MR. BROWER: I see, okay, okay. That is very clear. Okay. So it is two up and two down. I got it.

THE WITNESS: Okay.

MR. BROWER: Those are my questions.

THE WITNESS: Thank you.

THE CHAIR: Mr. Goncalves, can I go back to your last slide, which is also a figure that I noticed in your report, figure 11 on page 51 of your second report, which of course you know better than I.

I would like to make sure that I understand exactly what you have done and how this does not add up and why not, because you start with Deloitte's total damage figure -- I take the column on the right now, the total one.

And then you factor in what you call inaccurate causation, so you take out what you -- part of the loss that you considered not caused by the breach; is that correct?

THE WITNESS: Yes.

THE CHAIR: That gives you a figure of 156. And then you have a number of other elements that you have then limited to TTD and Arran, because you do not consider the two other projects. And there you have looked at the discount rate, that you think they have too -- Mesa

has too low a discount rate and you want to use a higher one. It was of course a net present value that would be lower, lower by 120 million; is that right?

THE WITNESS: Correct.

THE CHAIR: Then you have looked at GE turbine treatment, which is not the same thing like deposit, I understand?

THE WITNESS: That's correct.

THE CHAIR: That's a different issue. And that gives 12 million. Then you have the issue of the valuation date. That gives you minus 42, and then you end up with 19. And somehow I don't understand how these different deductions, what their relationship is, because obviously they cannot be added up.

THE WITNESS: Yes. That's an excellent question. I did try to address this in paragraph... I guess it was in the other report that I did that, but at any rate --

THE CHAIR: 174 and following maybe?

THE WITNESS: Here we go. It's footnote 157 at the bottom of page 51.

MR. BROWER: Which report?

THE WITNESS: Second report, page 51, footnote 157. And I do understand that this is a point of confusion. What we've done with the model is analyze each item in isolation, but there are some overlapping or compounding effects when you combine them, so that you can't simply extract them out and add them up perfectly.

For example, I address this on the PowerPoint presentation in footnotes 3 and 4, where I indicated that there is effectively some amount of overlap, for example, with the valuation date. You're not only changing the date in terms of the amount -- or the time at which you set the net present value to when you are discounting, but you are also updating several features of the discount rate to be appropriate for that date and time.

So there is a different cost of equity and, in particular, a different cost of debt. Well, that would seem to overlap the issue of the discount rate.

THE CHAIR: So that means --

THE WITNESS: There are some features that are in common and some that are different.

THE CHAIR: So that means if we

were to consider that you are right on the valuation dates, but that you are wrong on the discount rate, then we could not simply deduct $42 million, because that would mean that we're taking something away under the heading of discount rate because of the overlap?

THE WITNESS: I think that is correct. There may be -- I have to think it through a bit. There may be a solution within some of the other tables in our report, 53, 54. We have taken even further breakdowns of these components.

But simply put, I think the only clean way to come up with a proper result, once the theory of damages is -- or the conclusions regarding breach and damages -- breaches is decided is to put it all into the model and come up with a result.

THE CHAIR: I don't have the model.

--- Laughter.

THE WITNESS: I understand that. Sometimes that happens in these arbitrations. Sometimes it doesn't. But, yes, the answer to your question is, yes, there would be some elements of overlap there.

MR. BROWER: Don't throw the Bible away. You never know what may be....

THE WITNESS: I have seen it happen before.

THE CHAIR: We might, if needed, ask both parties' experts to work on whatever models they have and come up with answers to specific questions that we would have --

THE WITNESS: I understand.

THE CHAIR: -- because otherwise it could be difficult to handle on our part.

Any further questions for Mr. Goncalves?

MR. BROWER: That's it.

THE CHAIR: No? Then this ends your examination. Thank you very much.

THE WITNESS: Thank you.

--- Whereupon examination adjourns at 3:40 p.m.

PROCEDURAL MATTERS:

CHAIR: So now we have a number of procedural points that we would like to address for trying to be efficient so you can have time to prepare for tomorrow, and in that sense the Tribunal has a number of suggestions that they would like to make so it channels the debate, and

then you can comment on them.

I will try and make all of them together, and then you can come back on the different points.

We have provided earlier on that there would be post-hearing briefs. In terms of purpose and content of the post-hearing briefs, the Tribunal would expect your commenting on the evidence gathered this week and putting it into context with your case that as it has been pleaded.

Of course, we do not expect -- it's not only that we do not expect. We do not wish you to repeat what you have already explained in the briefs before. That is not the exercise.

However, what would be helpful for us is really to have a discussion of: This is what we find in the transcript and this confirms or rebuts, refutes, something that I find in this document or that the other side has argued and I have argued.

MR. LANDAU: Just one little footnote, if I may, to what you have just said. With the reference to the word "discussion", I think the -- I hope I am speaking for all Members

of the Tribunal is that there is a kind of plea for less narrative and just kind of bullet points and make it sort of just -- it can be -- it can be scaled right back, because we have already a huge amount of useful, we have a lot of narrative in all of the rounds of submission and pages and pages, and it kills trees and trees, and in the end it would be much easier for us, if possible, to scale it back in terms of pros.

MR. BROWER: I want to put it, if possible, even more strongly.

--- Laughter.

MR. BROWER: I personally avoid reference to the word "brief" and I refer to them as post-hearing submissions.

The whole point of this is this is the time for you at the end of the hearing, so all of the evidence is in, to list -- I call it list -- or more like a bill of particulars, what are the factual points that you wish to accept, and then why.

And the "why" is witness statement first or second of Mr. X, or whoever, paragraph such and such, okay, transcript, day, page, witness, lines such and such, document.

It is a road map. It needs to be on basically the factual issues. And as we will come to I think in a moment, this is particularly key in connecting the dots on causation, getting from the claimed breach to damages.

Just don't tell us any stories. We have heard all of the stories, I think, or at least we've heard all of the stories we're going to hear by the time we receive those post-hearing submissions.

What we need is the road map, and that has two advantages for you, and that is it ensures that we don't miss anything. If you connect all of the dots for us and give us the road map, then we know we've got what we need and you are protected against the possibility that we might overlook something in this vast record.

Also, without making any promises as to the timing of a result, let me put it that way, or a first result, it certainly facilitates putting together whatever it is that we have to put together.

So please err on the side of not narrating anything. Just give us your case on the facts. It may be necessary to an extent on the

law, too, but to the extent that's done, it has to be the same way. Okay, is that clear?

THE CHAIR: I am not sure it is that clear. If I were counsel, I would be a little bit disturbed --

--- Laughter.

THE CHAIR: -- by the different indications they got. Let me just kind of summarize, and, in the end, you're in control of your cases and you know what is effective at this stage of the hearing.

I think it is important that you know that what we want here is a discussion of the evidence. Obviously you can do it in short form, but then we need to understand what you mean.

And what I think it is not needed -- and I think it is important, because if you have now gotten the impression that you have to repeat everything that was already in your previous submissions, then that is not what we expect. It would be huge work to have to assemble everything again, and it would be quite duplicative.

Of course we will look at what you have submitted earlier when we make our order. Is it clear like this? I have other points, but maybe

I carry on, unless you have something specific on this.

MR. SPELLISCY: You can carry on. I can ask my questions at the end.

THE CHAIR: Good. We start of one simultaneous submission. For the time limit, we're very much in your hands. You may wish to have a short consultation among counsel.

You understand that we value something that is concise and effective, but we do not think that we should put a page limit. I don't think we would expect something more than 100 pages, but that gives you a range. There is no obligation to write 99 pages.

--- Laughter

MR. MULLINS: You may want to consult with your colleagues.

--- Laughter.

THE CHAIR: But it gives you an indication of what we have in mind. There is one specific issue that Judge Brower just touched on where we would like a little more -- would appreciate the parties specifically addressing, which is really it is causation.

We have spoken about causation a

lot and we understand a number of things, but it would help us to have a specific description of the causation change from each alleged breach to each claimed loss so that we have a clear understanding of the flow of events and what the result of these events are.

We have also thought whether we have other specific issues, but we think we have covered the ground well, and this is the only point right now that we think of. You can of course address it tomorrow, but we can also address it in your post-hearing briefs.

There are two procedural aspects that are outstanding at this stage. One is the claimant's 1105 damage valuation, and the second one is the respondent's subsidy defence that we have said we would address at the end of the hearing.

The Tribunal's suggestion is to handle this in the following fashion. If in our deliberations we come across -- we think that this is relevant to the outcome of the case, then we would come -- and it applies to the two aspects. We would revert to the parties and ask specific questions, and then we will take it from there.

If you think that requires a hearing, then it requires a hearing, but we will see, depending on what it is. It may also be that in the deliberations, as I mentioned earlier, we may come across other points where we thought now that it was clear and when we work closer we realize that one or the other issue needs more input from the parties, but that would be only limited input on specific questions.

With respect to further proceedings, once we have -- we need to agree on the time limits for the post-hearing briefs. At some point we also need to have a corrected transcript, and you would have to agree on transcript corrections.

There is another point -- then also we would like to have, after the post-hearing brief, cost submissions, and you may wish to agree among yourself about what level of detail. Is it just a statement of the costs incurred or is it a discussion of what should be considered, what should not be considered?

Another point that we will have to deal with is the release of the recording of the hearing on the PCA website. It seems to us, but

obviously we can hear the parties about this, it seems to us the reason for the closed-circuit was that there could still have been an issue of subsidy defence and witnesses being heard.

And if that is still the case, then I think the release should take place at the moment when the Tribunal has said that this is not relevant, or it is relevant and it has been dealt with.

So that would be the Tribunal's suggestion, subject to your views, of course.

So in terms of further procedures, then we would go into -- once we have done all of this, we would go into deliberation and handle this as we -- as I mentioned before, we would hope to get to a final award, but I cannot say that there will not be other issues that may come up in the course of the deliberation on which we would revert to you.

That's it in terms -- I may have a few things for tomorrow, but for beyond tomorrow, that is all what the Tribunal had in mind of putting forward to you. I don't know whether you want a short recess to discuss these points. Some points may also have to be discussed among counsel

on both sides, and you may have common views on certain things.

Should we take --

MR. BROWER: I would like to speak to a couple of issues that I feel they should cover tomorrow more precisely.

THE CHAIR: You can do so, absolutely.

MR. BROWER: Issues that at least I would and I think probably all of us would appreciate being addressed tomorrow and in the post-hearing non-brief, I would be interested to see some persuasive authority to the effect that where the MFN provision of NAFTA is breached, the measure of damages suffered, if and when suffered, is frankly along the lines of what Mr. Low has presented as opposed to what Mr. Goncalves has presented. This is not a position that I have had the experience of having presented to me before.

Similarly, the question before us, I think, is how it can be that a foreign investor, a national of a NAFTA treaty party investing in another treaty party, can take advantage of that foreign investor status, but through in this case a Canadian subsidy also claim non-national treatment,

which is what I have understood the position to be on the part of the claimant.

I think that's it, but I might point out that there hypothetically could be -- in putting together the chain of causation, it could be that more than one breach is required to get there. What I'm wondering about is do you need just, for example, a breach of MFN to get through causation to damage, or would you need in addition a breach of 105 -- 1105, I'm sorry. That's what has tickled my fancy, in particular.

THE CHAIR: Fine. Should we take a ten-minute break now for you to consider the different points, or do you want to react right away?

MR. MULLINS: We might -- unless the Panel really feels they want to talk today, we could use this time to talk to our opposing counsel and maybe talk in the morning before we start arguments, or however.

I think some of this sounds like we might want to come up with a brief schedule. We might want to think that through, and timing and that kind of thing. That may take more than ten minutes, and I would hate to have you sit around

and wait for us, but whatever works for the Panel.

THE CHAIR: Absolutely. That is a possibility. I don't think there was anything difficult in here. Let me just then say how I see it tomorrow.

We have on both sides reserved three hours maximum for closing. You can reserve time out of the three hours for rebuttal, sur-rebuttal.

We should, if at all possible, end by five o'clock, which, if we simply stick to the schedule, should not be a problem. I must confess that I have changed my flight.

MR. MULLINS: Then I withdraw my suggestion.

--- Laughter.

THE CHAIR: But we can do it tomorrow morning, but then maybe we start a little earlier tomorrow morning or have a shorter break.

MR. MULLINS: We can use the time left now. We still have time left in the day.

MR. APPLETON: But I do think it would be helpful for the disputing parties if you might give us some very general ballpark as to what you were looking for with respect to timing,

because we know that you're very busy Tribunal.

THE CHAIR: About the post-hearing briefs?

MR. BROWER: Is that what you mean?

MR. APPLETON: Yes. Not for tomorrow. Tomorrow we roughly can figure out -- we roughly know the order of who goes first and who goes second, so that part we know. It's about for us to talk to each other effectively, are you thinking about post-hearing briefs within two weeks, two months, two years? Let's hope it is not two years. But, you know --

THE CHAIR: Two days.

MR. APPLETON: That's what I'm trying to figure out. We need a transcript to be certified and come together...

THE CHAIR: It all depends also on your other matters and how your team is available. I would say something like four weeks, six weeks, something along these lines would seem reasonable to me, but...

MR. APPLETON: So, for example, because those deadlines start to hit into the holidays.

THE CHAIR: Yes.

MR. APPLETON: And many of the staff, perhaps on both sides, certainly for our side, have had no holidays, as they have been doing this through. So they all have these pent-up holidays coming in. That is what we're trying to figure out.

We will talk with Canada and see what we can do in the next few minutes, and then we will come back.

MR. SPELLISCY: Just to be clear, I deny staff holidays all the time.

MR. LANDAU: It's on record.

--- Laughter.

THE CHAIR: Right. Would you like to take a few minutes now? You can also think about a time limit for submissions on costs, but that can be logically, like, two weeks after the post-hearing briefs, because obviously you have to gather the costs of the post-hearing briefs and whether you want just statements of costs, or whether you want an opportunity to comment on your opponent's statement.

MR. SPELLISCY: And what detail.

THE CHAIR: And in what detail in

terms of entitlement to costs.

MR. APPLETON: Does the Tribunal have any views of any form to guide us here?

THE CHAIR: I would say what we certainly need is a statement of costs. You can give some explanations. Was it about entitlement? You may have arguments about: This was caused by the other party, and therefore they should bear the costs, and so on.

Then I would give a short time limit, like two weeks after that, if there is any wish to comment on the opponent's submission, for instance, to say this cost is too high, or without an obligation to file a reply. Does that make sense? Good.

MR. APPLETON: Excellent. Thank you.

MR. BROWER: So we will wait around?

--- Recess at 4:01 p.m.

--- Upon resuming at 4:28 p.m.

THE CHAIR: Fine. I see you are ready to resume. Should I first -- could I give the floor to the claimant? Mr. Mullins.

MR. MULLINS: Thank you. Members

of the Tribunal, you'll be happy to know that counsel have been able to come up with a recommendation for a schedule, and so we propose the following: December 18th, 2014 for post hearing submissions, not briefs. We then -- simultaneous, as requested by the Tribunal.

And then for cost submissions, we are proposing to follow simultaneously on February 3rd, 2015 with also an agreement internally by January 15th to agree on format, so there is no surprises and we can kind of agree what each side is doing, and then try to work as possible to match what each side is doing so there is no fights.

Then once we file the submissions on February 3rd, both sides will respond to those submissions on February 26th.

THE CHAIR: 26th?

MR. MULLINS: Yes, yes, Madam Chair.

And just obviously beyond the holidays, counsel have travels and other briefs and stuff. So hopefully these dates will work out for the Panel, and they worked out with the schedules of counsel.

THE CHAIR: Is this an agreed

proposal?

MR. SPELLISCY: Yes. Of course, yes.

THE CHAIR: Yes. That's wonderful. Should we have a date for an agreed corrected transcript, or you would not want to go through this? I don't need it. As long as you can work with the transcript as it is, it is fine, and if there are any issues that come up, we could also take it from there.

MR. APPLETON: The transcript that's being produced -- and I will put it on the record now how wonderful the team with Teresa and Lisa have been, really wonderful transcripts. They certify them themselves based against the oral hearing. And they have been doing that, I believe, the next day or -- really like almost overnight. We're getting them first thing in the morning.

So the real issue is about confidentiality between the restricted or the confidential. So that is the only issue. And we had one issue that we identified amongst counsel where there was a document that was marked as being "confidential", but actually had been declassified, so that will have to be marked appropriately so it

will form part of the public transcript, rather than the private part.

But with that one exception, we think it would be relatively easy. We had not discussed not having to worry about the transcript. Personally I'm very much in favour of that. That would speed everything up. So I am very interested in what Mr. Spelliscy has to say about that.

THE CHAIR: So are we.

MR. SPELLISCY: I am not sure what the question was to me.

THE CHAIR: No. The question was: Can we simply live with the transcript as it is? And if there is a major issue that you discover as you work on it, you could raise it, but that would not be expected. Then we have the other issue, which is: What is the public version and what is the confidential version? And that needs to be sorted out somehow, some time, but it is not that urgent, unless there is something that escapes me.

MR. SPELLISCY: We're perfectly fine working with the certified versions that they have produced, the final versions.

THE CHAIR: All right. And how do

you want to go about the public-confidential version? I mean, you have been going through -- you have gone through this exercise before, so...

MR. APPLETON: Well, some exercises have been less successful than others.

THE CHAIR: So let's try to copy the successful ones.

MR. APPLETON: We haven't had one yet, but we're hoping.

It would seem to us that -- why don't we give the parties maybe two weeks, after we get all of the certified versions back, to be able to look at that just to see if there is anything. That would be the time to notify with respect to if something that is 'off' with respect to confidential and restricted.

Otherwise, I think there is no -- nothing that will prevent the Tribunal from being able to deal with things. You have the restricted version and, as far as I can tell, it is completely complete, as I have looked at those already.

And perhaps we're on the way to get what Judge Brower wants with everybody with

point-forms and as short as possible.

MR. BROWER: I'm not the only one.

--- Laughter.

THE CHAIR: It shouldn't be difficult, because each time something confidential was raised, it was said. So you can do a search of "confidential" and you should be able to locate all the passages that are relevant.

Two weeks for that? Is that fine?

MR. APPLETON: It would be two weeks from the receipt.

THE CHAIR: From receipt.

MR. APPLETON: Because it might take a few days, especially they have been going non-stop. But, yes, two weeks from the receipt of the final.

THE CHAIR: Fine. Good. Is there anything further that you -- yes. The Tribunal had some thought about receiving USB keys. I don't know whether that has been discussed among the parties.

There is, in those that we have received before the hearing on both sides, a few things missing. So it would be nice to have a complete one, plus it would be good that we have

the expert presentations, because now we only have them in hard copy, the opening and closing presentations, and possibly the indices of the witness expert bundles, because in case we need to go back to a tab number and I do not have the exhibit number, having the indices electronically would make it more efficient to look for.

MR. APPLETON: Counsel discussed part of your request already. We had agreed on a process by which anything that was introduced here at the hearing, which are demonstrative slides and presentations, would be given the next number for each side, "C" or "R", and it would be done chronologically.

So the opening slides would be the next number. For example, Mr. Goncalves's presentation today would be the next one for Canada, and if Canada has slides in closing, that would be the next one.

We would identify, though, we would like sort permission from the Tribunal if there are items that are missing. Maybe the Tribunal has already advised the parties and I don't know about it, or --

THE CHAIR: No, we have not. We

have not.

MR. APPLETON: If you advise us, we will work on that to get that done. So I think that that shouldn't be all that difficult.

With respect, though, to your last request about the indices, it's a little bit more tricky. We have already had some problems with this, so that's why I'm asking or identifying.

With respect to the experts that we have produced, all of their documents are identified, because we have forced all of them to put into a common record with us.

So, in other words, none of the witnesses have separate exhibits. We have already scheduled them into a number, and I believe that they always have an index in the reports of the documents, as well; right? I don't think there is one that does not.

With respect to Canada, though, for example, BRG, they have their own numbering system, and there are other witnesses that didn't do a schedule. They sometimes referred to a website in some of their things and it is a general website. It doesn't have anything else.

So I am not sure how you want to

handle that, and I am not sure it is necessary at this time.

THE CHAIR: I wouldn't want anything to be done other than simply receiving these sheets that we have in front of the witness binder that lists what is in the tabs, because in case on the transcript it only says "tab 10" and not the exhibit number, which sometimes happens, or in our notes we have only tab 10, it will help us. I mean, we can also do it on the paper, but it would be nice to have it electronically.

MR. APPLETON: Okay.

THE CHAIR: It is nothing but just these sheets that we have in the front of each witness bundle.

MR. APPLETON: Okay. Well, then that does raise one other issue. It is very minor.

Both sides had put in the engagement letters for witnesses in the witness bundles, but they weren't formally a part of the record. They were produced by order and exchanged, but they didn't have a number.

So we will need to -- anything that was put in the bundle, I believe for both sides, are the only document that was not already

on the record other than the presentations that were in some of the witness bundles. They would need to be scheduled, as well.

THE CHAIR: Yes. I mean, we have the engagement letters, because we received them. Even if they had no number, we received them and we looked at them.

MR. APPLETON: Yes.

THE CHAIR: So I don't think it is necessary to complicate matters with this. If we have what you have in here on both sides, then that is -- that will be fine.

MR. MULLINS: Madam Chair, did you need the indices just for the experts or for the witnesses, as well?

MR. LANDAU: All of them.

MR. MULLINS: It sounded like this was the issue.

THE CHAIR: Witnesses is probably more important.

MR. LANDAU: Yes.

MR. MULLINS: Yes.

MR. APPLETON: So just to confirm, each bundle that was put up, because it would have been referred to in the transcript, because we

didn't know if you wanted that, we always would give you the other number, to Mr. Mullins's chagrin. So you will get that, and I am sure Canada can do that easily, no problem.

THE CHAIR: Yes, I suppose. Fine. Is there anything else that we would need to agree on now?

MR. SPELLISCY: I had two questions that I would like on the post-hearing submissions, non-briefs.

For these, I assume it goes without saying that the evidentiary record is closed, so no new exhibits are to be cited?

THE CHAIR: Thank you for mentioning. Yes, it was implied. No new exhibits, unless the Tribunal requests something specific, but, otherwise, the record would be closed, yes.

MR. SPELLISCY: And my other question, because Judge Brower had talked about the roadmap with the facts. Is the Tribunal looking for submissions on issues of law, as well, in these post-hearing submissions, or do you want them to be evidentiary submissions?

THE CHAIR: Yes. We have discussed this and I would not wish to exclude that

you want to discuss some aspects of the law, in the sense that -- if I now think about causation, causation is a legal issue, but it is also factual.

And we have heard evidence about causation here, so you may wish to say, Well, on the basis of what we heard about that, that is the legal consequence of this.

So I would say that it is in your judgment how much law you want to include. There may be other issues where there are legal consequences from the evidence that was taken this week. Does that answer the question?

MR. SPELLISCY: Yes, I understand.

THE CHAIR: Are there any other points that we would need to raise before we close for the day? No.

MR. BROWER: Do we meet at 8:30?

THE CHAIR: No. We meet at 9:00 and we start. Yes, that will be fine. Good. So I am not wishing you a good evening, because that would be...

MR. APPLETON: Just think about -- we talked about tomorrow, because we will have a lot of surprises. The idea would be we start at 9:00. I assume since there are three

hours, maybe there would be some time reserved for rebuttal, but it is probably still too long for the transcript to go without a break.

So I assume that you would like at some point --

THE CHAIR: In the middle of the three hours, approximately, I would say we would have a break. That would lead us to about 12:30. Then we would have an hour lunch, and then we would carry on until five o'clock with a break again.

MR. APPLETON: Three hours.

THE CHAIR: Three hours gets us to 4:30, plus the break would give about five o'clock. Is that...

MR. APPLETON: I am just worried about the time. I think it should be workable, but imagine, for example -- because let's say, for example, that we were to use two hours and 45 minutes, so we would finish -- and we start right at 9:00, so we finish before 12:00.

Would you have Canada start then, or no? You would want to take the break, I imagine.

THE CHAIR: It would be more logical to have the break, but then we could have

an earlier lunch. That would make sense.

Maybe the lesson to be drawn from this is that we need to tell the Arbitration Place to be ready a little earlier so that we have more flexibility.

MR. APPLETON: Yes. That was my point.

THE CHAIR: Nothing further? Fine. Then have, all, a good evening. It will be a busy evening, but we are almost there.

--- Whereupon the hearing adjourned at 4:43 p.m., to be resumed on Friday, October 31, 2014 at 9:00 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided transcription and transcribed therefrom, the foregoing proceeding.

Teresa Forbes, CRR, RMR,
Computer-Aided Transcription

PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONORABLE CHARLES N. BROWER
MR. TOBY T. LANDAU QC
held at Arbitration Place
333 Bay Street., Suite 900, Toronto, Ontario
on Friday, October 31, 2014 at 9:00 a.m.

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Also Present:

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Saroja Kuruganty
Lucas McCall
Alex Miller
Harkamal Multani
Darian Parsons
Adriana Perez-Gil
Melissa Perrault
Chris Reynolds
Cole Robertson
Sejal Shah
Michael Solursh
Mirrun Zaveri

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Lisa Barrett, CRR, RMR, CSR	Court Reporter

INDEX

Toronto, Ontario

--- Upon resuming on Friday, October 31, 2014

at 9:00 a.m.

THE CHAIR: Let me go on the record, then. Good morning, everyone. We are starting the sixth and last day of this hearing. I also greet those who are in the viewing room. We will now hear oral argument, and we'll start, of course, with the Claimant, Mr. Appleton. You have the floor.

CLOSING SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Thank you very much, Madam President, and to the members of the Tribunal. I first, of course, would like to thank you very, very much for the time that you've spent, and obviously you've read the materials, and you've spent a lot of care in the preparation for this hearing. I'm sure that myself and Mr. Spelliscy, on behalf of Canada, and certainly all of our delegations thank you very, very much for this attention to the detail.

I hope that we're able to just refresh some of your memory with some of the testimony that's occurred during this hearing and to be in a position to be able to assist you as you

make your deliberations, and hopefully you will be able to hear me clearly today.

Now, I also understand that we will distribute some materials by way of demonstrative aids, but I'm going to start while that's going on so that we can get everything going.

The testimony of the witnesses that you have heard confirms that what we have said in our opening statement is true. And the story of what happened to Mesa, not only is true, it is clear; it is simple; it is egregious; and it is outrageous.

As we said in our opening, the Mesa story is a story of a secret process, secret deals, arbitrary rules, and selective enforcement of those rules in the service of political expediency rather than public integrity and transparency that the ratepayers of Ontario deserve and that those proponents who would come here should expect.

There is nothing innocent or discretional in entering into a secret deal with one foreign investor to the detriment of other investors which Ontario was actively encouraging to

invest.

Did the government want to establish a renewable energy program? Yes. Was this a laudable goal? Yes. But under the NAFTA, Ontario cannot give favourable treatment to one investor over another. Under the NAFTA, Ontario was bound to protect investors from NAFTA parties and their investments like Mesa and its investments in Ontario. And if Ontario wanted to give additional benefits to a foreign investor, it was also bound under the NAFTA to provide those same benefits to investors and investments of a NAFTA party. Ontario did not do this.

By entering into a secret deal with the Korean Consortium, Ontario's investment environment for renewable energy lost the veneer of a transparent process motivated by laudable environmental goals and instead painted a disturbing picture of favoritism and systemically unfair and unlawful regulatory conduct.

The evidence that has been present to you unequivocally and conclusively demonstrates what really happened. Canada has done its best to portray the investor's case as being a tall tale of speculative intent. And as we have seen, it is far

from a tall tale. Canada's picture confuses political expediency with bona fide policy objectives. Canada's picture confuses the ordinary statutory authority of public officials to do specific things, in specific circumstances, in good faith, and with carte blanche licence to do anything they want to withhold information at will, to distort information at will, and to abuse the authority entrusted to them.

Meanwhile, what Canada does say is much less important than what it fails to say. Canada is conspicuously silent about some of the fundamental issues in this case. Canada does not address the fact that the local content requirements imposed by Ontario under the FIT Program were always violative of the NAFTA.

Canada did not even defend its conduct in any of its written pleadings, nor did it do so this week. Canada knows it was wrong.

Canada does not address the fact that the treatment provided to the Korean Consortium by Ontario, under the GEIA, was more favourable than the treatment provided to Mesa. Canada did not even defend its conduct in any of its written pleadings. Canada, again, knows

that it's wrong.

Canada does not address the fact that the Korean Consortium did not have to meet any requirements of any kind with respect to the guaranteed priority access to the first 500 megawatts of transmission access -- I can pause for you, if you like.

THE CHAIR: I'm starting to cough.

MR. APPLETON: -- which was accorded to the Korean Consortium in September 2009, more than three months before the GEIA was even signed, at a time when Sue Lo and Rick Jennings confirmed that there was no binding agreement between Ontario and the Korean Consortium.

Canada cannot defend this, so it argues that there is no damage to Mesa arising from this harm, but Canada is wrong. Canada ignores the fundamental legal duty and responsibility of public servants who exercise any statutory or discretionary authority to do so fairly, reasonably, and in good faith.

These are not issues of technicality or semantics. These omissions go to the heart of this case, and these omissions go to

the heart of the rule of law, the rule of law which is the bedrock of international law enshrined in the NAFTA in Article 1105, and it is the bedrock of Canadian law, and it applies at all times to all public servants, be they elected Ministers or public servants, and covers also the code of conduct of the Ontario Power Authority.

Canada's own witnesses recognize those duties here; that they had failed to comply with them -- sorry, they recognize these duties here, but they failed to comply with them. And the rule of law in international law and in domestic law is what this case is fundamentally about, because, at it's essence, the rule of law is as simple as the basic facts of this case and applies to the exercise of all public authority. It says that no public authority, no matter how discretionary it may be, is unfettered.

Put simply, the rule of law requires that all public authority must be exercised fairly and in good faith and on the basis only of relevant considerations assessed reasonably, honestly, objectively, transparently, and impartially, and only for the purpose which the authority was granted.

Anything else or anything less is an abuse of authority, an abuse of public trust, abuse of process. That makes any resulting act or decision a breach of jurisdiction and, therefore, ultra vires.

The unquestionable meaning and practical application of these bedrock principles comes from the Supreme Court of Canada, and those cases are on the record and are also clearly reflected in the Ontario Power Authority's employee code of conduct, which is Exhibit C-582.

OPA witness Jim MacDougall and others acknowledge that these bedrock fairness principles proscribe what was at all times expected of them as public servants. What these basic principles of fairness, reasonableness, and good faith require of all public servants is a fundamental fact in this case that Canada ignores.

The Ontario government made a bad deal when it entered into a secret MOU, so secret that it did not even tell the Ontario Power Authority, the very body that would be responsible for implementing any subsequent agreement. The Ontario government signed the GEIA agreement in the

face of evidence of the success of the FIT Program without Cabinet approval and to the dismay of the organization that would eventually be forced to implement it. When the Korean Consortium didn't comply with the terms of the GEIA, the Ontario government still didn't cancel the deal. Instead, Ontario continuously permitted Samsung to have priority access, the same access which blocked Mesa out of the Bruce Region.

Canada purports to downplay this by citing a January 2010 press backgrounder and purports that the Premier of Ontario was all ears for similar deals. This may be so, but as we saw during the hearing, his hands were tied. Although many other companies approach Ontario with a similar deal, the Ontario government rejected all of these.

Worse, Ontario's transmission grid could not even sustain the GEIA and the FIT Program at the same time. As a result, the OPA was forced to constraint the interest of investors under the FIT Program to ensure that the government's special deal with the Korean Consortium was protected. This was a violation of NAFTA Articles 1102, 1103, and 1105. Ontario should have either given all

renewable energy investors it was attempting to attract the same deal or not given anyone a special deal. But Ontario did not do either. Instead, it chose to give favourable treatment to a non-NAFTA party investor.

Now, it must be held accountable for breaching the obligations of the NAFTA Article 1103 Most Favoured Nation Treatment obligation by providing more favourable treatment to the Korean Consortium than it accorded to Mesa in like circumstances.

Canada also ignores the basic underlying fact that all of the actions of public officials, be they the OPA, when directed by the government, or the Ministry of Energy or the Premier's office, and all of their decisions were subsequent to a duty to exercise a public authority fairly, reasonably, and in good faith. This manifest failure of the public officials involved to respect and adhere to these two fundamental principles that Canada has tellingly chosen in this arbitration to ignore makes everything done by those public officials unlawful, each and every step of the way.

Throughout, Mesa itself acted in

good faith and spared no expense to satisfy all of the regulatory requirements and to be a good corporate citizen of Ontario and Canada. Mesa was prepared to invest over $1.2 billion in Ontario. It made actual out-of-pocket investments of over $160 million in its renewable energy projects targeted in Ontario. Both Mr. Pickens and Mr. Robertson testified that they believed in a fair, transparent, rules-based process would ultimately prevail in Ontario. That's the basic expectation of investors in the rules-based program.

There is nothing better that they or Mesa could possibly have done. Until these proceedings, Mesa had no idea of the parallel universe of deception and concealment that was occurring behind their backs to deprive them of fairness and equality. Their only recourse is to seek redress from this Tribunal under the NAFTA.

And as we've review the evidence from this hearing, we will see clear examples of gross unfairness where Mesa was told that it could not have information, but where others, like NextEra, had better access, and they received sensitive information about undisclosed FIT Program

changes.

We can all ask ourselves this question: In any of our dealings with government officials, would any of us feel that we have been treated fairly if government officials knowingly, arbitrarily, and for no proper purpose -- in fact, for an improper purpose -- concealed critically important information preventing us from doing what we were otherwise entitled to do or provided us with erroneous information and then concealed from us the actual content of the secret agreements, all to take the political pressure off themselves?

This whole process was not carried out in good faith. This was not honesty. This was not fairness. This process was infused with raw politics, arbitrariness, and an egregious abuse of authority.

And what was it intended to do? It was intended to send Mr. Pickens and his Mesa team packing back to Texas where they came from and instead to favour those with inside connections to the government who would be able to profit from what appeared to be a transparent process, but which in reality was not. It was a cesspool. It was shameful. I feel very badly

after seeing what went on here for my fellow Ontarians and the ratepayers of Ontario. They are having to bear the burden of the shameful behaviour.

Mesa came to Canada expecting a fair process, a transparent rules-based process for renewable energy generation projects, but Mesa did not come expecting the system to be rigged against them. Political favoritism, cronyism, or simple arbitrariness cannot be allowed to win the day, and politicians and officials whose highest duty is to preserve the rule of law cannot be allowed to abuse the system entrusted to their care to run roughshod over the rights of investors we welcome to this country to invest in legitimate projects and to whom NAFTA guarantees fair and equity treatment, national treatment, and Most Favoured Nation Treatment, and, of course, protections against prohibited local content rules.

So now that we have completed the witness hearing, we are able to review the facts, and the facts demonstrate the violations of the NAFTA alleged by Mesa.

Now, I'm going to turn to my colleague Mr. Mullins to piece some of the evidence

together and spare my throat a little bit, and then I will come back and have some more comments. Thank you. Mr. Mullins, please.

CLOSING SUBMISSIONS BY MR. MULLINS:

MR. MULLINS: Good morning, members of the Tribunal. On behalf of my client, I appreciate the time that you've given this case, a very significant case to our client and, as Mr. Appleton said, to the people of Ontario.

It's been a long week of evidence, so we thought it would be helpful for are for this proceeding -- obviously we understood what you'd like for the post-hearing briefs. We thought it would be helpful to tie the evidence together from the beginning to the end, and it might accomplish two things: To talk about there were simultaneously events going on, the Korean Consortium deal and the FIT Program, and how they are interrelated and how it affected our client.

I'd also like the opportunity, in addition, to remind the Tribunal of some of the evidence we got in 1782.

Upon reflection of the evidence that I saw this week, I went back to the deposition

of Colin Edwards, and I want to present to you some portions of that that show you exactly what's going on and what Pattern was thinking and what they were, and I think you'll find it very telling as to what happened here.

First slide. That slide, please.

As we learned from these proceedings, Samsung approached the Government of Ontario in August of 2008 for a special deal on renewable energy. And as Mr. Jennings admitted, on examining, we asked him:

> "Can you tell the Tribunal what Samsung's experience was with renewable energy at the time they approached you?
>
> "ANSWER: So they were certainly a very large international conglomerate that was substantially well financed. They had not, themselves, developed, as far as I know, wind or solar. Again, this was a very large component, financially sound entity that was look

continuing to invest in Ontario. Yes, they were not an internationally known developer of renewable energy." [As read]

In other words, Samsung had no experience whatsoever with developing wind or solar power.

That's completely undisputed. This was an unsolicited bid, and the Government of Ontario rather than trying to determine whether any other investor, whether a company that actually was in the industry of energy could provide a better deal for the ratepayers of Ontario, decided to strike a deal with the first company that came to them.

Why didn't the government seek a better deal? According to Mr. Jennings, it was solely to protects Samsung's commercial offer. He said it was unusual for the government to shop around contracts to ensure that ratepayers who ultimately will pay the price are getting the best deal. Absolutely no effort is made at all to determine if anyone else would be preferable.

As you saw from Mr. Jenning's

testimony, well, you know, they defended the decision because Samsung is big and renowned. Remember, I think, the Chair asked -- I think it was Mr. Jennings. She said, "Well, there are a lot of big companies in the world, Mr. Jennings." And any reader of a financial paper knows big and famous companies fall all the time, and it is not simply sufficient to say, "Well, I'm going to cut a special deal with somebody just because I've heard of them." Without criteria or analysis, how in the world can Ontario possibly know that it was getting a better deal from Samsung than any other company, large or small?

The answer is simple: It could not. Despite this, despite absolutely no analysis whatsoever, in December of 2008, the Government of Ontario entered into a secret Memorandum of Understanding with Samsung and the Korean Electric Power Company -- we'll call KEPCO -- an agreement reserving 2,500 megawatts of capacity of Ontario's grid for exclusive negotiations and requiring confidentiality.

Now, did the government ask the OPA or any other entity running the transmission group and its allocation before doing this? We

know the answer. The answer is no. As confirmed in this hearing, the OPA did not know. The OEB did not know. No one knew until the MOU was signed, and the public did not even know about a potential deal until the FIT Program had already been announced.

And that is going to be a crucial fact. There has been some talk about, "Well, you know, the die was cast. You can't complain for stuff that we did before you got involved." The die was cast, and there is clear violations well within the time period after we began investing, and we'll go through those facts in a moment. Now, this incredibly, not only do they enter into an MOU, they don't even follow it.

Now, read the MOU. It required -- required -- the parties to conduct a feasibility study. So even if you believed the witnesses to say, "You know, we thought it was a big company, and we thought they could do a great job, so what we're going to do, we're going to test it out. So we're going to allow a feasibility study to determine whether a final agreement will be feasible."

And then it says, we're going to

enter into a conditional agreement -- read the MOU -- a conditional agreement before entering into a final agreement. Guess what? Neither happened. Neither one of them. They'd even file the MOU the date signed.

The Auditor General, later, would do a scathing report about the failure to do the most basic study, a report that was not -- those factual findings were got contested either by the Ministry of Energy or the OPA.

None of this stopped the Government of Ontario from entering into a binding framework later in 2010.

And this is a crucial fact, members of the Tribunal. They entered a binding agreement well after our clients invested. There is simply no dispute about that.

Now, why Ontario was doing a deal with Samsung, frankly, remains a mystery. Again, before the OPA is made aware of the deal, the OPA had consulted with the public and stakeholders from March 2009 to July of 2009, through webcasts and teleconferences, with respect to the development of the FIT Program. So while the FIT Program was launched in September 2009, it was obviously made

public -- this is not something that came up overnight -- throughout 2009. It was notified that it was coming in.

Now, I do need to -- that slide is confidential, so could we go confidential, please?

--- Upon commencing confidential session at 9:31 a.m. under separate cover

--- Upon resuming in public session at 9:32 a.m.

MR. MULLINS: Thank you. Are we back? What the OPA does not know was that the government simultaneously was negotiating with Samsung.

Then, in May of 2009, the Government of Ontario released the Green Energy and Green Economy Act. This program empowered the OPA to exercise the powers of the government and carry out a Feed-in Tariff program. The purpose of the FIT Program was to encourage foreign investors to invest in Ontario by developing in renewable energy projects in exchange for a fixed term and fixed-price contracts.

One of those companies that was attracted by the OPA's public consultations was my client Mesa Power. Mesa, unlike Samsung, had significant experience in the development of energy

projects and was expanding into clean energy and renewable energy. Mesa successfully has developed the 278-megawatt Stephens Ridge wind project, which was later sold. It established a strategic wind and energy partnership with General Electric company, one of the most powerful and largest companies in the world. It had agreement for a reliable supply of whirlwind turbines. Mesa hired some of the most experienced wind developers in Ontario who previously had developed the largest wind projects in Ontario.

Please go to the next slide.

Now, we asked Mr. Jennings, about, "Wasn't it reasonable for potential stakeholders to recognize the FIT Program was coming in, in 2009 and to rely on the fact that your country was seeking investment?" He answered yes. So the legislation was intended to promote it, and there was specific consultation with stakeholders, some of them I was involved in, so it was prospective investors who not only knew about the program but had been involved in the consultations of it. So in the FIT Programs, there's consultations. In the secret Korean Consortium deal, there's not even consultation with the OPA.

Now, the Government of Ontario suspected and was counting on investors commencing their investment in Ontario before the launch of the FIT Program, and this is precisely what Mesa did. It was looking to invest in Ontario since the summer of 2009, and it closed on the acquisition of the Twenty-Two Degrees project in August of 2009. That's when our client, at a minimum, began investing in Ontario. It is a significant date.

The guaranteed FIT price -- guaranteed FIT price -- was 13.5 cents per kilowatt hour for a 20-year period, backed by Ontario's ratepayers, and obviously was very attractive.

The FIT Program appeared to have a predictable rules-based and transparent process. It turns out that last part was completely untrue.

Mesa expected, as it would be reasonable of any investor, that if you played by the rules and you did hard work, you'd obtain a contract. And what was a great benefit for Mesa was the location of the wind sites to develop, the Bruce Region. There was reliable wind there, and it was confirmed by wind studies for all sites it chose.

Now, at the time, neither the FIT proponents, again, nor the OPA itself knew that transmission capacity, which was expected to be awarded on this FIT Program that had been publicly announced, would be poached by the Korean Consortium. No one knew, not even the Korean Consortium, because this didn't happen until later, that it would eventually be taken into Bruce Region in 2010 after our client had already invested and picked its site. Remember, they picked their sites in November of 2010; right? Korea didn't take their selection to Bruce in 2010.

So we keep an hearing at the opening and throughout the proceedings, "Well, shouldn't you have inspected to know that Korea was here? Did you not read these public announcements?" No announcement could possibly have told anyone that we were going to go to the Bruce, because it hadn't happened yet. Not even the Korean Consortium knew they were going to Bruce in 2009.

In fact, as Mr. MacDougall admitted during his testimony, he, as one of the main FIT supporters, was not pleased with the

secret deal with the Korean Consortium when he found out. And Arbitrator Landau specifically asked him to follow up on a question that Mr. MacDougall, who I think you will find was fairly candid in these proceedings -- he said he was disappointed, and Mr. Landau followed up. "Can you explain that? Why not? Why were you not pleased?" And Arbitrator Landau went on:

> "What I'm driving at is, as somebody who was involved in the designing of the FIT Program, what kind of an impact did you see from the existence of a contract with the Korean Consortium?" [As read]

Remember, this was still secret from the public. This was during the time period when only OPA knew. Mr. MacDougall responds:

> "Well, certainly leading into, well, the FIT Program design, we knew that there was thousands and thousands of megawatts of interest of project development in

> Ontario, as witnessed by some of the prior renewable energy procurement activities. So I knew that there would be more demand for contracts than there would be supply of contract capacity. So my professional reaction was this just creates less supply of FIT contracts availability because a portion of the available grid capacity will necessarily need to be allocated to the Korean Consortium." [As read]

None of this is told to the investors in 2009. That testimony is very telling. This is because, by definition, by Mr. MacDougall's definition, the Korean Consortium was necessarily competing with FIT developers due to their priority access and would result in less contracts to be awarded on the FIT Program. He was wondering what was going on.

Here is one of the most important

things in the case, and I hope the Tribunal caught this in testimony. It was only an MOU -- if we go to the next slide -- because I asked Mr. Jennings about this because I wanted to be clear. I asked him, "You could walk away from this; right?"

So I asked him:

> "Q.So, if, for example, at any time Ontario or the Korean Consortium says "You know what, this is not working for me" they can just walk away from it; right?

A. So that's generally what an MOU is. I would have to refamiliarise myself with what -- there were specific things about the roles and relationships of each party." [As read]

Of course, they could walk away. They could walk away before January 2010, before August 2009 when my client began investing, before November 2009 when my client started picking wind sites and filing FIT applications. Of course, they could walk away. So this idea that all the bad acts occurred before we invested is absolutely ludicrous.

Now, when the FIT Program was

launched in September 2009, as we heard this week from Mr. Jennings, the program was actually a continuation of an extremely successful renewable energy initiative. And, in fact, Mr. Jennings admitted that the FIT Program received an overwhelming response:

> "Q.And in fact you got an overwhelming response to the FIT Program in 2009; correct?
> A. Yes, yes." [As read]

When the program opened, there was a two-month window which proponents could submit their applications. It's called the launch period. Sue Lo admitted during the hearing this week that the OPA received close to 10,000 megawatts in applications between October 1, 2009 and November 30, 2009. Again, no agreement had been signed with the Korean Consortium at this time. Why did they not pull the plug then?

Now, Ontario has told you, "Well we needed this anchor tenant." We have now uncontroverted evidence that, by the time Ontario undertook any legal obligation to Samsung, there were thousands and thousands of tenants clamouring for the mall space. And some of these tenants were

high-profile tenants -- like NextEra, our joint venture party, GE -- that actually could be an anchor tenant if that was your real theory.

Ironically, the anchor tenant had absolutely no experience at all. But even if you believe this anchor tenant theory, by the time they signed that agreement, they didn't need it. They had real evidence, not just a survey back in 2009, but real evidence. They had 10,000 megawatts of capacity before they signed the agreement, which, Mr. Jennings told you, they didn't have to sign.

Now, these wind projects that were being submitted were actually ironically more shovel ready than the ones that end up in the GEIA program, meaning they were in more advanced stages of development and would be ranked ahead of others that were not as ready. And shovel readiness was a yardstick in which the FIT applications were ranked.

Now, knowing that its TTD and Arran projects were in the advanced stage in development with turbines on order and with a very local experience, local development team, and with leases dating back to 2003, Mesa reasonably expected its projects would be very highly ranked

in the region -- and we'll talk about that in a moment -- and Mesa was not wrong on that.

Both of Mesa's original projects were located in the Bruce transmission region. Mesa was aware that a new transmission line was coming to that area, and when approved -- and it was approved timely. We talk about appeals and when you knew that the line was coming. The reality is that the line came in on time, and we were within the region for the original two projects, and then our later two projects, as well, would have been in the Bruce Region. In fact, the approval for the line came later.

Now, what happens? We've heard constantly through opening, through questioning, "Well, we told everybody about this deal when you needed to know about it." It is complete reverse history. Although the OPA was informed of the secret deal, it also kept the deal quiet. The OPA kept the deal quiet, and meanwhile the investors are being lured into Ontario through the FIT Program, all the while believing they had a fair process in which all the available capacity on the FIT Program would be available to the FIT proponents, but the secrecy continued.

As we heard from Mr. Jennings, we asked him, "So if, for example, at any time" -- sorry, next slide, please. I apologize. So we asked Mr. Jennings:

> "Q.So, if I understand your answer then, the plan was to not publicly reveal the status of these negotiations until you obtained Cabinet approval; correct?
>
> A. Which is -- yes, which is standard practice for anything that goes to Cabinet." [As read]

So what Mr. Jennings tried to tell us is, "Well, we had to keep this quiet because we had to go to the cabinet." I asked the Tribunal to read the Auditor General's report. It states that no Cabinet approval was obtained. None. It was discussed with the Cabinet. They didn't get Cabinet approval.

The secrecy actually continued until the Toronto Star broke this story, and the actual details of the deal were not provided. That article did not disclose the generation capacity, did not disclose the value of the economic adder,

that Samsung would not have to manufacture any components. We heard, you know, we're going to have this manufacturing component, but the reality is that Samsung did not have to manufacture anything. That's been very clear through the testimony. And it did not reflect that Samsung would get priority transmission. This is back in the September 2009 article. The article did not disclose that the deal was not only with Samsung but with its partner KEPCO; much less did it disclosure that Samsung or the Korean Consortium would bring another investor into the deal, all without the need for appropriate approval, and did not disclose that Samsung had already entered in negotiations with Pattern in August of 2009. We obtained that testimony through a deposition of Mr. Colin Edwards at Pattern, that Pattern had already been part of the deal in August of 2009.

Now, we have heard so much about how forthright Ontario was about this deal. Nothing can be further from the truth. What was the reaction to the Star's story when it broke in September 2009? The Ontario government said they:

"Regretted --"

Regretted.

"-- the fact that the secret deal had become known and prematurely entered into the public domain." [As read]

And the reason the government may have wanted this secrecy was perhaps because it was about to publicly launch a FIT Program on September 24, 2009, and perhaps it didn't want the FIT investors from backing out of the FIT Program and try to get a similar deal.

Ontario was interested in getting the FIT Program to work for the Korean Consortium, not the only way around. But we don't need to speculate. Here's the thing: Originally, the secrecy was not about protecting the Korean Consortium's commercial terms. You saw evidence that the Korean Consortium, in fact, to this deal public.

Mr. Jennings, in fact, admitted that. We asked him:

"Q. You would agree with me--"

We showed him the e-mail from Mr. Yoo from Samsung.

"Q.You would agree with me,

sir, though Mr. Yoo from Samsung did not have any problem releasing the MOU as of February of 2009?

A. Yeah, yes, he's looking to do that."

[As read]

The reason this secret deal was wasn't released is because the Government of Ontario was not ready to answer the questions the media and other government official would have.

So did the Ministry of Energy put the brakes on the secret deal when the news was leaked? No. Instead, immediately after the newspaper leak, Deputy Premier Smitherman provided a Ministerial Direction to the OPA, ordering it to set aside 500 megawatts of electrical transmission capacity for unnamed proponents -- this directive didn't even name who the proponents were -- even before any binding deal had been signed with the Korean Consortium. This directive does not state the unnamed proponents also were received in the Bruce Region, because obviously it hadn't happened yet. It didn't happen until a year later. Nor,

obviously, until years later, that any applicant in the Bruce Region could be bumped out. It couldn't have done so because that happened afterwards, years afterward.

The cloak of secrecy continued. Ontario continued negotiations of what would be known as the GEIA in secret. According to leaked press reports, there were concerns that the deal would take too much out of the provincial purse,

Mr. Smitherman was attacked by his colleagues about the deal specifics in the press. He ends up resigning. These press reports also consistently mention that Samsung would be building a wind turbine manufacturing plant in Ontario. This was the information given to the investors, and it was completely false.

But the deal was opposed by the Cabinet and, thus, was not approved. So the investors were being told that this was being imposed by the Cabinet, so the investors reasonably believed this deal may not go forward while they are being required to participate in the FIT Program. And, in fact, in November 2009, the chief of staff of the Ministry of Energy and Document C-683 actually instructed Samsung to keep all the

information about its relationship with Ontario secret. The chief of staff of the Ministry of Energy told Samsung the following. This is Document C-683. You, Samsung:

> "...should not be going ahead with any public announcements on this or any other piece of the deal because it would put the government 'in a difficult position.'" [As read]

On January 24, 2010, months after my client began investing in this country, months after it had filed FIT contracts, that's when, without Cabinet approval, despite the fact that the FIT Program was wildly successful in the quotes from Cabinet's own witnesses, the Government of Ontario announced that it had negotiated and signed the GEIA with the Korean Consortium, a renewable energy development agreement, guaranteed exclusive access to 2,500 megawatts of transmission capacity over five phases. The GEIA was signed by the Deputy Minister of Ontario in the presence of the Premier of Ontario. By this time, our client had invested in

Ontario in months earlier.

Ontario trumpeted this agreement as a $7 billion investment in renewable energy in Ontario that would boost manufacturing jobs. Ontario also admits in its press backgrounder that the contracts executed under the GEIA will be the same as those under the FIT Program and subject to the same base rates as that provided the FIT providers, but Ontario didn't make the GEIA public.

We've heard, "Oh, we had to keep the GEIA confidential while we're negotiating it." There wasn't a lot of logic to that once you signed it, and, in fact, it wasn't a lot of logic to it that they ended up releasing it after we sued to go get it in California. That's when it became public.

Withholding this agreement, Ontario did not divulge the extraordinary generous terms granted to the Korean Consortium and what little those investors had to do in exchange for these benefits. Most important, in spite of the after-the-fact arguments by Canada in these hearings, Ontario did not tell the public that the Korean Consortium would receive priority transmission and, in effect, be able to jump the

capacity line which every other investor was in line for. It doesn't say they. They point to words like "assurance of transmissions." As explained by Mesa industry expert Seabron Adamson, that's a vague term, and it doesn't say "Much of anything."

The agreement was already signed. If there had been a need to keep the deal confidential until it was signed, there wasn't such a need once it was signed. There was no reason to keep this contract quiet.

The only reason, we found out, that they kept it confidential, as Ms. Lo told us, was to protect the commercial interest of Samsung. That's what she said they did. Samsung needed to keep it quiet so they could negotiate the deal to try to obtain contracts and projects to fill up its obligations under the GEIA.

Instead of engaging in a fair, competitive, and transparent request for proposal process, the Government of Ontario conducted secret meetings in negotiation with Samsung that culminated in signing an agreement which lacked public support.

While the Ministry of Energy

originally believed they Cabinet approval, as testified by Mr. Jennings, when the approval could not be secured, the Ministry changed course and entered the agreement without getting Cabinet approval.

Go to slide 6.

The press was horrible to this deal. McGuinty's own Ministers vehemently opposed the deal in a rancourous Cabinet meeting.

Next slide. The leader of opposition said it was entered without the most basic of public reviews. Ms. Lo's response to this was, of course, they are upset. They are the opposition.

Once the Ontario's opposition leader caught wind of Samsung's deal, he requested it to be vetted by the Auditor General, but it was too late by then. It had already been signed.

As noted earlier, Ontario's Auditor-General, whose task it is to assess commercial viability of significant decisions by the government, was surprised to learn that no due diligence had been carried out before the Samsung deal was entered into. It was rush through in an unusual approval process without the typical

commercial checks and balances.

If you go to slide 8, it finds that:

> "The normal due diligence had not been followed." [As read]

And he goes on to say.

> "According to the Ministry, the decision to enter into the agreement with the consortium was made by the government. Cabinet was briefed, but no formal Cabinet approval was required." [As read]

And earlier:

> "For large projects such as a consortium agreement, we expected but did not find the comprehensive and detailed economic analysis of business case had been prepared."

Ironically, it actually had been required in the MOU and completely ignored. Transparency, a fundamental element of the rule of

law, clearly was not followed before entering into the agreement, and this happened -- the agreement was signed after we invested, but there was still a chance for Ontario to pull back to protect my client and other investors even after they signed the agreement, as early as 2010. Samsung didn't even comply with the agreement they entered.

Ms. Lo explained, after receiving the benefits of the special deal, she said, they incredibly wanted the same benefits that the FIT proponents had and excluding these extensions of time.

Go to slide 9.

She goes on. We asked her questions, and so I'm asking her at the beginning of these questionings, about -- remember, I'm asking her a question:

> "Okay. So you had the opportunity to tell the Korean Consortium that we are not going to proceed with this GEIA until you had agreed to make the changes; correct?" [As read]

This is what I'm asking her by:

"They are now in breach of the agreement; right?

"ANSWER: I don't think it was as blunt as that. It was a delicate negotiation because we also didn't want to see the entire GEIA nullified.

"QUESTION: You exercised that leverage with the Korean Consortium?

"ANSWER: Yes."

In other words, they threatened the Korean Consortium. They knew they could have backed out of this agreement. They knew they already had 10,000 megawatts of applications, and they still didn't get out it, and they had a chance to get out of this agreement before these contracts were awarded, and they still did not do it. And then she goes on to talk about how the Korean Consortium wanted some benefits that the FIT proponents had received, ironically, the special they deal they got.

Had the Government of Ontario exercised its leverage and taken the opportunity to

terminate the contract, then the Korean Consortium would have not reserved 500 megawatts in Bruce, and my client, Mesa, would have received contracts for TTD and Arran and the other projects.

In fact, with respect to the two projects, you heard yesterday that Canada's own expert admitted that, had the GEIA deal not been done, our clients would have gotten two projects in Bruce. He admitted that yesterday in his slides and on questioning from Arbitrator Brower.

You know the deal of the Samsung deal, but for now let me complete the relevant timeline of events.

Now, the FIT Program itself had elaborate rules that our client thought would be followed. After announcing first round contract award, the OPA advised stakeholders in March of 2010 and May of 2010 that an ECT would be run -- now, this is when they announced it. We saw the webinars -- and that the ECT would begin in August of 2010.

In May of 2010, Mesa submitted applications for two additional projects, Summerhill and North Bruce. These projects were geographically situated next to the TTD and Arran

projects, and such, they were an ideal location for generating wind off of Lake Erie. And all these projects were in the Bruce region.

Now, in July of 2010, Mesa and the other proponents were informed that the ECT was temporarily postponed, in July of 2010. Now, Mesa itself was not concerned about this delay as it remained confident that, once the ECT was run, its TTD and Arran projects would receive contracts, or, worse, they would be placed in a special secure queue called the "FIT production line."

Now, at this point, I would like to talk a little bit -- and I told this at the beginning -- about the testimony of Pattern Energy's Colin Edwards.

I took this guy's deposition a couple of years ago in California in the 7282 applications. My old mentor, Sandy Downberg (phon) he is a former ADA president, wonderful lawyer, I think he would say that Pattern has no dog in this hunt; right? They are not in this case. And Mr. Edwards' testimony, extremely candid, and I will be referring to it in some of my remarks here.

His testimony is nothing less than

devastating to Canada's arguments. For one thing, while most FIT proponents were limited to the FIT program, Pattern -- remember, they'd been negotiating since August of 2009 -- had submitted ten projects in the FIT program, he testified and, meanwhile, was also a joint-venture partner of the Korean Consortium.

Go to slide 10.

Pattern submitted a number of projects to the FIT Program in November of 2009. He says:

"At the same time, we were in negotiations with Samsung."

[As read]

Now, Mr. Edwards had the overall responsibility for the Canadian wind development business and -- for Pattern in its joint venture, and he says that of these ten projects, once -- he only got one in the FIT Program, and what he tells us is that, at that point, he then took five of his projects, including the one he wanted, four that failed, and he put it in the GEIA.

One of these, Merlin, had gotten a knit contract, and so he got his security deposit back. Other FIT proponents who had gotten

contracts were not allowed to jump into the GEIA.

And Pattern began to buy low-hanging fruit. I think Arbitrator Brower had asked one of the witnesses, "Did it look like Pattern was going around and grabbing some of these lower-ranked projects?" I actually had the exact same question that arbitrator Brower had two years ago.

If you go to slide 11.

So my question to Mr. Edwards:

> "Q. And how would that affect your decision, the ranking."
>
> [As read]

This is in the context of me asking him about what projects you're buying. He says:

> "A. We would -- parties who are ranked higher on the list would be more likely to stay in the queue in the hopes of keeping their project and receiving the FIT contract, knowing that there was transmission capacity coming to this area."

"Q. And the lower ones, well, they would be low-ranking fruit; right?

"A. The low-ranked parties would have a lesser chance to get a FIT contract.

"Q. And it would be more easily able to buy their assets in order fulfil your obligations under the GEIA as a joint venture; correct?

"A.Perhaps." [As read]

Well, in fact, it wasn't perhaps. I went through a list of the projects he bought. Listen to this: Pattern, after the rankings come out, they buy Rank No. 13, No. 16, No. 17, No. 33, No. 34, and No. 44 of the West London region, low-hanging fruit. Fruit was on the ground. He admitted in his deposition that was his strategy.

These projects additionally received the benefit of getting their deposits back. The ones he bought, they got their deposits back from FIT. This is all in his deposition. Pattern and the Korean Consortium took advantage of their priority access to buy FIT projects that were

low in the queue due to the fact that these projects were at the bottom of the queue and were unlikely to get a FIT contract.

Pattern even approached my client and tried to get its contracts. Of course, our client did not know they were going to be thrown on the Bruce.

Make no mistake, the Korean Consortium had exclusive control who was going to be in the GEIA.

As part of the deal -- you remember I talked to Mr. Jennings and Ms. Lo about this. As part of a deal, Korean Consortium and pattern -- this is in his deposition as well they had an exclusive joint venture agreement amongst themselves, and, in fact, they agreed amongst themselves that there could be no other joint venture agreement for up to 1,000 megawatts. In other words, even if we wanted to be in the GEIA program with Korean Consortium, we couldn't get in because they already locked themselves in with Pattern up to 1,000 megawatts. Not that Samsung was going to allow us to do it anyway, not that there was any ability to petition the Ontario government to get into it, but they even bought

themselves in. This is, again, all in the deposition of Mr. Edwards.

Make no mistake, This was not some alternative program. You know, you have the fit opportunity and the GEIA opportunity. The GEIA opportunity was no opportunity at all for my client. Who is fooling who? It was a sweetheart deal given to one competitor and to get a jump out of everybody else and then be able to shut people out. Ms. Lo, herself, recognizes this in slide 12:

> "Q. You recognise that the KC bumped out people in the FIT Program; right?
>
> "A.Yes." [As read]

The GEIA partners would were not just competing for capacity with the FIT projects. They were waiting to see the rankings of the projects so they could decide who they could buy at a substantial profit. That was an unfair competitive environment. Ms. Lo, in a candid moment, admitted we are not dealing with an even playing field.

Now, on September 17, 2010, while Fit Program was underway, the Ministry of Energy directed the OPA to reserve 500 megawatts in the

Bruce Region exclusively for the Korean Consortium. That's when Mesa ends up being risked to be shut out. It's because, at this point, Bruce Region is what they picked, and they were locked out.

Mesa did not know that until it discovered in this arbitration that Samsung didn't even -- did not even use 50 megawatts of its guaranteed capacity in the Bruce, and that was not even shared with FIT proponents. Mesa also did not learn until this arbitration that the Korean Consortium's movement of 270 megawatts to the 500 kilowatt line revised upwards the Bruce area transfer capability by the same amount. Mesa also did not know there was more capacity in the Bruce Region available, but the Government of Ontario chose not to disclose so that the Korean Consortium could use it for this hidden capacity for phases 3 through 5 of its generation capacity goals under the GEIA, but it got worse.

Inundated with the FIT success in November 2010, the LTP is released, limiting the total capacity that could be awarded for renewable energy projects. Meanwhile the Korean Consortium itself was taking 500 megawatts out of 1,200 megawatts for the Bruce.

Now, what happens? December 21, 2010, the OPA released its priority rankings to the projects that had not received a FIT contract. These rankings show that there will be 1,200 megawatts awarded in the Bruce and that my client's two projects will be ranked eighth and ninth. These were sufficiently high enough to get them contracts, even with the limit of this 150 megawatts. These rankings also show that 300 megawatts will be awarded in the west of London, and the majority of NextEra's projects would not be eligible for a contract -- of NextEra's projects.

So what does NextEra do? Because they are in west London. When they find out they are going to be shut out, they are going to want to make sure this happens.

So now we have jeopardy on two fronts: One, the Korean Consortium's special treatment which reduced the availability capacity in the Bruce Region and now NextEra's efforts to make sure that they would be able to jump into the Bruce Region because they are going to be shut out in the west of London.

Now, let's talk about the NextEra story. It's clear from the beginning, the politics

overshadowed the regulatory process for Samsung's and NextEra's benefit. Once Samantha's sweetheart deal is locked in, it had a cascade effect, which paved the way for Ministerial officials to give special favour to those that had friends in high places. This too was unbeknownst to Mesa which was, again, relying on a process that it thought would be immune from political interference. Apparently my client did not have the same friends in Ontario that its competitor NextEra had.

Now, due to the fact that the OPA was planning on awarding the capacity activated through the Bruce-to-Milton line, but no ECT was going to be run -- remember they had simply cancelled this by this point -- the Ministry of Energy and the OPA discussed different alternatives. The OPA, you heard, recommended a revised TAT/DAT process limited just to the Bruce Region. This process, it said, would be familiar to proponents because it had already been run. It was very similar to the process that had already been run. It would not require a directive from the Ministry of Energy and would not require a connection-point change.

If I could go briefly to

confidentiality.

--- Upon resuming confidential session at 10:07 a.m

under separate cover

--- Upon resuming public session at 10:07 a.m.

MR. MULLINS: The next day, despite this information being confidential, OPA executive told you he felt uncomfortable sharing this information with the Ministry of Energy, but on April 14th, 2011, he informed the Ministry of Energy of the dry run results, and I would ask the Tribunal to look very carefully at his original statement. He said "Oh, we didn't leave it there. We didn't discuss it." I asked him, "But you showed it to him?" Answer was "Yes."

Why would the Ministry of Energy need it? You remember that Sue Lo said the Ministry of Energy didn't care, you know, about the results, and she, of course, was impeached on this point because she was later shown an e-mail where she was concerned about bumping out a high-profile Canadian company called IPC in the west of London region whose president, it turns out, was a Liberal Party leader. She was concerned.

The Ministry of Energy requested this recommendation and adopted a -- sorry, they

rejected this recommendation from the OPA and instead adopted a five-day connection-point change window amongst only two regions in the province with a weekend's notice.

And the Tribunal has heard a lot about how much time was allowed for the rule and people have known about this.

Mr. MacDougall and Mr. Cronkwright told us the true story. The government made the decision that it had to change the rules, and they had to comply.

There were internal meetings about these changes and discussions with select proponents. This was a major change to the rules. The Ministry made the decision to reject the recommendations of the OPA.

It had no stakeholder consultations, virtually no notice given to the applicants. Mr. MacDougall told us how different that was from other rule changes.

This is not a matter about whether applicant could have started Mr. MacDougall, who left the Ministry of Energy at the height of this mess -- he didn't stay around for this thing -- agreed that the amount of time provided was not adequate notice to the parties

that invested millions of dollars in developing their wind projects relying on a proper process. Why did this not happen?

Ms. Lo, in a candid moment, with questioning by the Tribunal, told us. It was all politics. There was an election coming up, and they were worried that they had to get contracts awarded before an election. That's the reason they rushed it. That's not a proper process. That alone is not a legitimate purpose.

Many questions remain because many documents were not provided, but this is what we do know took place: We did not get a chance to depose NextEra like Pattern, but we do know the following: NextEra, knowing that it had a special deal -- knowing that it would not receive a special deal that Samsung had, had to find other ways to get into the Bruce Region. So what do they do?

Well, on May 10, NextEra's vice-president, Al Wiley, met with high government officials. NextEra also proceeded to contact directly, Sue Lo, the Assistant Deputy Minister, at Ms. Lo's personal number discusses projects and connection-point changes. By this time, the MOE had already seen the dry run results.

The next day, on May 11th, Andrew Mitchell, senior policy adviser in the Minister's office, personally met with Mr. Wiley to discuss whether connection-point window would be opened up prior to the next round of FIT contract awards, which he, in an e-mail, says was:

> "A very significant issue for NextEra."

This connection-point would be contrary to what had been told to the applicants because the rules and even the webinars had tied it to a province-wide ECT, and, remember, that never happened.

Now --

MR. LANDAU: Can I make a personal plea, which is that you just slow down a little bit?

MR. MULLINS: Yes, sure.

MR. LANDAU: Because I'm trying to write down as much as I can. It's giving my hand a pain at the moment.

MR. MULLINS: I apologize. I have a lot, and then we are going to hear from Mr. Appleton again, so I appreciate it though. I think we're in good shape.

NextEra's meeting with Mr. Mitchell was immediately followed by the Ministry ordering a fundamental change that went against the recommendations of the allocation experts of the OPA.

On the same day, the decision to change the FIT process to allow generees to switch into an entirely new region was made, on May 12th. Now that was admitted by Mr Cronkwright. Mr Cronkwright admitted it.

While the decision had been made, the Ministry of Energy held onto the decision four weeks without holding stakeholder consultations as was the OPA's preferred practice. Despite having made the decision in May they waited until June 3 to announce it, given a weekend's notice. That is on May 12, the decision that was made that reversed the expected outcome of the process, the effect of which took -- effect of which allowed NextEra to take six contracts into the Bruce Region.

Following the May 12th high-level meeting where the decision was made about the Bruce allocation, Ms. Lo then schedules a meeting with NextEra that night. She scheduled a meeting for the next day.

Now, Mr. MacDougall was questioned about NextEra's lobbying. That's Slide No. 14. You never heard the reason they did it was because NextEra had lobbied for that. He said, "Yes I had heard that, after the fact, after I left the OPA." He had heard that NextEra had been lobbying, and that's what happened.

Indeed on May 13, Ms. Lo and NextEra did meet, and immediately after the meeting, NextEra followed up by sending her a list of six project, and I believe it was Arbitrator Brower that pointed out that e-mail and said, "Well, Ms. Lo, why were they ending you these projects?"

We now know that NextEra was bundling to the government the NextEra six pack. NextEra found the right audience.

Next slide. If you could keep on going. Next slide. Keep going one more. Keep on going.

So on May 12, the Minister of Energy ordered the OPA to carry out the rule change. As we heard this week, this information at this time was not communicated to the FIT proponents.

Next slide.

Mr. MacDougall was asked:

"Q. So you agree with me, as at least May 31st, 2011, Ms. Geneau --"

Now, she is with NextEra.

"-- knew that there was going to be a connection-point change window; right?

"A. Yes, I think she suspected as much." [As read]

How could she possibly know? Well, it's pretty obvious.

Mesa was, therefore, left with a rule change that projects now could connect to locations outside the region that he was not consulted on; was based on one business day's notice. It was done in secret weeks before it was decided based on political considerations and looks like it was told to its competition.

In fact, Mr. Robertson, in his statement, testified that NextEra, around the same time period, began bragging that they were going to bump out Mesa from the Bruce Region. And he wasn't

asked about that in his cross-examinations. All the while complaints of unfairness by Mesa were ignored with no opportunity to be heard.

Yet Canada purports that its decision was justified because it was an approach endorsed by CanWEA, but it can't be, because it already made the decision before it got the CanWEA letter.

Next slide. Keep on sliding down. Okay.

And so what you see here is the decision is made on May 12th, so it couldn't be the CanWEA letter they got on May 27th. This letter does not refer to any regional connection-point change. In fact, the letter purports to be written on behalf of all CanWEA members who they claim, you know, want this connection-point change, but Mesa wrote a letter several days later.

Next slide. If we go to the next slide. That's May 30th, but go to slide 19.

We write a letter that says:

> "The CanWEA letter does not reflect the majority of the applicants with megawatts on the current queue list, and

> we urge Ontario to stay the course and avoid further delay in awarding the contracts." [As read]

Tab 20. But we're ignored. That letter was rejected without investigation of whether or not the CanWEA letter was true. And you'll remember that Ms. Lo claimed that the decision was based on the CanWEA letter, and Mr. Cronkwright said he never heard anything like that.

And within days, the FIT rule change was made public in the form of a directive. This allowed NextEra's projects to enter into the Bruce Region. This was a significant change to the process because no consultations were provided. The OPA itself understood this was a significant change and "would need to be clearly communicated in an announcement." JoAnne Butler of the OPA said:

> "I am sure a directive can micromanage the project to get what we want. However, that means we need a directive." [As read]

Even the OPA officials thought it was a significant change then.

Now, we heard from Mr. MacDougall, when he was questioned on this topic:

> "Well, in fact, this is the only time that the Ministry of Energy actually, up to this point, had issued a directive that required a change in the FIT Rules.
>
> "A. I believe so." [As read]

This was the first time that such a change was carried out. Awarding of contracts had always been carried out on a regional basis. Ranking was released on a regional basis. Applications were submitted on a region basis. At the time, six transmission regions had already been awarded contracts, and no project up to that point had been allowed to switch in from one region to another.

And as you heard from questioning from Arbitrator Brower yesterday, Mesa's own expert said:

> "Had this rule change not occurred that allowed NextEra

to go into the Bruce Region, my clients would not have lost two projects." [As read]

He answered that to Arbitrator Brower.

Now, that wasn't just Mesa's understanding. Please read the following testimony from Mr. Edwards two years ago.

Now, I asked him:

"Okay. Do you know of the rules prior to NextEra doing that?"

And he's talking about NextEra going to the Bruce Region:

"Do you know if it had been allowed for a project to go into a new transmission area?

"ANSWER: My understanding is that, when applications were originally made in November of 2009, that they were confined to a given transmission zone, and I have been told that the

Ministerial directive of June 3, 2011, I believe, enabled developers to change circuits and to change transmission zones.

"Q.Was that news to you when it happened, news to Pattern?

"A. Yes.

"Q.And you had no advance knowledge that that was going on?

"A.No." [As read]

Pattern itself believed exactly what you heard my client say: This was new; this had not been allowed; this was a complete change. Pattern was actively involved in Ontario at this point as part of the joint venture project and also a FIT contract owner.

Now, this was all about not what you knew, but who you knew. Now, we may never know exactly all that happened, but we do know the following: These decisions were made with discussions with NextEra, and, shockingly, NextEra gets these contracts.

Now, Mr. MacDougall, on slide 23,

talks about the NextEra six pack you heard about, how they were able to jump into this Bruce Region. All this was unbeknownst to Mesa who did not know that it was not in a transparent process, free from political favoritism. Had it known that at the beginning, perhaps it would not have invested in this country.

As a result of these changes, Mesa's attempts to secure help from officials were left unanswered. They started to raise questions at the OPA level. Didn't get any answers. They also went to the Premier; didn't get any answers there either. Meanwhile, NextEra, who had been shut out of the west of London region gets four contracts and Bruce.

Next slide.

Then a couple of days later, NextEra starts giving money to the Liberal Party. Why is a Florida-based company giving money to a Canadian Liberal Party? The liberal Party won the election in October 2011.

Now, the two-thirds directive, slide 25, this was a change. They only allowed it for two regions. It opens a five-day window for only two regions on one business day's notice.

Now, Mr. MacDougall, slide 26:

"Q.Do you agree with me --

This is Mr. MacDougall.

"Q. -- that the June 3 change was a major change in the FIT front process? Don't you think. June 3; right? I mean, especially for people that are proponents of the Bruce region?

"A.Yes. That was a major change, yes." [As read]

Go to slide 27. Compare all the other rule changes: Five months' notice for FIT Rules. Four months for 1.3.1; 4.3.2, five months; 1.4, one month.

The directive, the change rules. None. None. Why? Because Ms. Lo told you they had to do this before the election.

You heard from Cole Robertson. This five-day change window, if you look at all the options, it's just not realistic. I mean, it's just not.

Slide 29. Mr. MacDougall says:

"Sir, is it adequate notice,

sir? It's a weekend.

"It's not very adequate."

[As read]

Now, the Ministry of Energy knew all along that this would cause an upset in projects in west of London. Ms. Lo admitted during her testimony that their rush was in to get the contracts in before the "brick was dropped."

Now, incredibly, Ms. Geneau confided to Mr. MacDougall on his way out that this FIT process "was chaos," and I would point you to C-302, an e-mail from Ms. Geneau calling the FIT program "chaos."

Now, we're not done, though. Let's not for get the Koreans. In July of 2011, despite being provided priority capacity, the GEIA was amended.

Now, let's understand what we're talking about here. At the same time my client is shut out because it is not getting contracts in this 2011 period, and then meanwhile, when NextEra comes in, they now are amending the Korean Consortium agreement because Korean Consortium can't meet its obligations. The exact same month that the awards were made in Bruce, they end up

reducing the EDA in the GEIA agreement, July of 2011. Meanwhile, though, Samsung is still getting the full capacity.

Now, slide 30. Here's the deal. It's not just me saying they could have gotten out of this deal and awarded that capacity to my client, perhaps other FIT proponents. They were allowed to get out of the contract on 30 days' notice, 14.2. Next slide.

Again, they had to use best efforts, and they were not doing that. They had the ability to get out of this agreement. Instead, they amended it and start to revise it, and then by the time it was over with, they were simply reducing the phases instead of terminating the agreement and awarding capacity.

Meanwhile, all this is being delayed because, on slide 32, you remember Mr. Chow was telling us that they were delaying. The reason this process was delayed, as well, is because the Korean Consortium was not finalizing its connection points.

Slide 33: Mr. Cronkwright talked about how the Korean Consortium delayed their connection points, and eventually in the June

3rd direction, the OPA was directed not to wait for them to do so. In other words, at that date, the Korean Consortium delayed this process so long that they eventually end up basically going ahead and awarding the contracts due to the election.

At slide 34, Ms. Lo says:

> "As we were working to develop the Bruce-to-Milton allocation process, the Korean Consortium was still unable to finalize the points at which they wished to interconnect in the Bruce Region." [As read]

Despite this breach and other breaches under the agreement, the Ontario government did not hold the Korean Consortium accountable, and this decision hurt my client in its ability to get contracts in the Bruce Region.

By the fall of 2011, with Premier McGuinty's leadership and decision under much scrutiny, the Liberal government was under pressure to maintain its position. The Liberal government wanted to call an election at the right time. It chose to do so on September 7, 2011. It was in the

Liberal Party's interest to ensure that, before that date, it could try to appease its critics and try to file it a success. Shortly thereafter, the Liberal Party's leader resigned, and the FIT Program was cancelled on June 12, 2013. Incredibly, the GEIA is amended later to even reduce the generous generation capacity the Korean Consortium had priority access to.

Now, just briefly, there is no doubt that the GEIA and the FIT are alike. Both Mesa and their investors were competing for the same thing: Power purchase agreements for access onto Ontario's limited transmission grid. The only difference between these initiatives was the treatment provided to each. That's been demonstrated by the uncontroverted evidence of expert economist Seabron Adamson. The manufactured commitments to the GEIA simply amounted to the same domestic content requirements of the FIT Program. In return, Samsung was eligible to receive development adder payments of 437 million originally, later reduced to only 110 million, after it was too late to protect my clients. All told, the deal offered Samsung the possibility of nearly $20 billion on return for a supposed

$7 billion investment.

Obviously, that was a great deal.

Mr. Adamson says:

> "The Korean Consortium was required to sign contracts with equipment suppliers --"

This is all they had to do.

> "-- they would have had to have signed anyway to meet the Ontario minimum domestic content rules." [As read]

And just a moment on the content rules: Remember the testimony that, even before they started the FIT Program, the Ministry of Energy was told there may have been an issue with NAFTA, and they proceeded anyway. You would think, when they knew there was a NAFTA issue, they would try to tread lightly, and they did the exact opposite.

Canada purports there was an advantage to have a dominant market player that could manufacture its own equipment, but to come clear, Samsung had no experience in this area and eventually failed to make the effort to break into it and eventually had to bring in Siemens in order

to meet its commitments.

On the other hand, when it entered the market, Mesa had already partnered with GE, with a long-standing reputation in the wind turbine manufacturing area, and indeed Mesa had a contract for supply of equipment it needed. Samsung bought turbines from Siemens. Mesa would have bought them from GE. Both were required to meet the domestic content requirements, which, by the way, Canada has no defence to.

Now, this brings us to the employment creation theory. Canada says, well, we had to do this deal with Samsung because of all the jobs it would create. In fact, you heard evidence that the FIT requirements, the FIT contracts would have created jobs as well. Ms. Lo talked about how the jobs were focused on in both programs.

It's just simply, simply unbelievable.

The agreement was to split into five phases the megawatts. In other words, they didn't have to do 2,500 megawatts all at one time. They had five phases.

All they were required to do was point to these manufacturing plants. They weren't

required to build them. The first 500 megawatts of transmission capacity was given away for free. They didn't have to do anything for the first 500. Nothing. Just give it away.

Mr. Adamson identified areas where the GEIA provided better treatment, and you've heard this in his testimony, and just remind you, slide 36. Better access to government officials, facilitated Aboriginal Consultations, guaranteed access to 2500 megawatts, fast-tracked contract approval. They didn't have to get ranked. They didn't have to get ranked. They just got it.

And the fact that Pattern was jumping in and out of it, what else do you need to know? This is the same deal. Just one guy got a better deal. You can't tell us, "Oh, it's different because I gave them a better deal." You can't. That's insane. The fact that they gave them a better deal without rankings does not make it different; it makes it improper. It makes it violative of NAFTA is what it makes it.

Now, slide 37: Mr. Robertson told us, "We would have been willing to do a deal like Samsung had we been given the opportunity." Who wouldn't? Who wouldn't do a deal where you are

guaranteed access? Anybody with a chequebook could have made this deal. As proved by Samsung did it, because they had no experience in the area; right? Anybody with a lot of money could have cut the deal that Samsung made, because they didn't have any experience in the area; they just got somebody with a lot of money. So that's not a reason to claim you should get different treatment.

Go back to Mr. Edwards. Again, he was the guy no was there, and he was in both programs, and I asked him, "Well, why would you want to get into GEIA or the FIT?"

He says, "Look the fact we signed a joint venture agreement and elected to participate with Samsung is evidence that we thought this was a better opportunity." Of course, it was a better opportunity. He immediately took five projects and put them right into the GEIA, and then he got his deposit back.

THE CHAIR: Mr. Mullins, we will see when is a good time to break.

MR. MULLINS: Yes. I was actually about to say goodbye, ironically. I was about to turn it over to my colleague Mr. Appleton, so this

would be a good time to have one.

THE CHAIR: I thought this was a good time. Absolutely. Thank you. Could we take a ten-minute break and then continue?

MR. APPLETON: Whatever you like.

THE CHAIR: Okay.

--- Recess taken at 10:31 a.m.

--- Upon resuming at 10:48 a.m.

THE CHAIR: We are ready to start again. Could I ask someone to close the door in the back and then, Mr. Appleton, you can proceed.

MR. APPLETON: I'm just making sure that I'm on here. I'll start my timer. Excellent.

CLOSING SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: We would like to turn to Canada's general jurisdiction and exception defences to explain why they do not apply.

Let's start with consent to arbitration. I want to point out, of course, I'm not going to restate what we said in the opening statements. We talked a lot about law in the opening statement. I'm going to try to highlight issues and if the Tribunal has comments I'm happy to take them. We will try to FIT them within the

time as much as we can. Then of course we'll try and keep whatever time that's left over to the end by way of reserving for rebuttal.

So, let's start with consent to arbitration. We addressed why Canada consented to this arbitration in our briefs and in the opening statements and there is nothing to add. To be clear, Canada provided its consent to this arbitration within the text of NAFTA Article 1122. This is a clause compromissoire article of the NAFTA and as such Canada consented to the arbitration in the NAFTA.

Any alleged procedural violation, which of course we say there is not a violation here, but that Canada raises as such, could not impair Canada's existing consent to arbitrate in the NAFTA.

Let's talk a little bit about time. Canada asserts that there could be no possibility of breach in this case until July 4, 2011. As we have seen, clearly from the evidence, from the testimony in this hearing, and from Mr. Mullins' discussion of what we have seen earlier this morning, this conclusion completely ignores the evidence.

Let's return to the timeline we saw during the opening slide. The notice of arbitration was filed on October 4, 2011, the green flag. The events giving rise to the 1106 claim began almost 15 months before the NAFTA arbitration filing. Whether that's July 7, 2010 or, arguably, August -- whatever that date is, 2010, we say it should be July 7, 2010, let's be quite clear -- because that is the first date when the investor received an e-mail from General Electric, confirming that the 1.6-megawatt turbine was the only turbine that would generate sufficient Ontario local content for use by Mesa for deployment in 2011.

Remember that comes from a document, BRG-123, a document brought to our attention by Canada's expert, Mr. Goncalves in his rejoinder report, and that's why we had to say, yes, you're absolutely right, the date was July 7th.

Now, a second event giving rise to the Article 1103, 1102, and 1105 claims, arose more than 12 months in advance on September 17, 2010, when Mesa learned that one-third of the transmission that had been reserved to FIT

applicants in the Bruce Region, was being given in priority to the members of the Korean Consortium under the GEIA.

If you recall, that was a ministerial directive and near the bottom it identifies that now 500 megawatts are being reserved. That is the first time that the public would be aware of the impact of the Korean Consortium and the Bruce Region.

We also note that means they had an investment in Canada before it made its formal FIT applications in November 2009. The definition in NAFTA article 1139 is very broad and it includes, as an investor, someone who is making an investment.

The definitions of "investment" and "investor", were modelled on the early jurisprudence of the U.S. land claims Tribunal.

I'm sure that Judge Brower has published a book on this, and has been affiliated with that institution for some period of time, would be somewhat familiar with some of the case law that helped influence the very broad definitions that were used in NAFTA Article 1139.

So, Mr. Robertson testified that

Mesa was acquiring leases in the summer of 2009. In addition Seabron Adamson in his testimony, he testified that advanced investments of inputs for wind project would be very common. These are all investments covered by the definition in Article 1139. As we heard this week, the initial investment made by Mesa included an investment in August 2009 before any public news of the GEIA was available.

If you'll recall, Mr. Robertson discussed Exhibit C-0461 which had an operating agreement that would be used for its investments in Ontario and which evidences Mesa's efforts to start its in investment in Ontario through the corporate process which we would expect to see in any complicated investment between a foreign investor coming into another country to be able to make an investment. So, clearly, that NAFTA claim, anyway we look at it, arose well before April 4, 2011 and that is the question.

So let's talk about procurements. Our response to Canada's contentions on procurements are twofold. Again, Canada cannot rely on the Article 1108(7)(a) procurement exception. That's the exception to MFN and

national treatments because that exception is no longer in force for Canada because of the operation of better treatment provided by Canada to investors and their investments under the Canada/Czech or the Canada/Slovak treaties so that exception with respect to Canada is spent.

I would imagine that exception is still available for the Government of United States and the Government of Mexico unless they similarly have made other treaties. I have not made that investigation and it is irrelevant to our consideration. All we are looking at here is whether the Government of Canada has taken actions that make that exception no longer applicable and, in fact, they have through these two treaties.

So, as a result, there is no defence to Canada under Article 1108(7)(a) because we don't ever have to look at government procurement for those NAFTA violations.

But, in any event, we would always have to look with respect to Article 1106 because there is no similar provision in the Canada/Czech treaty, and it is also relatively easy because the measures in question do not actually constitute government procurement.

Now, as we said in our opening, the NAFTA contains a definition of procurement in Chapter 10 which is the government procurement chapter. It just simply didn't contain a explicit definition for its use in Chapter 11.

A treaty of course is to be interpreted in accordance with its ordinary meaning to be given to the terms of the treaty and the context. The context is defined by Article 31(2) of the Vienna Convention and it tells us that we looked to the text of the treaty as an important part of the context. We look there first.

Canada has provided no reason to deviate from the ordinary rules of treaty interpretation as contained in the Vienna Convention on law treaties and therefore the Chapter 10 definition should be applied.

I of course took you through in the opening the decisions of other NAFTA Tribunals that have come to the same conclusion and even the arguments of Canada that came to the same conclusion in previous cases because that's a logical, ordinary, normal meaning to be given government procurement and the facts on the record are clear that there is no government procurement

here.

The ratepayers are the consumers, not the government. The ratepayers are ultimately billed each month. As stated by Mr. Jennings, slide 4, the next slide, so the ratepayers, the consumers, ultimately are billed each month. Those bills are paid by them and that covers the electricity that's consumed.

So, the OPA simply acts as a pass-through. Moreover, this week we heard from various OPA officials and it is made clear by both Canada and the OPA officials that the OPA is not part of the government.

When questioned, Mr. Cronkwright testified here on slide 41:

> "Question: You are basically saying the Ontario Power Authority is not the government per se?
>
> "Answer: That's right". [As read]

So he's admitted it.

Mr. Chow testified, slide 42:

> "Question: Were you the only government person involved in

the group?

"Answer: I'm not a government person. I'm from the OPA." [As read]

We have the OPA, an entity that is not government, acting as a pass-through or clearing house between generators and ratepayers. Now, that's not to say that there is not state responsibility for the OPA and we'll talk about that separately, about attribution; that's a different question.

Sue Lo stated that the GEIA is actually a commercial agreement. I saw Ms. Lo earlier today. I believe she's even around. Slide 43, if we can refresh your memories with her testimony. She says at page 84:

"Question: You would agree with me that this was a sole source contract, the GEIA?

"Answer: No, I think that in the previous statement you showed me it's a commercial agreement." [As read]

This is not governmental. We've already described why the title isn't taken by the

OPA, the power doesn't go to the OPA, the payment doesn't come from the OPA; it comes from the ratepayers.

Under the definition there would be in Article 1001(5), it doesn't comply. In the WTO we have clear rules that make it easy about commercial resale. Here we don't have to worry about the commercial side. We simply have to understand is this procurement. That's not what procurement tastes like, feels like, and it doesn't meet the definition set out in 1015, because it is sold to others.

As we know, it was designed not to be governmental for the purposes of subsidy. We saw that testimony as well, that when they looked at it would this violate subsidy, and they said, no, this is not going to be a governmental subsidy because it is paid for by the ratepayers. Well, it is going to be designed to be able to avoid subsidy. It is also going to avoid governmental procurement.

There are many ways to design this program. The OPA could have designed a program. That could have been a procurement program. The Government of Ontario could have done it. But this

is not procurement. They chose another way, probably for another reason to avoid the issue of subsidy. In fact, Mr. Jennings has given testimony about that this was not a governmental subsidy. He had said, at slide 44:

> "Question: So, in fact, the Ontario electricity system is not heavily subsidized, is it, sir?
>
> "Answer: No.
>
> "Question: In fact, it is not subsidised at all, is it?
>
> "Answer: No, it is not." [As read]

Canada hasn't even met its evidentiary burden to be able to even raise this defence. We'll deal with this on costs and the issues that go with it. But, in fact, Mr. Jennings has testified that it is not a subsidy. The other documents we'll take you to show it was not a subsidy.

There was evidence on the record. Canada said there was no evidence. In fact, there was evidence exactly to the contrary of what they were saying, that somehow this could be, in some

circumstance, a subsidy. It's not. It's not a governmental subsidy. There is something funny, but that's not the subsidy. That's just not what it is. Canada's subsidy defence must fail. This matter needs to be addressed in costs.

Now, let's turn to MFN; we have had a lot of discussion about MFN. I first deal with likeness and then turn to treatments. Throughout this arbitration, Canada has contended its own subjective perception is relevant to the determination of likeness. The test for determining likeness is objective.

The likeness test is relevant as it is a comparison of treatments offered and given to enterprises by a state. Such an analysis must be done objectively on the facts and not based on the perception of a state whose conduct is disciplined by the very rule in question.

The investor suggests that the relevance of nationality is, in fact, determined by the nationality comparator in each of these provisions and it is by properly using that comparator, that the Tribunal arrives at a determination of whether or not differences in treatment are nationality-based. That is the

relevance here. That's the only relevance.

Now, Judge Brower had asked some questions and so I'd like to try to deal with one of them. I believe it's the last question he had raised yesterday. His question was as follows: I think I'm going to put it up on the slide if we can do that just to make sure that I get it right:

> "Whether a foreign investor could seek damages directly for a violation of the NAFTA under either NAFTA Articles 1102 or 1103 and seek damages in addition arising from its ownership interest that the foreign investor holds in the Canadian subsidiary." [As read]

There is a simple answer to Judge Brower's question but I'm not entirely sure if the question is exactly what Judge Brower wants so I'm going to discuss the pieces that go with it because I think this will comprehensively deal with the issue and then hopefully put the issue to bed. If there are still more questions I would encourage the Tribunal to ask.

So, we have to look to the NAFTA, of course. The first issue that we need to look at is the way in which a NAFTA claim is submitted. NAFTA Article 1116 provides that an investor of a party may, on its own behalf, submit a claim to arbitration that another party has breached the NAFTA and a claim made by that investor may include damages arising both to the investor and its investments. So the terms "Investor" and "Investments" are defined in NAFTA Article 1139.

The term, "Investor of a party," means a national or enterprise of such party that seeks to make, is making or has made an investment. It is very broad and Mesa has met each of these three definitions at some point, as I'm pretty sure all investors probably do.

The term, "Investment," is very broad. It goes for a page and a half in the NAFTA.

It includes many different types of investments. I'm not going to go through them all but it includes an enterprise, equity or debt, real estate or other property, tangible or intangible, acquired in the expectation of economic benefit or other business purpose. These are just a couple of the many examples. They are manifold.

It includes it; they are not even limited there. It was designed to be exceedingly broad.

So, if I can just pull up the slide, so the first one here, Article 1116, you see here that Mesa as a U.S. company, I've just used one of the project companies, TTD, it's Canadian, so I'll use that. If you bring a claim under Article 1116, the U.S. investor can bring the claim against Canada. Also on behalf of its Canadian investment, TTD.

Go to the next slide.

There is another provision in NAFTA, Article 1117. But it is not in issue in this case. We brought this under Article 1116.

Under that claim, you can bring a claim on behalf of the Canadian company against the Canadian Government, if it's owned by an American national.

So, in that claim, under 1117, then, even though Mesa, as a U.S. entity, controls TTD, normally the normal rule is that the Canadian entity could not have an international process against the Canadian Government. You'd have to go to a local court; that would not be permitted. Here a special rule is set up that TTD could bring

a claim if it was brought under 1117, but only if it's brought under 1117. So it has to be an enterprise of another party that the investor owns or controls directly or indirectly.

In such circumstance, and only in such circumstance, a foreign investor is able to bring a claim in the name of a local subsidiary against its own government. Because otherwise it is going to run afoul of the general rules of international law, but that's permitted.

Let's look at some of the implications now of Articles 1102 and 1103 because they also are involved in some of this.

First, let's just look at the definition of "Investment of investor of a party," which is relevant as we get through here.

The term, "Investment of an investor of a Party". That's capital "P", "Party", means an investment owned or controlled directly or indirectly by the investor of such party. So you could be in a corporate chain, and here we have a corporate chain. Anywhere down the chain then you are going to be covered.

So that also means that what would normally be an investment, could in itself be

an investor because it owned something down the chain. Companies themselves are not the only investments because you could have -- in this context, you could be engaged in economic activity in the area. You could have real estate or tangible or intangible property used for business purpose. So it gets very complicated very quickly. But the answer is actually relatively simple because anybody could basically fit if you fit within the rule. You have to look at specifically who is seeking and which circumstance.

I'll give you some examples but I'm making certain assumptions as we look at these. So that's -- as I start putting through the arrows, as you will see through, you have to understand it is based on those assumptions. So there could be a difference depending on what the factual circumstance is, but I wanted to be able to answer this so that we could really get it comprehensively done because there has been a lot of confusion, and I would actually suggest a lot of mischief-making here and we're going to get this cleared up very easily.

Let's look at slide 46. My numbers might be out so let's look at the next

slide. It's absolutely clear that the NAFTA always envisioned that claims could be brought by a foreign investor on behalf of its domestic investments. So here I'm using some examples. I'm not saying these are the examples in this case. I'm just using them because we all know that Samsung is a Korean company so it's an enterprise that is from Korea.

So that is going to be Samsung Korea is what we are going refer to. Mesa is American; TTD is a Canadian. These are our examples and TTD is an investment of Mesa and of course, as we know, TTD has multiple elements down the chain as well, so it could also constitute an investor or an investment.

So, if you are looking at the comparative treatment provided Samsung -- that was not in Judge Brower's question but I thought maybe that might be where he was looking because that was an issue in contention brought by Canada.

If we are looking at a comparison of better treatment provided to Samsung, than provided to Mesa, in like circumstances, then Article 1103(1) applies. Let's go to the next slide.

It could also be possible, depending where Samsung is on this chain, especially -- again, we have certain assumptions, that it could invoke Article 1103(2) with TTD. It would depend, if there are technical issues as to whether Samsung Korea is an investment, whether incorporated. But whatever it is, the main thing here is we look at is there better treatment to Samsung than better treatment to Mesa. So, generally, we look on the top line to the top line and the bottom line to the bottom line, but there could be factors that make the arrows go two ways which is why I've done that.

Now, let's go to the next. If we have a situation where the investment, Samsung Canada, is treated better than Mesa, again we have to figure out, well, which Mesa is it and where is it in the chain, because they are a different Mesa, or different AWA and various other entities. So normally, without question, Samsung Canada would be compared to TTD Canada.

That would normally make sense and that would be Article 1102, national treatments, where you are looking at better treatment to a Canadian company. So, if Samsung Canada was

an investor itself and had investments, which it probably does in these wind projects, because we know that they have wind projects under Samsung Canada, then the better treatment provided to Samsung Canada is better treatment to an investor, that triggers Article 1102(1).

If Samsung Canada could never be an investor and could only be an investment, as a factual determination, not an issue so I can't tell you, I think it's unlikely, then you could not have this. You could not have that comparison. So you have to look to that situation.

In the purposes of these case, these conceptual problems aren't going to arise and I will give you examples specifically to make it easy for the actual facts but I want to go through the theoretical facts, because it is broad and it was always designed to be broad and I'll explain to you in a minute why.

Let's go to the next one. Here we have the situation where Samsung Korea has better treatment than provided to TTD, and TTD Canada owns TTD Alberta and several other things, as we see. There are various companies, one with wind leases, one which is operating, et cetera, et cetera, so

TTD Canada, it constitutes an investor on its own and so you would compare Samsung Korea as an investor to TTD Canada, actually that would be 1103(1), and if Samsung Korea actually ended up being an investment, it would be 1103(2), that would really be more applicable, I think, to the line below, Samsung Canada certainly if it's -- next slide, please. Samsung Canada you have a direct line, there is no question and again it is a question of fact. That's our problem. You have to look at specifics rather than going generally but I want to identify it.

Now let's look to the next slide. Let's go back then, sorry, and keep us here for a second.

So, the specific answer is there is no impediment to an investor from the United States to bring a claim on its own behalf and on behalf of its Canadian investments, and certainly this claim here, brought under 1116, that's certainly permitted.

If there was an Article 1117 claim, which there is not, then it would have another shape that would be permitted. But this is all without controversy in the NAFTA and the reason

is simple: Because what we want to understand here is that we're looking at relative obligations.

Article 1102 and Article 1103 compare the treatment given to someone else. That's different from NAFTA Article 1105 which sets out a specific type of treatment. Or just like if we had Article 1110 of expropriation, another type of treatment. So if you are comparing on that type of treatment then we do not look at a situation that is comparative. In that situation we look at actual, what it is. If you hit that requirement has it been arbitrary. Has it been a breach of fair and equitable treatment? Is it unfair?

But here we always must look at a comparator so we are always identifying, is Mesa treated differently than someone else in like circumstances? Then we look at that nationality and we will compare usually investments to investments. That's Article 1102(2) or 1103(2) for MFN and we look at is the investor being treated differently from another investor? That is Article 1103(1) for MFN and Article 1102(1) for national treatment.

That is the normal route that we could look at but the facts -- facts are funny

things so you have to actually look at them. That's what you've been doing so we can figure out and sometimes an investor can end up being investment and sometimes the investment can end up being an investor because of what they are doing.

So that's why I couldn't give you a simple answer but the general reason here was: The best treatment in the jurisdiction is what 102 and 1103 were designed to do and that's reflected entirely in Article 1104 which says that if there is a difference between the treatment, between Article 1102 and 1103, that best treatment in the jurisdiction must be provided. That was the design of the NAFTA.

So if a Canadian investment is treated better, that should be the basis and if a Korean investor is treated better, that would be the basis.

As you know, our view is the wording of Article 1103 is very clear that it was never designed to say, "Well, you can treat some Americans better than others, any other party," which is what the words in 1103 would apply to Mexicans or Americans.

That was the whole idea of that NAFTA so better treatment to an American triggers MFN because otherwise there would be an issue as to whether it would be triggered, it would be covered and that would leave a big lacuna in the regime and since 1104 tells us we're looking for the best and your bringing all those to rise up with the tide, that's the idea here.

Now, I'm not sure if I've been able to answer your question but I thought I might as well give you something comprehensive to be able to address this and if you have more questions we're very happy to deal with those at an appropriate time. But we wanted to make sure that we could explain this very, very clearly.

Now, I just wanted to point out that of course there is no provision in NAFTA that excludes from comparison of better treatment of domestic investments, from foreign investment. There's nothing because of course of the design of the NAFTA.

So, Judge Brower, you asked -- actually, we should go back just before I go there.

I also like my favourite thing,

one of my favourite international law experts recently passed away, Andreas Lowenfeld, and you couldn't have a case without talking about a quality of competitive opportunities which was a principle that was very dear to him.

I had the privilege of teaching with him for many, many years and the issue of quality of competitive opportunities is at the heart of Articles 1102 and 1103; the requirement to treat the investors fairly so that they can know what's going on.

The absence of transparency has a very significant impact on the ability to have a quality of competitive opportunities. So if one entity has better information, that clearly would have to be a breach of that. If they had better access, it is a breach of that. If they are given priority access, that's a breach, and that is what the telltale tells us, to start looking at Article 1102, national treatment, and Article 1103.

I'm like a dog. I know where to sniff once I see that. That's where I'm going. Maybe if I'm lucky I'll find a truffle. Maybe I'll find something else. You have to be careful where you look sometimes. But the fact is simple, that's

the main principle that's being addressed.

Let me deal with Judge Brower's second question about the law of damages related to MFN. I will talk about damages later but let me try to address them.

First of all, Judge Brower was not surprisingly unfamiliar with MFN damages but certainly with respect to NAFTA because there are no NAFTA damage awards that you can really look at generally about Article 1103, but there are in Article 1102 and we think since they are both looking at the same basis, we can look at things to help us to understand what to do.

Again, you have to look at the situations of each case. But I think a very helpful case to assist you, a very persuasive case to assist you, would be Cargill. Cargill looked at the requirement for MFN treatment to track that of national treatments. So that's the first bit.

Where Tribunals have awarded damages for national treatments Cargill also helps us on that too because the Tribunal in Cargill -- and by the way, that is the Respondent's schedule of legal authorities, RL-45 so it is in the record.

The Cargill Tribunal agreed with the Claimants, that the failure to provide treatment as favourable as that provided -- in this case, it was in Mexico -- so that in that situation, the appropriate measure of damages was the overall damage, the economic success of the investor arising from the measure. That is exactly the situation.

So in Cargill the investor was treated more less favourably than domestic investors in like circumstance. So, in that case, the Tribunal held that the appropriate approach to assessing damage is to determine a present value of lost cash flows.

A similar approach was taken by the NAFTA Tribunal in Feldman, although on the facts in Feldman they found the Claimant hadn't documented the false profits so they took the approach but they couldn't give the award because of evidential issues. They had to find some other way to calculate damage but that was because of a problem of evidence, not because of a problem of approach.

Also, the ADM Tribunal which was looking at a similar situation as Cargill, a

separate tribunal -- I think actually the late Professor Lowenfeld sat on that one -- applied the same principle of lost profits they would probably have reasonably anticipated.

So, there is no reason why the overall damage, the economic success of the investor approach, should not apply the compensating harm for less favourable treatment under NAFTA Article 1103. It's a logical outcome of the restitutio in integrum approach in the Chorzow Factory case to a situation where the nature of the breach is the failure to accord treatment that's less favourable.

As you've seen in our pleadings, it is necessary to determine what the position of the investor would have been in the Ontario wind market if it had been treated as favourably as a member of the Korean Consortium, which of course is an investor of a non-NAFTA party and therefore invokes Article 1103.

Of course, there were many factors, not only the priority access but systemically risking of the process of all of the benefits that would be given to the Korean Consortium. That also would affect the

discount rate and those are all detailed in Mr. Low's report. He was quite meticulous in identifying the considerations and to identify, if the treatment was extended under the GEIA, why it would work in that way.

Now, you also asked a separate part of the question as to whether or not you have to look to more than one breach to be able to get you there. So the easy issue here is that if you look at Article 1103 as the basis for the harm, because of the GEIA's unbelievable terms, then you basically will get all of the damage that would be applicable in this case, and so that makes it relatively easy.

If you were to find though that you weren't going to give all of the benefits of the GEIA, then that would change and then you would have to look at what you would look at.

There are cases of course that tell you very clearly that you have to look at each type of breach and to identify what the losses would be. But quite regularly, if the losses are subsumed, the Tribunal doesn't need to go there if they specify why. So I would just identify that the MFN breach has the largest scale and scope for

what would go on, and that's been laid out by Mr. Low in his report.

I'd like to talk about national treatment if, in fact, that satisfies you.

Canada purports to restrict the factors that might objectively justify different treatment to the determination of likeness, rather than to the analysis of whether treatment is less favourable. So the test for likeness is objective, and here where there is a regulatory process of general application itself that is the focus of concern, it is appropriate to view all entities, domestic and foreign, because the same fundamental process applies to them all.

Now, the NAFTA Tribunal in Grand River stated -- and we'll look at that slide -- that:

> "... the identity of the legal regime(s) applicable to a Claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102

and 1103." [As read]

So you can take into account the legal and regulatory analysis, you can do that. But you have to figure out what the real issue is at stake. If you change the name, it doesn't mean that you are not like.

If you simply apply a measure, that doesn't become the basis, the name of the measure or simply treating somebody differently by legislative fiat, it is not the basis. You must do a test to see if, in fact, they really are like or not and it known as the "Occidental Tribunal" in assessing the comparators? This cannot be done by addressing exclusively the sector in which the particular activity is undertaken; we have to look and understand.

In this context you've seen tremendous evidence that FIT and GEIA are really interchangeable. The GEIA proponents wanted to be treated like FIT in some circumstances, and certainly not like FIT in others.

They all got the FIT contract, they all got the same price, or actually better, because you could get a little adder, if you could point to things. You didn't have to do it; you

just had to point.

They had to follow the same local content. They had to follow the same process for regulatory environmental. They just got better treatment but they were like in that respect.

So, Mesa was seeking to obtain permissions to obtain access to the Ontario electricity grid and obtain renewable power PPAs just like the proponents under the GEIA, very like circumstances in respect to seeking long-term renewable power agreements and seeking transmission access to the grid.

Now, national treatment allows a regulatory process to produce different outcomes, as long as that process demonstrably treats the parties with evenhandedness to ensure that investors are granted equal opportunities.

To be evenhanded the treatment need not to be identical. Article 1102(3) makes clear that best treatment needs to be provided and that evidence is clear that that best treatment was provided to the Korean Consortium.

This again leads to the issue of burden of proof. Each side of course, as you know under international law, has the burden to prove

the facts upon which it relies and comment to NAFTA Tribunals and most explicitly Feldman, and some of the WTO, appellate body of recent rules and international treatment, is the notion that the nature and magnitude of the difference of treatment between those in like circumstances, once that's been established by the Claimant, that burden shifts to the responding state to show that its difference, both its nature and magnitude, can be fully accounted for by legitimate regulatory considerations.

In this present case, not only has Mesa established that nature and magnitude of the difference of treatment, Canada has actually not filed any defence on the issue of treatment.

In these circumstances, it is clearly reasonable to require a full demonstration on Canada's part that all differences of between the investor and the Canadian entities subject to the same regulatory process are fully accountable on objective regulatory considerations unrelated to nationality, and Canada has not done this.

Due to the difficulties with the discovery process in this case and the extensive redactions of material, the investor can only

partially infer what were the internal deliberations of government that reveal the exact range and relevant way the considerations would affect the treatment that it received, and this is a strong reason for putting the onus on the responding state to establish that the objective, legitimate considerations can fully account for the difference in treatment. We say that Canada simply can't do that here. They haven't and they cannot.

Now let's look at some of the facts applied to Most-Favoured-Nation in national treatment. NAFTA Article 1102 provides that Canada provide treatment no less favourable than it provides the Canadian investors and their investments were in like circumstance with the Claimants and that likeness must be considered for all of those who seek such regulatory environmental permissions, the test for likeness in this case.

So all of the regulatory permissions that are involved here for access to the grid, for all the issues that we deal with are subsequent for that. A test for likeness in this case must address all those who seek such governmental permissions for projects where there could be potential environmental review or where

there could be potential access to the grid, or there could be this issue about aboriginal considerations, all of these are the types of things that we look at.

Throughout the course of this week and our pleadings, we have met this burden on likeness. In respect to likeness, when questioned about the GEIA and the FIT, Sue Lo admitted the following:

> "Question: We talked a little bit about this but again the FIT program had a local content requirement.
> "Answer: Yes.
> "Question: And both the FIT Program and the GEIA had 20-year FIT contracts.
> "Answer: Yes.
> "Question: Both the FIT Program and the GEIA were being paid the same amount of money per megawatt with the exception of the adder.
> "Answer: Yes.
> "Question: Both the FIT

Program and the GEIA had foreign investors?

"Answer: There were a variety of investors." [As read]

Of course we know the answer here, which is, "Yes."

We heard from Mr. MacDougall this week, and he stated the following here on slide 56, Day 3, page 287. He says:

"Question: So I was aware that the two would be running in parallel and as you know, as one of the lead spokes people for the FIT Program, I wasn't terribly pleased by the competing development opportunities that were running in parallel."

Then he said the following:

"Well, certainly leading into -- well, in the FIT Program design, we knew there were thousands and thousands of megawatts of interest of

project development in Ontario, as witnessed by some of the prior renewable energy procurement activities. So I knew there would be more demand for contracts than there would be supply of contract capacity. So my professional reaction was, this just creates less supply of FIT contracts available because a portion of the available grid capacity will necessarily need to be allocated to the Korean Consortium." [As read]

Slide 58, sets out where Mr. Jennings admitted that FIT and GEIA projects are interchangeable:

"Question: Isn't it true that had Ontario not entered the GEIA with the Korean Consortium, it could have entered more FIT contracts and specifically

would have gone so in the Bruce Region?

"Answer: Well, whether we would have or not, there certainly would have been more space available for other projects, yes."

FIT proponents were in the same like circumstances as the GEIA proponents, the only difference being that the GEIA proponents were treated more favourably. The fundamental element of competition for the same limited amount of access to the government-controlled transmission grid and for the same type of renewable purchase agreements, fundamentally demonstrates that Mesa was in like circumstances with GEIA proponents from any other NAFTA party or from a non-party like Samsung, and even Ontario treated FIT proponents interchangeably with GEIA proponents.

Ontario announced in November 2010 that they would reserve 1200 megawatts of transmission in Bruce for FIT proponents. On June 3, 2011, Ontario announced the 450 megawatts up to 1200 megawatts that was allocated for the Bruce, 450 megawatts was allocated to the

Korean Consortium for GEIA projects. So even Ontario has treated GEIA and FIT interchangeably.

The investors made reference to a number of Canadian investments and investors who were in like circumstances to Mesa, such as Boulevard Canada, and during the hearing we heard from Sue Lo, who finally explained to us what the "breakfast club" was, a private cabal of high-ranking government officials who would meet from a variety of different places.

I had worked for the Government of Ontario for three years, so these were the most senior people you could get, the head of the civil service and the senior person from the Premier's office, that's the B Club, the club that nobody else gets to go to, a very high level, and the B club, in their discussions, had set out a discussion that International Power Holdings Canada was protected. International Power Canada's senior executive was the former president or maybe still the president of the governing Liberal Party of Ontario, and then became the president of the Federal liberal Party of Canada. He was a highly-connected insider.

The lobbyist who had been

connecting Ms. Lo. She had talked about Mr. Lopinski, a very high-ranking former official of the Premier's office. I have no doubt that Ms. Lo knew who Mr. Lopinski was. Mr. Lopinski was a senior operational advisor in the Premier's office before and was, again, on the current Premier's election campaign and this was in the papers. It is notorious. It is well known.

I believe it was covered in Mr. Wolchak's statement too.

A similar. So these are special deals given to those who are connected, who are local, and that triggers 1102. That's where we look at national treatments and when we look at the better treatment to Samsung, that's where we look at 1103. And the better treatment to Pattern. That also triggers 1103.

But of course, if you look at Samsung, you never really have to go so far as to look at Pattern, but they are all getting better treatment. Everyone is getting this. The only people who aren't getting it are the ones who play by the rules, like Mesa who believe that it is a rules-based system, like Mesa, and they are the people who are treated badly, because there is

another game in town and only those on the inside, the B club or the senior officials, the C club or the A club, they are the ones who get in.

Now, let's talk about treatments. Canada is required to provide treatment no less favourable to Mesa than it provided to Canadian investors and investments, and you heard this week, repeatedly, that Canada did not provide this same level of treatment to Mesa and its investments. Canada still has not addressed Mesa's arguments in that respect.

I talked briefly about local content. There is no question that Canada imposed local, prohibited, content requirements on Mesa in the FIT Program. Mesa had to disrupt its normal decision-making in order to conform to these internationally wrongful measures.

Mr. Low confirmed in his expert report on value, and in his testimony, that Mesa incurred harm as a result of the local-content rules, and that it would suffer further harm in the future as a result. And Canada has filed no defence to the local-content claim, and has not provided any evidence to refute Mesa's proof that it has been harmed of any substantial element. It

just simply says there's no harm. It does nothing else. It just says no.

I'd like to talk about attribution. It is clear that all the measures in these claims are attributable to Canada. Let me know you why. First, with respect to MFN. You've seen the secret MOU in the GEIA.

They were negotiated and signed by the Government of Ontario. The Minister of Energy, the Premier of Ontario, these are all integral parts of the Government of Ontario. They are clearly directly responsible. ILC Article 4 clearly is in effect.

So the breach of Article 1103 with respect to the GEIA is completely attributable to the Government of Ontario. Moreover, the Minister of Energy specifically directed the Ontario Power Authority to enter into PPAs that were substantially similar to FIT contracts.

The reservation of a 500-megawatt gift to the Korean Consortium, that first phase where they had to do nothing for, was directed by the Minister of Energy. The priority access and further technical and regulatory assistance to the Korean Consortium was directed by the Minister of

Energy.

The same reasoning applies to national treatment. Ontario's actions are equally attributable to Canada as the Canadian subsidiaries of the Korean Consortium, such as Pattern Renewable Holdings Canada, ULC received this preferential treatment.

Also, we can look at Boulevard Power, the Canadian operation of NextEra, and here we're looking at that it got treatment directed or dictated by Article 4.01 of the GEIA which was signed by Ontario, not the OPA.

The treatment under the GEIA is signed by Ontario, directed by Ontario, provided by Ontario, Canada's directly responsible. So it does raise the issue though about chapter 15 of the NAFTA and lex specialis.

Canada suggests Article 8 of the ILC Articles are somehow inapplicable with respect to acts and omissions of the OPA because of Chapter 15, and Chapter 15 contains Article 1503(2) which Canada says lex specialis on state responsibility.

In order to assess this contention we need to look at two things. First, what do the ILC Articles say about the effect of lex specialis

on the applicability of the ILC Articles, that is Article 55, and then whether Article 1503(2) of the NAFTA or whether ILC Article 8 is applicable to the OPA's course of conduct in this case.

Just to be clear, the course of conduct of the OPA is attributable to the government as a result of ILC Article 8. The ILC Article refers to situations where an entity, in fact, is acting on the instructions or under the direction or control of the state. But with respect to the first issue, given ILC Article 55, a lex specialis does not render the ILC Articles inapplicable.

The articles are only applicable to the extent that state responsibility is governed by a special rule. That's what Article 55 says.

On the second issue, Article 1503(2) clearly establishes that normal actions of state enterprises are attributable to the state and it thus clarifies the understanding of the parties that state enterprises are not to be treated like Article 4, organs of the state, where essentially all of "the conduct of an ILC Article 4 organ is attributable to the state."

1503(2) duplicates, in essence, or

largely duplicates what you see in ILC Article 5 which deals with state enterprises. Article 5 says:

> "The conduct of a non-organ is attributable to the state where the entity in question has been empowered to exercise governmental authority and the conduct in question constitutes such an exercise." [As read]

So different tests.

In sum, Article 1503(2) establishes attribution of conduct of state enterprises and that they must operate in a manner akin to ILC Article 5 and ILC Article 4 and this makes a lot of sense as many state enterprises including the OPA exercise commercial-for-profit activities where the act based on the same incentives and considerations as private market actors and not as implementers of public policy and regulators.

It is understandable that one would not want such activity attributable wholesale to the state. But, as opposed to the situation

under ILC Article 5, Article 1503(2) doesn't speak at all to the situation addressed in the ILC Article 8, which is where one organ of the state is giving a specific direction or instruction to be carried out by a state enterprise or an employee of a state enterprise or by somebody completely different.

Let's take a hypothetical. Let's say the Interior Minister of a country decides that an investor's plant is to be destroyed. But instead of having of the military do it, someone that is clearly part of the state, the Minister operates through a state enterprise or some employees of a state enterprise that are instructed by the Minister to destroy the factory.

Can the state really avoid the international responsibility simply by using a state enterprise as an instrument to effect the state of affairs? Here, an organ of the state is determined to bring about a specific decision and is instructed that it happen.

There is simply no language in Article 1503(2) that addresses this issue or that suggests that ILC Article 8 is inapplicable. Such a result would allow a huge escape hatch from

international responsibility and this was clearly never intended by the NAFTA parties.

So, in the situation of the OPA, its actions under the FIT represent conduct that originates with the actions of the state. We've seen that both under Article 25.3.5 of the Electricity Act where the Ontario Minister of Energy used a statutory power to direct the OPA to follow directions from the Ontario Government; and also under Article 25.3.2 where governmental authorities actually delegated, delegated to the OPA.

Now, the conduct of the OPA initially in this dispute is not technical. It's not an exercise of a governmental authority as to context unless it's been set out. The FIT is not a price of any commercial operator. It is a government-created entitlement that is conditioned and Canada has indeed belaboured this point on the compliance with extensive rules, regulations and requirements.

So how is the OPA's rule of determining who is entitled to sell electricity at a regulated price different from core examples of the exercise of governmental authority in Article

1503(2) such as granting licences or approving commercial transactions. Other than by grant of governmental entitlement no-one would be able to sell electricity by the rates established in the FIT.

The OPA was allocating governmental entitlements and enforcing the laws, regulations and requirements with respect to those entitlements. And it is an authority, the power authority, its role here was clearly with respect to the exercise of governmental authority.

Ontario of course used its power under the Electricity Act to delegate or direct, so direction would be ILC Article 8, or delegation under the Article 25.3.2 of the Electricity Act, and they make it clear the Minister is directing and is responsible for these acts. Ontario is in charge of these acts. Ontario is the puppet master.

It is making the OPA do things and we heard testimony that, in fact, the OPA was happy to do this because then the blame would go to the government because the government is in control of these things.

The following actions, there were

a number of actions which harm Mesa and they are directly attributable through directions. So, for example, on June 3rd, we can go there, the Minister of Energy directed the OPA.

Here you see under 25.3.2, that is about the FIT program. It instructs to open the five-day window for interconnection. That's directed.

Here on April 1st, under 25.3.2 that's a delegation of governmental authority. It was instructing the OPA to negotiate PPAs with the Korean Consortium. Again, there is a large list which we've set out in the memorandum.

So, hence the limited consultation window and the resulting harm that allow the connection-point change between regions is directly attributable to Ontario through this mandatory directive. This was a clear exercise of governmental power.

Similarly, there is no question that Canada, through Ontario, is responsible where the Minister directed the OPA on April 1 to give priority to projects within the scope of this direction, when assessing transmission availability with respect to the FIT.

Again, there is specific direction exercising governmental authority for a specific action which with result in the farm. The same reasoning applies to the Minister's direction on the 500-megawatt reservation of transmission capacity, the gift on December 17, 2010.

I would like to turn the damages. What does this all mean to our client?

Slide 60 is a chart, and this is the slide number 7 from Mr. Low's summary and it provides a clear summary that breakdown of damages for each NAFTA breach, the total losses claimed for all NAFTA are 704.1 million to 768.2 million.

You heard the testimony from Mr. Low and Mr. Goncalves about the elephant in the room, as the difference in approach to quantifying damages. That is displayed on slide 61 here on the monitors before you.

This difference reflects an amount of $500 million this accounts for the majority of the difference between the valuation experts and the difference relates fundamentally to the interpretation and application to the NAFTA to damages.

The question is simple: In

interpreting the Most-Favoured-Nation clause relating to evaluating damages, do you assume that a party should be given the most favourable treatment or do you attempt to take away the benefits of the more favourable treatments that have already been given to some other party and calculate damages on that basis?

You've heard from Bob Low, the investor's chartered business evaluator on this point and he was consistent, credible and gave his professional opinion which he's been doing in numerous other cases, for many, many years, over 60 cases, and his damages analysis is premised on giving the most favourable treatment to the investor.

Mr. Goncalves had no basis for his approach. We saw that on cross-examination, other than his own view, his own experience which he said he had none in NAFTA.

Canada's valuation approach with respect to NAFTA Article 1103 can simply be dismissed as illogical by the following hypothetical.

So, let's assume that ABC Company is interested in accessing the Ontario wind market

and wants to enter into a business arrangement similar to that of the Korean Consortium. So company ABC can attract a manufacturing facility for the Province of Ontario. Company ABC is not participating in the FIT Program. Under BRG's basis of damages, the elimination of the wrongful action by Canada would leave company ABC in the position of not receiving a long-term fixed price contract or any relief whatsoever.

Canada would thus have breached its NAFTA MFN obligations with respect to ABC Corp but it would receive no compensation for that breach. This just doesn't make any sense. The only damage approach that gives meaning to the MFN principle is that which was adopted by Mr. Low, and which was to provide the most favourable treatment to the investor which is what the NAFTA tells us that we should be doing and now as we've talked about this in relation to Judge Brower's question, which other Tribunals would give us an indication would be the appropriate approach as well.

Now, the second largest difference in the quantification of losses to the lost of equity, when looking at lost profits, slide 53, which is Mr. Low's slide, the cost of equity is in

line of the OPA's, his cost of equity, whereas Mr. Goncalves' cost of equity is significantly higher and this difference alone accounts for $120 million between them.

Now, let's go to slide 46.

Mr. Goncalves suggested that the OPA's 11 per cent cost of equity represented a project already in operation and no longer reflected any of the risks of development.

This is simply incorrect. Mr. Low indicated that on the basis of OPA's own documents, a presentation of the 11 per cent rate of return does reflect the risks of development.

Next, it's important to note that if the Tribunal finds a breach, damages are certain. Canada's own expert concedes that at least two of Mesa's four projects would be awarded contracts and that causation is proven for each of all the four projects.

Remember, Mr. Goncalves opined on causation and note that means our version of the transmission allegation must be correct.

Mesa could not get those contracts. Mr. Goncalves says the contracts were awarded exactly as Mesa has shown in the evidence

and Mr. Chow has suggested that the provincial rankings were key. Finally, at the end of his examination, I believe I finally, from a question from the President, he admitted that when faced with an OPA document from the FIT team, Exhibit C-617, that it was the exact opposite of what he was saying, and that the rankings were by region, not by province.

The FIT team, you will remember, stated the area ranking as more important than the provincial ranking, and Mr. Goncalves must agree with the FIT team or otherwise he would not have said that Mesa would have gotten contracts in the Bruce but for the GEIA or the FIT pool change.

Next slide. Contrary to what Mr. Goncalves presents Mr. Low's report does not provide an all-or-nothing conclusion. Mr. Low's first and second reports provide a clear breakdown of all the components of his conclusion of losses by project for the Tribunal to consider alternative loss scenarios, if they need to go there.

Now, I'd like to turn briefly to the MTSA obligations. We have here a chart that identifies the MTSA and various documents that support it. We thought that might assist you.

While in May of 2008, Mesa signed a master North American turbine supply agreement and paid the deposit thereafter, that was an agreement, as you heard Mr. Robertson's testimony, that would be for all of North America. The MTSA was amended in November of 2009 for the express reason of using turbines for the FIT projects.

Immediately after the amended MTSA was signed, Mesa submitted its launch applications. You will see, the numbers change dramatically between May and November 2009.

Shortly thereafter, they filed the North Bruce and Summerhill applications in May 2010 and while Mesa waited for the Bruce area to open transmission and saw the one-year extension from GE in February 2011.

Then it receives notice in July 2011 that it did not obtain contracts. Mesa thereafter tried to mitigate its losses by using the turbines elsewhere but it was unable to do so. This resulted in Mesa breaching the amended MTSA in December 2011 and forfeiting some of the deposit -- you see that there -- and then the remainder of the deposit in 2012.

We thought this would be helpful. Mesa had to keep those wind turbines available, so they could be able to deal with contracts that could have been awarded under the FITs.

That is what you needed to do to be shovel ready. One of the important elements of the launch criteria is to be able to deal with it and it would be required for your planning to know what your turbines were and where to site them because you'd need to know that.

So, in conclusion, investors are entitled to expect fairness from governments when they were investing millions of dollars in a public process. Instead, the story about the Ontario FIT Program is nothing but shocking and egregious to any reasonable observer.

We'd like to close off in the words of Mr. Pickens, T. Boone Pickens, a man who came from Texas to bring investments and a promise of clean energy security to Ontario.

Let me just pull up what Mr. Pickens said at page 288 on Day 1.

He said:

> "Well, you always feel bad when you lose, and then you

look to see why you lost, and here we lost because we didn't have a level playing field." [As read]

Now, the evidence shows us the disappointing fact that despite outward appearances, Ontario was not a good place to invest because the rules were not followed, and the playing field was not level.

This was not fair and Mesa was harmed. Members of the Tribunal, you have the ability, and only you have the ability, to provide a remedy to this unfairness and we ask that you find for Mesa and compensate it for this wrongful behaviour. Thank you very much.

THE CHAIR: Thank you. So this leads us now to the lunch break. Maybe you tell us how much time the claimants have left because they are entitled to rebuttal, if they wish.

MR. DONDE: The claimants have 28 minutes left.

THE CHAIR: Fine. Should we resume at, would you say, one o'clock?

MR. APPLETON: Perhaps quarter to one. Yes.

THE CHAIR: Quarter to one. I think give a little margin, yes.

Let me turn to Canada. Is it fine or would you like to have a little bit more time? I think you would.

MR. SPELLISCY: I think it should be fine.

THE CHAIR: Should be fine. Good. Then have a good lunch. 12:45, that's what I understood, no?

--- Lunch recess at 11:57 a.m.

--- Court reporter, Teresa Forbes continues

--- Upon commencing at 12:46 p.m.

THE CHAIR: Fine. Now we're ready. Mr. Spelliscy, you're ready too.

MR. SPELLISCY: You bet.

THE CHAIR: Okay. So you have the floor for Canada's closing argument, please.

SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: Good afternoon, Professor Kaufmann-Kohler, Judge Brower. Let me take the time right off the bat to also thank you on behalf of the Government of Canada for the attention you have paid to this case. It is a complex case with technical details about

electricity system that we have all struggled to wrap our heads around, and I think you have done an exceptional job on it.

I think as well here, at least the written submissions that were originally submitted by the claimant, have made the case seem quite complex, as well. But as we have seen this week, I think the case has gotten a little bit simpler.

So let me walk through a little bit of what was originally at issue, because I don't really intend to address it at all, much of it, today. I'm going to try to be relatively focussed today. I am estimating hopefully that we will be around two hours in our submissions here.

So let me get started. Let me take some time to try to separate the wheat from the chaff here so that we know what is really at issue.

You will remember in our opening presentation I took you to two sets of slides. I took you to a slide that had the Ontario measures on them and the slide that had the OPA's measures on them, and both sets of measures were at issue.

Let me talk to you about the latter first. As you will recall, in its written

submissions the claimant alleged, as a breach of NAFTA, that the ranking of the claimant as TTD and Arran projects during the launch period violated Article 1105, as well as some of the technical decisions made by the OPA about whether, in the Bruce-to-Milton allocation process, to award contracts to certain projects connecting at particular circuits or on particular lines also violated Canada's obligations under Articles 1102, 1103 and 1105.

But we heard almost nothing about that from the claimant this week, and we heard nothing about that from the claimant this morning.

On the first point, during the examination of the claimant's expert Mr. Timm, we looked at the FIT rules and we looked at section 13.4 after Mr. Landau directed Mr. Timm to it, and we saw, and Mr. Timm confirmed, that this provision made clear that the OPA had the discretion to determine what evidence would be deemed acceptable in order to be awarded a criteria point.

Canada submitted the testimony of Mr. Duffy in this arbitration, who explained in depth in his witness statement what the OPA did, why it made the decisions it did, and why the

claimant did not succeed to obtain any criteria points.

In short, he explained how the OPA exercised the discretion that it had, and why it did so in a fair and reasonable manner.

He was available to give testimony in front of this Tribunal, but the claimant did not even call him as a witness.

Instead, they relied on the testimony of Mr. Timm, but he clarified on the stand that he actually was not offering an opinion on the quality and the outcome of the OPA ranking. He did not conclude that, in fact, the claimant should have gotten any of the criteria points. He didn't assess that.

He relied upon the testimony, at least in cross-examination only, of Mr. Robertson, who -- and we'll put this evidence in our post-hearing submissions -- basically admitted that the claimants didn't provide the evidence necessary to get the points.

The claimant here in this case and this proceeding so far, it has it in its written submissions, but here at this hearing it has become clear they have simply failed to put in the

evidence necessary to prove that the conclusion of the OPA launch period process with respect to their TTD and Arran applications would have been any different than it was had their alleged wrongs not occurred. They have failed to show it was a breach of NAFTA.

So if we look at the OPA measure slide, we see, again, the second grouping of measures, and that was the technical decisions made by the OPA in awarding contracts as part of the Bruce-to-Milton allocation. For the Tribunal to remember, we had allegations in the written submissions about connections on the L7S circuit, connections to the Bruce-to-Longwood, the 500-kilovolt line, enabler requested projects.

Again, we have heard virtually nothing from the claimant this week on those claims, and this morning we heard nothing.

As Shawn Cronkwright told us on Wednesday when he was here, he said there are only a few people in Ontario who have a sophisticated enough knowledge of the system to be able to explain why the OPA made the decisions they made.

The claimant had one of them here on Tuesday, Bob Chow. They didn't ask him a single

question about any of these allegations.

Now, perhaps the claimant is dropping these claims about OPA conduct. Maybe it is dropping these allegations entirely, and, if they are, I think they should say so, because it would save everybody a lot of time in the post hearing submissions and in writing and drafting any part of the award. But to the extent they are still challenging them, we have fully addressed them in our previous submissions, including the opening and all of our written submissions, so I don't propose to come back to them in this closing argument, at all.

So let's instead focus on what the claimant did pay attention to this week, and that is the measures of the Government of Ontario. You will recall I also took you to a slide in the opening where we had those measures listed, and you will recall the measures that were being challenged were: One, the domestic content requirement of the FIT program; two, the treatment accorded to the Korean Consortium under the Green Energy Investment Agreement; and, three, the June 3rd Ministerial direction with respect to the allocation of the Bruce-to-Milton line capacity.

I want to be clear right at the start, because we heard arguments from the claimant on this this morning, there is no dispute, never has been, that these measures are attributable to the Government of Ontario. These are government actions.

Canada argued that and admitted that in its counter memorial. What we're talking about with respect to attribution is the OPA measures that we showed on the previous slide, not these measures.

And so if this now is the full extent of the challenge being made by the claimant, then, in fact, the issue between the parties about the OPA and whether its acts are attributable to Canada simply drops away. Only the claimant can tell us that.

I want to come back to something Judge Brower asked specifically, and it really was the focus of all of yesterday, and it is a question of what really matters here. What caused or even could have caused the claimant any losses?

And the claimant, from its presentation this morning, seems to still not understand that it is its obligation to show how

the alleged wrongful conduct caused its losses.

At one point this morning claimant's counsel said Canada has not met its obligation to refute the damages claims. That has got it totally backwards. It is the claimant's obligation to prove not just causation, but also quantum, and we will address that at length in our submissions.

And this is important because, as you are all well aware, a NAFTA tribunal is not a domestic court. It is not a court of general jurisdiction where they can review all of the acts of government. It can review the acts of government that actually caused harm to the claimant.

Contrary to what the claimant said yesterday in some of its questions, and contrary to what it said this morning, it is no different for Articles 1102 and 1103. You still have to prove how the alleged more favourable treatment actually caused the claimant harm.

This morning, we heard reference to Cargill. Cargill does not say otherwise. In Cargill, the question was a methodological one about whether to award lost profits and for what.

The tribunal in that case still applied the same "but-for" test that international law requires. It looked for: But for the alleged wrongful conduct, what was the most realistic and probable scenario in which the claimant would have found itself?

That is exactly what Mr. Goncalves analyzed. Cargill did not say that the appropriate standard for damages is to bring the claimant up or to give the claimant the discriminatory treatment about which it is complaining. You remove that discriminatory treatment.

Here, you remove the priority transmission access given to the -- given in the GEIA. That is what caused the claimant harm and that is what Mr. Goncalves has done.

But this pervades other aspects, I think, so far, of its submissions, because there are numerous allegations that have been raised this week that simply would not have resulted in losses to the claimant.

So let's focus on causation for a few moments. For example, in the context of the Green Energy Investment Agreement, the GEIA, the claimant has complained about the phase 1 allocation of transmission capacity to the Korean

Consortium; phase 1, not phase 2.

We heard about it this morning, as well. They called it a gift. But that capacity was not in the Bruce region. It did not have an impact on whether or not the claimant's FIT projects could connect to the electricity system. It did not have an impact on whether or not the claimant got contracts.

I think this morning claimant's counsel said Canada says it did not, but it did, but left it at that. We had no explanation of how it was possible that it could connect.

The claimant has also complained about the economic development adder provided to the Korean Consortium. But as Ms. Lo explained in her testimony, the job counting was still going on. When the claimant brought this claim in alleged damages, it had not been paid. It could not have affected and caused the claimant harm, because it had not happened.

The claimant has also complained about the capacity expansion adder or capacity expansion option in the GEIA, but, again, the fact is, as the evidence confirmed at this hearing, this was not used in the Bruce region. The Korean

Consortium did not increase phase 2 capacity by 10 percent, and so it had no effect on whether the claimant's projects could get FIT contracts.

Let's think about the June 3rd direction. With respect to the June 3rd direction, the claimant seems to have raised complaints during the course of this hearing, anyways, in its questioning of the witnesses, that developers outside of Bruce and west of London regions were not able to participate in the Bruce-to-Milton allocation process.

They phrased it in various ways. They said a province-wide ECT wasn't run. They said people in other regions of the province were not able to change their connection points into the Bruce or west of London regions during the connection-point change.

But how could whether other projects in other parts of Ontario had the opportunity to switch connection-points impact the claimant's projects? They are not in the Bruce region. Whether or not someone in northern Ontario got an opportunity to change its connection points is simply not causally related to whether or not the claimant could obtain a FIT contract in the

Bruce region.

And let's just think about the other point that the claimant has consistently come back to in this regard, and it has come back to it again today, and that is why developers in other regions weren't allowed to switch-in to the Bruce or west of London region.

How would it benefit the claimant to have more people come into the Bruce and west of London region to compete for transmission access that the claimant was competing for? If other developers in other regions were allowed to compete for transmission access in the Bruce region, there would be more people competing, not less.

Increased competition, far from causing harm to the claimant, limiting the number of developers who were able to compete for the Bruce-to-Milton transmission capacity was to the benefit of anybody already in the Bruce region, like the claimant.

And a similar conclusion is reached when we think about the notice that was provided to developers about the Bruce-to-Milton allocation and the length of the connection-point change. We heard a lot about this this morning,

that it was inadequate. They had slides on this.

But Mr. Goncalves spoke to you directly, in response to a question I believe from Judge Brower yesterday, what would have happened if there had been more notice or the period were longer.

No one is going to switch out of the Bruce region. That's where the capacity is. More notice and more time would only lead to increased transmission -- or competition for the transmission capacity. More developers would have switched in.

So a lack of more notice and a short time frame did not cause the claimant any harm. So let's try to get down to what is really left and what really should matter here, which is the things that actually could have -- could have -- caused the claimant harm, the things the claimant would have to prove. It's not for Canada to prove this or refute it. It is for the claimant.

So with respect to the Korean Consortium and the alleged treatment that they were accorded, as I understand it, the claimant is complaining about two primary things, now, anyway,

first, that the negotiations of the GEIA were not fully transparent, and, second, they seemed to be complaining that the Korean Consortium was afforded priority transmission access in the Bruce region and that that was not available to them.

We're going to come back to those two things. With respect to the June 3rd direction, the only real remaining claim, the only part of that direction that could have caused harm to the claimant, was that projects from west of London were permitted to change their connection points through the Bruce region. That is the claimant's allegation, that they should not have been permitted.

That's what this Tribunal can assess, whether that change in connection points is a violation of Canada's obligations under NAFTA.

So these allegations, what we have on the screen there, that is what we're going to focus on in this closing presentation. In our post hearing submissions, of course we'll be more fulsome. We're going to try to be relatively targeted here and be efficient about what we do.

But as we go through this, there is one thing that I want you to keep in mind, and

that's the claimant's obligation to provide evidence of the wrongful conduct. The claimant has the burden of proof. I want you to think about what has been provided here.

The claimant's questions and its allegations this morning have been loaded with innuendo about corruption, about political cronyism, about, in their slide, bags of money being paid for favours.

Those are serious allegations against government in Canada. They should not be made lightly, and there is no evidence to support them.

Each one of Canada's witnesses who was asked about this rejected any allegation that there was corruption, that there was political cronyism. Insinuation is not enough and it should not be enough. They need evidence.

We see no merit in these allegations, and I do not really propose to address them in much more detail in any of our submissions today orally. We do have some responses in our written submissions, but I am just going to leave them to the side.

So now let me explain to you how

we're going to structure the remainder of Canada's remarks this morning, and because even I am getting a little bit tired of hearing my own voice, there will be some welcome relief over the next few hours.

First Ms. Squires is going to come back, and she will explain to you why the claimant's claims are beyond the jurisdiction of this Tribunal.

Second, Mr. Neufeld, who you have not yet heard from this week, will come up and explain why the claimant's Articles 1102, 1103 and 1106 claims are precluded because of the exception for procurement in Article 1108.

Now, as I explained in the opening when we went through those demonstratives, this Tribunal could stop there, because the reality is that this dispute is beyond the jurisdiction of this Tribunal or outside of the scope of Chapter 11.

But we will also show you today and in our post-hearing non-briefs why there is no merit to any of the claimant's allegations of wrongdoing. Now, this part gets a bit complicated because, as you will remember from the slides I

just showed you, the treatment accorded under the GEIA and the challenges to the June 3rd direction are all alleged to violate all of 1102, 1103 and 1105. It is complete overlap.

So in an effort to avoid repetition, we're going to approach it in the following way. First, Ms. Kam will come up and she will explain to you the legal standards in Articles 1102 and 1103. Then Ms. Marquis will explain the legal standard under 1105.

Then I am afraid you will have to suffer through me again. I will discuss the evidence that we have heard during this hearing, and I will show how neither the treatment that was accorded to the Korean Consortium, nor the June 3rd direction, violated any of Canada's obligations under Articles 1102, 1103 or 1105.

Mr. Watchmaker will then discuss with you the issue of damages, and he will focus on the issue of causation and the appropriate approach to calculating damages in international law.

Counsel making these presentations will be happy to address any questions you have, but I will also stand up at the end to give a brief closing remark and will be available to answer any

questions you have on any of these topics, as well, if that is what you prefer.

With that, I will give the floor to Ms. Squires.

SUBMISSIONS BY MS. SQUIRES AT 1:08 P.M.:

MS. SQUIRES: Good afternoon, members of the Tribunal. In the course of my submissions today, I will speak to three jurisdictional bars in the claimant's claim: First, that this Tribunal is without jurisdiction over all the claims, as the claimant failed to respect the conditions placed on Canada's consent to arbitration under NAFTA Chapter 11.

Second, and in the alternative, even if the conditions required to submit a claim to arbitration have been met, the claimant has made numerous arguments which are outside the jurisdiction of this Tribunal. First, the claimant has made claims with respect to the alleged breaches that occurred before the claimant made its investments in Ontario, and, second, the claimant has made claims based on the actions of a state enterprise, the Ontario Power Authority, who is not acting in the exercise of delegated government authority.

And I will turn to each of these in turn, but before I move to these points I would like to remind the Tribunal that it is not Canada's burden to prove that this Tribunal does not have jurisdiction.

As NAFTA and international arbitration tribunals have consistently affirmed, it is for the claimant to establish that its claims fall within the jurisdictions -- within the Tribunal's jurisdiction. Further, as the tribunal in ICS Inspection held, a state's consent to arbitration shall not be presumed in the face of ambiguity.

And with that in mind, I would like to turn to my first point, and that is the issue of consent to this arbitration. A NAFTA party's consent to arbitration is neither universal nor unconditional. As Article 11022 indicates, Canada, the United States and Mexico have only consented to arbitrate disputes under Chapter 11 provided that procedures set out in the NAFTA have been followed.

These procedures are that indicated in Articles 1118 to 1121. It is only when these conditions are satisfied that the NAFTA

parties have consented to arbitrate.

And all three NAFTA parties agree on this point, as both the US and Mexico have indicated in their 1128 submissions to this dispute.

Quite simply, these articles cannot be ignored at the claimant's discretion. Article 1120 indicates one such condition on Canada's consent, and it indicates that claims may only be submitted to arbitration provided that six months have elapsed since the events giving rise to the claim.

Now, the exact meaning of this phrase has been the subject of much dispute between the parties. However, it cannot be disputed that this phrase must be interpreted in accordance with its ordinary meaning, applying the customary international law principles of the Vienna Convention on the Law of Treaties, Article 31.

If we look then at the plain language meaning of the term "events giving rise to a claim", there is only one meaning. Every event which gave rise to the claim must have occurred at least six months prior to the submission of that claim in order for consent to crystallize.

And this interpretation makes sense when you consider the policy reasons behind Article 1120. The six-month period gives the respondent an opportunity to learn about the measure at issue before the formal submission of a claim.

This is especially important where a sub-national government is involved, much as we have here with the Government of Ontario.

Now, the claimant has put forward an interpretation of Article 1120 that is simply incorrect. In the view of the claimant, Article 1120 allows claims to be submitted to arbitration provided that at least some of the events giving rise to the claim have passed.

In fact, if you follow the claimant's interpretation, a claimant could submit its claim to arbitration before all of the events in issue have actually even occurred, and this cannot be the correct interpretation, as it goes against the very purpose of Article 1120 that I just mentioned.

However, for the sake of argument, even if Canada were to accept the claimant's position, the requirements of Article 1120 have not

been met. In fact, the claimant cannot even meet its own test.

Under Article 1116, a claim does not arise until the investor has allegedly suffered harm arising from a measure that it alleges breaches the NAFTA.

So even if some events occurred more than six months prior to the submission of the claim to arbitration, those events must still be events which give rise to a claim in order for the six-month clock to start.

And this becomes very important when we look at the facts of this particular dispute, and I want to highlight a few pertinent dates for the Tribunal in that regard.

On July 6th, 2011, the claimant filed its notice of intent. On October 4th, the claimant submitted the claim to arbitration.

Now, if we count back six months from that date, it will take us to April 4th, 2011. And if we look at events which predate that claim -- predate that date, sorry, what we see are numerous events, but those are simply not events that give rise to a claim, for example, Ontario and Samsung entering into the GEIA, or the release of

the FIT rankings or the signing of the MOU.

These are all events, but they simply do not -- they simply are not events that give rise to a claim.

If we look at events, however, that post-date April 4th, 2011, we see the June 3rd direction that the claimants have put at issue, but we also see the July 4th FIT contracts offer as part of the Bruce-to-Milton allocation process.

And it wasn't until the claimant failed to receive a contract on this date that any alleged harm arose and, as such, this is the pertinent date for the cooling-off period.

As a consequence of the claimant's failure to wait six months since this event giving rise to a claim, this Tribunal is without jurisdiction.

Now, even if the Tribunal finds that the requirements of 1120 have been met, the Tribunal is still without jurisdiction over certain of the claimant's claims; namely, those which are with respect to alleged breaches which occurred before the claimant owned any investment in Canada.

Article 1116 provides, in part, that:

"An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under..."

Section (a). That must be read, of course, with Article 1101(1), which indicates that Chapter Eleven applies to measures which are adopted or maintained by a party that relate to investors of another party or investments of investors of another party.

Therefore, for Chapter Eleven to apply to a measure relating to an investment, that investment must be of an investor of another party at the time of the alleged measure. Now, as the tribunal in Phoenix Action indicated, a tribunal is thus limited, ratione temporis, to judging only those acts which occurred after the date of the investor's purported investment. The claimant must then demonstrate that it was an investor at the relevant time.

NAFTA tribunals have also submitted this proposition. For example, the Glamis tribunal indicated that NAFTA arbitrators have no mandate to evaluate laws and regulations

that pre-date the decisions of a foreign investor to invest.

The Gallo tribunal, as well, reached the same conclusion and, in doing so, cited the Phoenix Action case I just mentioned.

Now I would like to turn to look at the facts of this case and how that would apply here. Both the TTD and Arran projects were incorporated on November 17th, 2009. For North Bruce and Summerhill, their incorporation date was April 6th, 2010.

The Tribunal then only has jurisdiction with respect to measures which occurred after these dates, as those measures relate to those investments.

For example, the claimant has alleged that the signing of the MOU with the Korean Consortium in December of 2008 and the GEIA on January 21, 2010 was not transparent; hence, a violation of Article 1105.

Yet the MOU predates the incorporation of all four of Mesa's projects, and the signing of the GEIA predates the incorporation of both Summerhill and North Bruce.

As such, the Tribunal is without

jurisdiction over these measures as they relate to those particular investments.

I would like to now turn to my last point, and that's the point of attribution, and it has been extensively discussed by the parties in their written submissions.

However, I am going to be extremely brief here today because, as my colleague Mr. Spelliscy explained, it's not even clear to Canada anymore that the claimant is even challenging certain measures of the OPA.

As I previously mentioned, Chapter Eleven only applies to measures adopted or maintained by a party, and there seems to be no dispute here in that regard. As such, the Tribunal must ask itself when it is considering the measures challenged in this arbitration: Are those measures of the Government of Canada? If they are not, the Tribunal does not have jurisdiction over them.

But before I get into the measures at issue, I would like to highlight for the Tribunal what Canada does not challenge. We do not dispute that the decisions taken by the Government of Ontario are attributable to the Government of Canada. Of course, the actions of sub-national

governments are attributable under the NAFTA.

In this regard, if the claimant is challenging the June 3rd, 2011 direction, of course this is attributable to Canada. It was a measure carried out by Ontario in order of Canada.

The same applies to the Minister's direction to the OPA to negotiate power purchase agreements with KC, for example.

However, the claimant has pointed to numerous acts of the OPA which are not attributable to Canada, and it is those acts which I would like to focus on for the remainder of my time.

This includes the ranking of the FIT applications and the decision to offer a FIT contract to some applicants and not others. And in this regard, I have three points to make: The first, that the OPA is not an organ of the state; the second, that the OPA, a state enterprise, was not exercising delegated government authority with respect to the alleged breaches; and third and in the alternative, that if the Tribunal finds the OPA is not a state enterprise, the actions of the OPA are not attributable to Canada pursuant to Article 8 the ILC's articles.

Turning to the first question of whether the OPA is an organ of the state, while Canada extensively briefed the Tribunal on these questions in its counter memorial and reply on jurisdiction indicating that the OPA is not a de jure or de facto organ of the state, the claimant appears to have not pursued this option in its reply or even here today.

While I am happy to answer any questions the Tribunal might have on that matter, I will move on to my second point in that regard, and that deals with the OPA as a state enterprise.

Article 1503 establishes that a NAFTA party is responsible for the actions of state enterprises only when such enterprises exercise any regulatory, administrative or other governmental authority that a party has delegated to it.

As the tribunal in UPS explained, Article 1503(2) can create a lex specialis, that the rules of customary international regarding attribution do not apply to measures taken by the state enterprise in the context of the NAFTA.

I would like to pause here for one minute to address the specific comments that the claimant made this morning, and that was with

respect to Article 55 of the ILC's Articles. I want to make it clear that Article 55 makes clear to the international community the residual character of the ILC's Articles, that the articles do not apply where and to the extent the conditions for the existence of an internationally wrongful act or the implementation of international responsibility of a state are governed by special rules of international law.

And that is precisely what we have here. Article 1503(2) has created that lex specialis. As such, the Tribunal is faced with two questions in this regard. First, is the OPA a state enterprise; and, second, was the OPA exercising delegated government authority with respect to the measures alleged to breach the NAFTA?

Quite simply, the answer to the first question is, yes, the OPA is a state enterprise, and the answer to the second, no, the challenged measures of the OPA were not the result of delegated government authority.

Turning to the question of whether the OPA is a state enterprise. In its memorial, the claimant agreed with Canada that the OPA was a

state enterprise. It stated the same in its notice of arbitration. In its reply memorial, in one section it indicated that in fact it was a state enterprise, and in another section it wasn't.

And, quite frankly, I am unsure today in the claimant's earlier submissions whether or not they see the OPA as a state enterprise.

But for the sake of clarity, I will indicate to you that it is. Article 1505 of the NAFTA provides a definition of state enterprise relevant to this dispute, one which the OPA meets.

Article 1505 indicates that a state enterprise is an enterprise which is owned or controlled through ownership interests by a party.

The OPA falls within this definition, as it is a non-share capital corporation created by Ontario. Further, there are numerous indicia of Ontario's ownership of the OPA which demonstrate the OPA is in fact a state enterprise and which demonstrates that Ontario owns the OPA in this regard.

And I would refer the Tribunal to authority CL-0401, the Electricity Act, in support of this, where numerous provisions support the proposition that the OPA is a state enterprise,

such as section 25.23, indicating that on winding up of the OPA, the remaining property of the OPA following all debt payment belongs to the Government of Ontario; section 25.4(2) and (8), that the Minister of Energy appoints and dismisses the board of directors of the OPA; and section 25.22(2), that the Minister of Energy approves the OPA's business plan.

Now, the next question for the Tribunal to assess is whether the OPA was exercising delegated government authority with respect to the measures alleged to breach the NAFTA, and in response to this Canada submits it was not.

It is important to note the mere fact the OPA is a creature of statute does not, in and of itself, form the basis of attribution to the state of the subsequent acts of the OPA.

Both the UPS tribunal and the Jan De Nul tribunal have spoken to this issue. Specifically, the Jan De Nul tribunal noted that there is something important about government authority, and what matters is not the service public element, but the use of the puissance publique or governmental authority. As such,

attribution of activities of a state enterprise to the state requires a careful analysis of whether the measures in question are an exercise of government authority.

I would like to turn to those measures now, but again I would remind the Tribunal the claimant may have in fact even dropped these claims.

The claimant has challenged the OPA's design and administration of the FIT program. There is nothing governmental about these acts.

The OPA's ranking of the claimant's TTD and Arran projects in the launch period and the OPA's award of contracts as part of the Bruce-to-Milton allocation are simply not examples of delegated government authority.

I would like to turn now to my final point. The claimant had argued here today that certain measures of the OPA are attributable to Canada under Article 8 of the ILC Articles, and this is misguided in several ways.

For starters, the claimant has used this article to indicate that the June 3rd direction and the set-aside to the KC are attributable to the Government of Ontario. But to

this, we would say of course they are. These are actions of the Ontario government itself.

But if we look at the actions of the OPA that I just mentioned, the story is quite different. Now, the ILC has specifically addressed instances where a state has established an entity via statute in its commentary to Article 8. It noted that these entities are considered separate. Prima facie, their conduct in carrying out their activities is not attributable to the state unless they are exercising elements of government authority within the meaning of Article 5.

As such, the fact that a state establishes a corporate entity is not a sufficient basis for attribution.

Now, I have already discussed the contents of Article 5 in discussing delegated government authority, so I won't repeat myself here, but suffice to say, once you get to Article 8, it brings you back to the exact position we were in when we were discussing state enterprise.

I would also note attribution under Article 8 is exceptional and only applies where the private entity acts on the instructions of a state or under the state's direction or

control.

In examining the proper test, it is one of the fact of control, and as the ICJ in the Genocide Convention case indicated, analysis under Article 8 requires one to look at whether effective control is exercised in respect of each operation in which the alleged violations occurred.

Now, let's take a look and apply that to this case. The OPA's ranking of the claimant's TTD and Arran projects in the launch period, the OPA's decision on what to include in the TAT table, the OPA's award of contracts as part of the Bruce-to-Milton process are not examples that fall under this category.

The claimant has not pointed to a single direction from the Minister of Energy to the OPA ordering it or directing it or instructing it to carry out these alleges breaches and nor can they. There simply are no directions.

Those end my submissions on the jurisdictional issues in this arbitration, and I am happy to answer any questions you may have. Otherwise, I will yield the floor to Mr. Neufeld, who will speak to the issue of procurement.

THE CHAIR: Thank you.

SUBMISSIONS BY MR. NEUFELD AT 1:27 P.M.:

MR. NEUFELD: Good afternoon, Professor Kaufmann-Kohler, Judge Brower, Mr. Landau. It is a real honour to be before you today. There is a lot of truth that has come through this hearing, but none more true than this. I have never heard my colleague Ms. Squires speak as slowly as she has just now.

--- Laughter.

MR. NEUFELD: She is from Newfoundland.

--- Laughter.

MR. NEUFELD: My job is to talk to you about procurement, and I have about 20 minutes to do that. Please don't hesitate to interrupt me to ask a question if you have anything.

Just to key this up -- sorry, about that. So a lot of ink has been spilled over one word, the word of "procurement", and there's probably good reason for this. That's because if a measure constitutes procurement, then Articles 1102, 1103, and 1106 do not apply.

Admittedly that is a drastic outcome, so it is no wonder the claimant has made every attempt to escape the application of such a

broadly worded exemption.

But the NAFTA parties chose this language expressly in order to preserve their right to continue to influence policy through the use of procurement programs, the likes of Buy America and the United States and many other programs throughout the NAFTA territories.

The right of the NAFTA parties is preserved when the exemption is interpreted, as it should be, according to its ordinary meaning, in its context, and in light of the NAFTA's object and purpose.

As previous NAFTA Chapter Eleven tribunals have said, the ordinary meaning of "procurement" in Article 1108 is to get or to gain a good or service.

The claimant disagrees, and to escape the application of the procurement exemption, it argues that you should supplant it with other treaty provisions, some in NAFTA, some not. But no matter how much it twists and it turns, and no matter how much its position evolves, it cannot escape the characterization that it first gave the FIT program.

In its memorial, this is how the

claimant described it. At paragraph 180, the claimant submitted that the program permitted different companies to compete for contracts to generate energy from renewable resources -- from renewable sources.

At paragraph 194, the claimant admits that in order to transmit and sell wind-generated power on the Ontario grid, Mesa needed a power purchase agreement.

At paragraph 181, the claimant cites to the Auditor General's report, which refers to the quantities of power the FIT program was intended to procure.

Yet despite its early characterization, the claimant has since engaged in verbal acrobatics to avoid these words. In its reply, the claimant calls the program governmental assistance, like financing transaction or guarantee. It also calls it a cooperative agreement, a loan, a fiscal incentive.

But the reality is that like hundreds of other FIT applicants, the claimant applied for its wind power to be procured. It applied for power purchase agreements, and now it is complaining that it wasn't awarded any.

Instead, the energy is being procured from other providers because, in its view, they were treated more favourably. We have already shown you, and shortly my colleague Ms. Kam and Mr. Spelliscy will speak to the fact, that there is absolutely no merit to the claimant's allegations of favouritism.

But even if there were, Article 1102, the claims of Article 1102, 1103 and 1106, would be barred. Those are the exact types of claims that are precluded by Article 1108.

Let me pause to give you a little bit of a road map of where I will take you. Now that I have set out the ordinary meaning, I will focus on the claimant's attempts to escape its application and consider first the claimant's arguments with respect to the Canada-Czech Foreign Investment Protection Agreement; next, its attempt to pilot in the description that is found in NAFTA Chapter Ten; and then the words that it likes in GATT Article III:8.

Afterwards, we will turn to the claimant's additional -- what we can boil down to the conditions and limitations they would like to place on the ordinary meaning of the word.

And, finally, we will come back to where we started with the contested measures to show they involve procurement.

So let's turn to the claimant's escape routes. First, the claimant runs to the Canada-Czech FIPA because that agreement does not contain a procurement exemption, and it argues that because the MFN provision of NAFTA allows a US investor to be treated no less favourably than a Czech investor, the procurement exemption in NAFTA must be invalid for use.

The claimant's argument is, well, confused. It is wrong in more ways than one, but one particularly egregious just error deserves your attention. The claimant invokes Article 1103 to oust the procurement exemption; yet it needs to prove it isn't a procurement to access Article 1103.

The claimant's attempt at escape route is what Joseph Heller would call a Catch-22. NAFTA Article 1108 couldn't be clearer. It states that Article 1103 does not apply to procurement by a party. The very purpose of 1108 is to preclude the application of 1103, meaning it is impossible for the MFN provision to oust the application of

the procurement exemption.

Second, the claimant seeks to evade the ordinary meaning of the words in Article 1108 by importing NAFTA Chapter Ten's description of procurement, with all of its conditions and all of its limitations, into Chapter Eleven.

According to the claimant, it is logical to believe that the drafters of NAFTA presumed the definition of procurement, that it would be internally consistent throughout the NAFTA.

Well, in reality, importing the conditions that are relevant to Chapter Ten into Chapter Eleven would be anything but logical. The NAFTA contains definitions applicable to the entire agreement. Those are found in the early part of the NAFTA.

And you have heard from each NAFTA party now that the description in Chapter Ten is meant for Chapter Ten, not Chapter Eleven.

The US agrees that the terms used in Chapter -- the term used in Chapter Eleven is a carve-out, whereas in Chapter Ten it is a carve-in.

And Mexico states it even more bluntly. The Chapter Ten sets out the scope and

coverage for Chapter Ten. It does not apply to Chapter Eleven.

It even goes so far as to say that the description was never intended to have effects on other chapters.

So you are welcome to consult Chapter Ten. That description can be a relevant context, but this is for interpretive purposes. It is not to apply it to Chapter Eleven.

Those additional limitations and conditions can't be imported into Chapter Eleven, because context, after all, is as important for its differences as its similarities.

Third, the claimant seeks to avoid the application of the ordinary meaning of the terms of Article 1108 by invoking a GATT provision and related WTO jurisprudence.

Here the claimant attempts to pilot the concepts of not with a view to commercial resale, and purchased for governmental purposes into Article 1108.

These concepts are nowhere found in Chapter Eleven. They are particular to GATT Article III:8.

But what is more interesting,

although they can't be found in Article 1108, they can be found in other NAFTA chapters, such as NAFTA Chapter Fifteen.

So while NAFTA parties purposely chose to exclude those concepts in the procurement exemption found in Chapter Fifteen, the parties did not include them in Chapter Eleven.

I think I said excludes, and I certainly meant "include".

While the NAFTA parties purposely chose to include those concepts of procurement, the procurement exemption found in Chapter Fifteen, they did not include them in Chapter 11.

Again, these provisions may serve as context for interpretive purposes, but it is their differences that are important.

The claimant also chose to mischaracterize the WTO jurisprudence. In the claimant's opinion, the appellate body found that many of the measures in the FIT program are not procurement and that the terms of the FIT program did not govern government procurement of electricity.

The claimant's summary of the appellate body decision is patently false. First,

the panel recognized that Ontario was engaged in procurement. When it focussed solely on the ordinary meaning of that term, not the other bells and whistles that Article III:8 contains, the panel stated clearly that: We have concluded that the Government of Ontario's purchases of electricity under the FIT program constitute "procurement".

Likewise, the appellate body concluded that the product purchased by Ontario under the FIT program and contracts is electricity, and it said again: In the case before us, the product being procured is electricity.

Neither the panel nor the appellate body ever doubted that Ontario was engaged in procurement, just that the issue in that case was about the importation of generation equipment, generating equipment, rather than the procurement of electricity itself.

The claimant in this case is in a very, very different situation. The claimant here is complaining -- it is not complaining about its generating equipment being procured. It is complaining about not having obtained a FIT contract to sell its electricity.

So I want to make one thing

absolutely clear. A determination that the claimant's 1102, 1103 and 1106 claims are barred would, in no way, be inconsistent with what the appellate body has found.

In its effort to escape the ordinary meaning of procurement found in Article 1108, the claimant would like to impose additional conditions and limitations on what does and does not constitute procurement. In particular, the claimant argues that its necessary for the procurer to acquire the electricity, or title to it, and the assets used to generate it.

It also argues that it is the government that must consume it, use it for its own exclusive use, and it argues that the procurer has to pay for it, not the ratepayers. We have heard a lot about the ratepayers.

None of these conditions can be found in the ordinary meaning of the term "procurement". The French word or the Spanish word I think reinforce that. Those equally mean to gain or to get, to purchase. There is no extra conditions. In French we use the word "achats effectues" or in Spanish "compras realingadas".

To pilot in these extra conditions

would improperly constrain the ability of NAFTA governments to use procurement as a policy tool, something they specifically reserve for themselves.

It would mean that NAFTA parties would no longer be able to favour their domestic industry in the procurement of infrastructure projects. For example, a NAFTA party wouldn't be able to insist that domestic steel be used to construct a toll road since, according to the claimant, use of that road wouldn't be for the government; it is for people.

And it would be a toll road. So other people would be paying for it. It wouldn't be the government. So there, too, it would fail according to the claimant's test. Finally, let's assume that the government gave the road to a PDP to manage. Well, that clearly would make it an ineligible, according to the claimant, because it wouldn't have title to it anymore. It wouldn't possess it.

NAFTA parties have not given away the right to procure general infrastructure or, for that matter, electricity.

The panel, the WTO panel in renewable energy, agreed -- in Canada renewable

energy agreed. It stated in the clearest terms that Japan's argument that procurement implies governmental use, benefit or consumption does not sit well. It's not immediately apparent from the ordinary meaning -- meanings of these terms.

Perhaps the clearest way to show that these conditions have no obligation in Chapter Eleven, indeed they make no sense at all, is to consider how they would apply to the procurement of a service, because we all know Chapter Eleven, the carve-out for procurement, is meant to apply as much to a service as it is to a good.

But the acquisition of a service, getting title to it or consuming it, is impossible in many instances.

For example, the parcel handling services that Canada Post procured for -- that Canada Customs procured from Canada Post in the UPS decision, they were -- they are not acquired or consumed by Canada. Yet the UPS tribunal held that they were procured.

The facts were as follows in Canada Post -- in UPS, sorry. Canada entered into a service contract with Canada Post whereby Canada Post provided data entry and duty and tax

collection services.

Canada Post workers scanned each parcel, recorded the information, and then collected the duties and taxes upon delivery of the parcel.

In that instance, it doesn't make sense to talk about title, and it certainly doesn't make sense to talk about consumption. These conditions are irrelevant to whether a service is being procured.

What's more, the issue of who ultimately pays for the service didn't affect whether it was a procurement because, in that case, it was the person receiving the parcel at the door that paid the service fee, not the procurer, not Canada.

In sum, none of the conditions the claimant seeks to impose form part of the ordinary meaning of procurement.

The last point I would like to address with respect to the claimant's limitations conditions is the nexus argument.

It argues there must be a nexus between the measure at issue and the procurement. Now, finally here, finally, there's something that

we can agree on with the claimant; namely, that just as the ADF tribunal has already found and articulated, the pertinent issue here is whether or not the measure at issue constituted or involved procurement. That is the nexus.

Yet the claimant argues that Canada has not met its burden of proof by failing to demonstrate the nexus between the measures at issue and the FIT procurement program. The claimant is mistaken.

Canada has repeatedly stated that no matter how the claimant frames its 1102, 1103, and 1106 claims, what it is complaining about is the fact that it was unable to have its electricity procured.

The claimant chose to participate in the FIT program, and all of the allegedly discriminatory treatment that it contests is provided in the context of the FIT procurement program. But if you want to be more sure, let's break it down.

The claimant alleges that Canada breached Article 1102 through the June 3rd direction or through the OPA's awarding of contracts to NextEra and Suncor. Now, these

measures were adopted in the context of the FIT procurement program and apply solely to the applicants for FIT contracts. On their face they involve procurement.

It also argues with respect to Article 1103 that the GEIA, the set aside, the government allocated 500 megawatts. This all breaches 1103. And here, whether the measure is characterized as a purchase of electricity from the Korean Consortium or the effect it had on the FIT program, either way, we're talking about procurement.

And, finally, the claimant argues that the domestic content requirements of the FIT program violate Article 1106. On this point, the claimant urges you to separate out those domestic content requirements from the rest of the measure.

But as the WTO panel recognized, these were the prerequisites of the program. They were the requirements that govern the procurement.

And, in fact, the claimant is asking you to do the same thing that the claimant in ADF asked that tribunal to do, and that tribunal refused. So should you.

In that case, the claimant tried

to isolate the ground provisions through the buy American program from the State of Virginia's procurement program, but the tribunal did not find the investor's argument persuasive. There was extensive argument over this.

Despite the claimant's attempt to distinguish between the domestic content provisions and the procurement process, the Tribunal would have none of it. It concluded that the US state had every right to impose domestic content requirements within its procurement process without violating NAFTA Chapter Eleven.

I am a little bit confused when the claimant alleges we don't have a substantive defence to Article 1106 when an exception applies so blatantly to the measures at issue.

Ultimately, the finding of the ADF tribunal turned solely on whether the highway interchange project constituted or involved procurement. That is the nexus.

It resisted the claimant's push to separate out the domestic content requirements of buy America from the rest of the procurement process. You should do the same thing here.

It's a fact that electricity in

Ontario would not be available to people and industry throughout the province if the government did not purchase it. Green energy produced by solar panels or wind turbines would absolutely not be procured without this program. The claimant in the -- or a similar program.

The claimant in this case chose to participate in the FIT program, a program designed to procure energy from renewable energy sources. That comes directly from its statutory mandate, and when the government acted on that statutory mandate and directed the OPA to establish the FIT, it described it as a program to introduce a simpler method to procure and develop generating capacity from renewable sources of energy.

There can be no doubt that the FIT program constitutes procurement in the ordinary sense of that term by a party or state enterprise.

And that's where the claimant has come full circle. After all of its verbal acrobatics and its great attempts to recharacterize the FIT program, it ultimately cannot escape the obvious. When the claimant's witness Mr. Robertson on Monday was considering whether the FIT program was the only way that Ontario could buy

power -- his words, "buy power" -- he said the following:

> "The feed-in tariff process had been the only large-scale renewable procurement process."

Finally the verbal acrobatics have stopped, and despite Mr. Robertson's counsel's attempt to throw out a safety net, Mr. Robertson made things clearer still.

On re-direct, Mr. Appleton asked the following:

> "During your testimony you mentioned that the FIT was a procurement process. Did you mean 'procurement' in the legal sense under the NAFTA?"

And Mr. Robertson answered that he used the word procurement in the sense of every utility when they are going out and issuing power purchase contracts, at that point typically called a procurement process.

Unlike his lawyer, who seems to be looking to redefine the term, Mr. Robertson was using it in its ordinary industry sense.

In fact, every witness described the FIT program as a procurement process. Rick Jennings made clear that renewable energy is procured through government decisions. And Sue Lo talked about having to slow down the pace of procurement.

Jim MacDougall referred to the renewable energy procurement targets and FIT's open procurement rules, and Bob Chow described how he was responsible for transmission planning in support of the procurement of which the FIT program is one.

Finally, Shawn Cronkwright stated clearly that:

> "I'm procuring under the obligations that we have as an entity and satisfying those obligations."

And he added that:

> "The Korean Consortium wasn't a program. It was a discrete procurement initiative."

After all is said and done, when you boil the term down to its ordinary meaning, the way it is commonly used, it appears we can all

agree procurement means to gain or to get, and in this case what's being procured is electricity.

Accordingly, Articles 1102, 1103, and 1106 do not apply to the conduct at issue in this arbitration.

That concludes my statement. Thank you very much. I will now leave you in the capable hands of Ms. Kam on national treatment and MFN.

THE CHAIR: Thank you. Ms. Kam.

SUBMISSIONS BY MS. KAM:

MS. KAM: Good afternoon, Professor Kaufmann-Kohler, Mr. Landau and Judge Brower.

Once again, my name is Susanna Kam, and I will be providing the closing remarks on Canada's approach to the law in response to the claimant's NAFTA Articles 1102 and 1103 claims.

Next Ms. Marquis will explain Canada's position on the law on Article 1105, following which Mr. Spelliscy will then apply the facts to the case -- apply the law to the facts of this case and explain why the claimant has failed to demonstrate that Canada has breached any of these obligations.

So let's begin. Canada's position is simple. As previously explained by Mr. Neufeld, Articles 1102 and 1103 do not apply in this case because of the procurement exemption in Article 1108.

Even if they did, in applying the legal test for Article 1102 and 1103, the claimant has nevertheless failed to demonstrate a violation of these provisions.

NAFTA Articles 1102 and 1103 ensure the treatment of foreign investors in accordance with the principles of national treatment and most-favoured nation treatment.

The central objective of both of these provisions is to protect against nationality-based discrimination. This purpose has been long recognized by NAFTA Chapter Eleven tribunals.

For example, the tribunal in Loewen concluded that Article 1102 is directed only to nationality-based discrimination and that it prescribes only demonstrable and significant indications of bias and prejudice on the basis of nationality.

Similarly, the ADM tribunal found

Article 1102 prohibits treatment which discriminates on the basis of the foreign investor's nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances.

Specifically in this case, Article 1102, the national treatment provision, requires that the treatment Canada accords to US investors and investments be no less favourable than which it accords in like circumstances to its domestic investors and investments.

In contrast, Article 1103, the MFN treatment provision, requires that the treatment Canada accords to US investors and investments be no less favourable than which it accords in like circumstances to the investors and investments of any other party or of a non-NAFTA party.

So what must the claimant do in order to demonstrate a breach of 1102 and 1103?

In order to demonstrate a violation of Articles 1102 and 1103, the claimant is required to satisfy a three-part legal test with respect to each of its claims.

First, it must demonstrate that

Canada accorded both the claimant and the appropriate comparators "treatment" with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Second, the claimant must demonstrate the treatment at issue was accorded "in like circumstances."

And, third, it must demonstrate that the treatment it was accorded was less favourable than the treatment accorded to the appropriate comparator investors or investments.

As determined by the Tribunal in UPS, failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the claimant.

Contrary to the claimant's assertion, the burden of proof does not shift to Canada to demonstrate legitimate regulatory considerations.

With this legal framework in mind, I would now like to turn to addressing two issues with respect to the claimant's application of the legal test in this case. These are as follows:

First, the claimant's inappropriate comparison of the treatment accorded to foreign investors under Article 1102, as well as the inappropriate comparison of the treatment accorded to an investor of the same nationality under Article 1103.

Second, I will address the claimant's inappropriate comparison of the treatment accorded under two different regimes. First, as a threshold issue before any two instances of treatment can be compared for the purposes of 1102 and 1103, the claimant is required to identify the appropriate comparators.

However, contrary to the claimant's views, the appropriate comparator in respect of these provisions cannot just be any investor or investment. Here, in the context of a dispute between a US investor and Canada, the appropriate comparator investors and investments for the purposes of Article 1102 are Canadian, and the appropriate comparator investors and investments for the purposes of Article 1103 are either Mexican or nationals of a non-NAFTA party.

Based on the foregoing, Canada specifically opposes the claimant's comparison of itself to Pattern, Samsung Canada, Boulevard and

NextEra.

As acknowledged by the claimant throughout this hearing, Pattern, Samsung Canada and Boulevard are Canadian subsidies of foreign investors, and NextEra itself is a US investor headquartered in Juno Beach, Florida.

Let me first address the issue of why Pattern, Samsung Canada and Boulevard are inappropriate comparators under Article 1102.

This provision specifically provides that each party shall accord to the investors or investments of another party treatment no less favourable than in accordance and like circumstances to its own investors on investments of its own investors.

Therefore, in the context of the claimant's 1102 claim, the only relevant comparators are domestically-owned entities of Canadian investors.

This is consistent with the purposes of national treatment. As explained in the United States 1128 submission, Article 1102, paragraphs 1 and 2 are not intended to prohibit all differential treatment among investors or investments.

Rather, they are intended only to ensure that the parties do not treat domestically-owned entities that are in like circumstances with foreign-owned entities more favourable based on the nationality of ownership.

In order to demonstrate nationality-based discrimination, the claimant must show US investors or investments are treated less favourably than Canadian investors or investments because of their nationality.

In this regard, Canada rejects the claimant's assertion that Pattern, Samsung Canada and Boulevard qualify for national treatment consideration merely because they are Canadian investments. Regardless of this characterization, they are the investments of foreign investors.

The oddity of the claimant's approach is apparent from the fact it compares the same treatment accorded to the same investors under both Article 1102 and 1103.

It means that whenever a foreign investor makes investments through a local enterprise, as so many do, that the limitations in Article 1102 and 1103 seem to disappear.

Mr. Appleton has offered his

opinion on the design of NAFTA, but all three NAFTA parties disagree. Judge Brower asked for an authority and the claimant has not provided one. This is because there are none.

Absent any comparison to a Canadian investor or investment, there can be no violation of Article 1102 and -- 1102.

Therefore, the claimant's comparison of itself to Pattern, Samsung Canada and Boulevard, which are all foreign-owned entities, must be rejected.

With respect to Article 1103, the claimant, a US investor, has attempted to compare the treatment accorded to it with the treatment accorded to NextEra, who is also another US investor.

In doing so, it misinterprets the phrase "investors of any other party" in Article 1103 as applying to any investor including those of the same nationality as the claimant.

Such an interpretation must be rejected. Similar to national treatment, MFN treatment is designed to prevent against nationality-based discrimination. As such, some diversity in nationality between the comparators is

required.

Therefore, the only appropriate comparators under Article 1103 can be an investor or investment of any other party, other than the party of which the claimant is a national, or of a non-NAFTA party.

As explained by the UN Conference on Trade and Development, this diversity of nationality is required because, in order to establish a violation of MFN treatment, the difference in treatment must be based on, or caused by, the nationality of the foreign investor.

This position was also reiterated by Mexico in its 1128 submission.

Moreover, this interpretation is also consistent with section 8(2) of the IL C's Draft Articles on most-favoured nation clauses, which specifies that the extent to which a beneficiary state may lay an MFN claim is determined by the treatment extended by the granting state to a third state or to persons or things in the same relationship with that third state.

The phrase "any other party" as opposed to the phrase "non-party" is used in

Article 1103 because NAFTA is a multilateral treaty. In the context of a NAFTA investor-state dispute, there is still a contracting party to the treaty, in this case Mexico, who is a non-party to the dispute.

The reference to any other party is not uncommon in the context of other multilateral treaties. As was pointed out during Canada's opening, Article 91 of the Energy Charter Treaty compares the conditions accorded to companies and nationals of any other contracting party or any third state.

The simple fact is there is no basis on which to conclude any difference in treatment is due to the nationality of one of the comparators if they are both of the same nationality.

Thus, the comparison of treatment that was accorded to two US investors cannot possibly lead to a finding of nationality-based discrimination.

In summary, due to the claimant's failure to identify appropriate comparators, its 1102 and 1103 claims against Pattern, Samsung Canada, Boulevard and NextEra must be dismissed.

Now I will move on to addressing the issue of why investors under different regimes are not in like circumstances for the purposes of 1102 and 1103.

As explained by the Tribunal in Merrill, the proper comparison between investors which are subject to the same regulatory -- is between investors which are subject to the same regulatory measures under the same jurisdictional authority.

Canada's position is that investors who have not concluded an investment agreement with the host state are not in like circumstances with investors who did.

From the outset, the government's ability to enter into investment agreements is recognized by the UN Conference on Trade and Development. Its 2010 most-favoured nation treatment publication specifically states that if a host country grants special privileges or incentives to an individual investor through a contract, there would be no obligation under the MFN treatment clause to treat other foreign investors equally.

The reason is that a host country

cannot be obliged to enter into an individual investment contract. In this case, "freedom of contract prevails over the MFN clause."

Moreover, with respect to the legal test for Article 1103, the publication goes on to expressly state that the foreign investor that did not enter into a contract is not in like circumstances with the third foreign investor that did conclude the contractual arrangement with the host state.

With respect to Articles 1102 and 1103, the Tribunal's role is not to second-guess the Ontario government's policy choices. To require international tribunals to evaluate the merits of government's reasons for entering into investment agreements would require the Tribunal to step into the shoes of government and discharge the function of elected officials.

This would greatly undermine government's ability to make public policy decisions. It would also make tribunals ultimately responsible for determining the appropriate means for achieving public policy goals.

This is not what investor-state arbitration is designed to do. As stated by the

tribunal in Paushok, it is not the role of the tribunal to weigh the wisdom of legislation, but merely to assess whether such legislation breaches the treaty.

This brings us back to the legal test of 1102 and 1103 which, in summary, places the burden of proof on the claimant to establish whether or not there has been nationality-based discrimination.

In applying these tests, the claimant is required to identify comparators who are of the appropriate nationality and accorded treatment pursuant to the same regime.

If the Tribunal has no further questions, I will now turn it over to my colleague, Ms. Marquis, who will provide Canada's position on the law as it pertains to the claimant's 1105 claims in this dispute.

THE CHAIR: Thank you.

SUBMISSIONS BY MS. MARQUIS AT 2:05 P.M.:

MS. MARQUIS: Good afternoon, Madam Chair, Judge Brower, Mr. Landau. I should also be brief in addressing the legal standard under Article 1105.

In particular, in view of the

claimant's opening and closing remarks, I have in fact narrowed my presentation here today to address just two overarching issues.

So I will attempt to guide you through my slides, but there may be slight discrepancies. You have a full presentation for your records, and if you will just follow me.

The claimant has in its opening and in its closing today made vague allegations regarding the lack of transparency or the unfair and unlawful regulatory framework.

In its opening, claimant had some introductory remarks on Article 1105 and the standard under the law. We were promised to hear more in the closings, but nothing was brought forward.

First I want to address these allegations, and then I would like to take the Tribunal to the correct standard that it should apply under Article 1105.

Now, as I said this morning, the claimant has advanced a proposition that NAFTA Article 1105 requires a state to act completely transparently. NAFTA Article 1105 does not contain any such independent obligation for a NAFTA party

to fully disclose, for example, any and all commercial deals that it enters into.

The claimant also seems to have made much of the idea of what its legitimate expectations under Article 1105 were and the purported requirement under this Article to provide a stable and unchanging regulatory environment.

In the recent decision of Mobil versus Canada, the tribunal addressed this very issue and provided that no such legitimate expectations existed.

Further, for the claimant -- sorry, further for the claimant to provide a claim of legitimate expectation, it must seek to establish it was given specific assurances on which it could reasonably rely to make its investment.

Finally, the claimant has, once again, reiterated that Article 1105 requires a stand-alone good-faith obligation.

There is no such thing. Good faith is not a stand-alone obligation under Article 1105. Rather, it is a principle which bears upon the application of other substantive obligations. This was consistently recognized by NAFTA

tribunals, and most recently by the ADF tribunal.

Having addressed these arguments briefly, I now want to turn you to the correct legal standard that the Tribunal should seek to apply in looking at Article 1105. The claimant is straining to get away from the plain meaning of Article 1105. Because it has offered no new arguments, I will in fact be brief.

With Article 1105, the parties agreed to accord investors of another party the minimum standard of treatment. It reads in relevant part as follows:

> "... and requires that each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

What does that mean? The 2001 note of interpretation issued by the Free Trade Commission tells us Article 1105 requires no more and no less than the customary international law minimum standard of treatment.

Second, the note further explains that the concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment.

Now, the claimant has argued, at least in its written submissions, that the note is not binding for two reasons, first because it would constitute only one source of interpretation of Article 1105, and, second, because it would, in fact, be nothing more than a legal amendment.

Once more, this is incorrect, but I -- we have fully briefed on this and I will just turn you to our written submissions.

Of course the text of the NAFTA itself in Article 1131(2) provides that an interpretation of the Free Trade Commission is binding on the Tribunal.

Since this note of interpretation was adopted now over 13 years ago, not one single NAFTA tribunal has found that Article 1105 guarantees that a standard of treatment that extends beyond the customary international law minimum standard of treatment.

The claimant here is asking that the Tribunal ignore the unambiguous wording of Article 1131 and the binding nature of the note of interpretation. It should not do so.

While the claimant did not mention it this morning at all, it also has seemed to imply that the customary international law standard has evolved and would now somehow have converged with the autonomous, fair and equitable treatment standard which can be found in other investment treaties.

These allegations are meritless and once more have been fully refuted in our written submissions.

If you will give me just one moment. It is claimant which has the burden to discharge and demonstrate the existence of a rule of customary international law. It has failed to discharge this burden, and as the Cargill tribunal said, it is not a place of the tribunal to assume this task.

The Tribunal has merely stated that Article 1105 must be examined pursuant to a flexible standard under which the customary international law and autonomous, fair and

equitable treatment would have merged, but it has been nothing more than to state it. It has not proven it. This is incorrect and should not be given any weight.

Let me now turn you to the high threshold required to establish a breach of Article 1105. We are now I see, in your presentation, at the slide of S.D. Myers.

Now, the purpose of Article 1105 is to establish a floor below which treatment cannot fall, and avoid what might otherwise be a gap.

What is this threshold? It is a threshold so high that it is described as guarding against unfair or manifestly arbitrary actions by the state.

The claimant has alleged that Canada sustains there has been no evolution to the standard since the Neer decision. This is completely false.

Canada has never held that the standard for customary international law has not evolved. To the contrary, it has recognized in all of the cases it has defended against under NAFTA that it is, in fact, a standard simply which

evolved from when it was first laid out in the Neer decision.

Canada's position is that to understand the standard, we only need to look back to the past five years to show where the tribunals are standing today. This is most efficiently done by looking at three cases, Glamis, Cargill and, finally, Mobil.

Now, the Glamis tribunal stated that the violation of the customary international law minimum standard of treatment requires an act that is sufficiently egregious and shocking, a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination or a manifest lack of reasons.

This was then followed by the Cargill award, where we stated and where we could see a government's conduct towards the investment may not amount to gross misconduct, manifest injustice or, in the classic words of the Neer claim, bad faith or willful neglect of duty.

The tribunal aptly summarized the minimum standard of treatment, which you should look at under Article 1105, when doing an analysis.

In its words:

> "To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic, arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals or to otherwise grossly subvert a domestic law or policy for an ulterior motive or involved an utter lack of due process so as to offend judicial propriety."

Finally, the Mobil tribunal in 2012 told us in its decision on liability, after a lengthy review of all awards of all NAFTA decisions

on this high threshold, and confirmed that the required threshold was that the conduct be arbitrary, grossly unjust, idiosyncratic, or discriminatory.

Article 1105's objective is not to prevent a government from making legitimate public policy changes or even to reflect a requirement that an investor may legitimately believe that no material change would be made to the regulatory framework under which it invested.

The Mobil decision confirmed once more this very thing, saying that nothing in Article 1105 prevented a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effect, and even if they impose significant additional burdens on an investor.

In the words of the tribunal, "Governments change, policies change, and rules change."

In closing, Canada asks that the Tribunal reject claimant's wrongful interpretation of Article 1105, and I will now turn the floor to Mr. Spelliscy, who will address how the obligations

under the law of Article 1102, 3 and 5 can be seen from the facts. Thank you.

THE CHAIR: Thank you.

MR. SPELLISCY: I think I am going to --

THE CHAIR: Would you like to have a break now?

MR. SPELLISCY: Sure.

THE CHAIR: Would this be a good time?

MR. SPELLISCY: Yes, I won't make my two-hour promise, so let's have a break right now.

THE CHAIR: Fine. Let's take ten minutes now and resume at 2:30.

--- Recess at 2:18 p.m.

--- Upon resuming at 2:34 p.m.

THE CHAIR: So we're ready to listen to you again, Mr. Spelliscy.

FURTHER SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: Yes, hello again. As I mentioned at the beginning, I'm now going to discuss why the measures that I identified in those slides, in the Ontario slide, do not breach any of Canada's obligations under Article 1102, 1103, or

Article 1105.

And it's been a while, so let's pull that slide up to remind ourselves what it is that we are talking about in terms of the allegations.

I think we're just waiting for the...

THE CHAIR: Here it is.

MR. SPELLISCY: Great. On the first, which is the domestic content requirements of the FIT program, you just heard from Mr. Neufeld, who has explained to you why these measures cannot be challenged under NAFTA because of Article 1108.

After me, Mr. Watchmaker will explain why these measures also cannot be brought to this NAFTA arbitration, because the claimant has not proven that it has suffered any loss as a result.

I'm going to move on and I'm going to focus on the remaining two claims and show why any allegation they have breached NAFTA is without merit.

So let's take the first allegation under the GEIA, the one that I identified earlier.

There's been a lot of focus. It's that the negotiations of the GEIA were not fully transparent.

Now, as far as I can understand this, this is an allegation of a breach of Article 1105 of NAFTA. As Ms. Marquis just explained, there is no independent duty of transparency that is part of Article 1105. The question is whether the actions of the government are so egregious, so wrongful that it amounts to conduct that essentially shocks the judicial conscience and renders the conduct in question manifestly arbitrary, discriminatory, shocking or otherwise egregious.

Let's look at the negotiations in question and let's see if it meets that standard. First, the claimant has at times suggested throughout this hearing that in order for Canada to comply with its 1105 obligations, Ontario was required to disclose, in full, its commercial negotiations with Samsung and the Korean Consortium even while they were ongoing.

There is no merit to this. Such a level of public disclosure is not required by customary international law. In fact, there is

really no legal system in the world that would require that amount of disclosure. Even Canada's own access to information laws allow third party business confidential information to not be disclosed to the public.

As a result, it is unsurprising that the claimant has failed to provide any legal support for its assertion that Article 1105 requires NAFTA parties to act with complete transparency in respect of its commercial negotiations, because the fact is commercial negotiations simply do not work that way. It would make no sense, and it would prejudice the positions of both the developer and the government.

Let's think about it from the perspective of the developer that made the proposal to the government. And the claimant put some of these slides up in the opening, but I think they go the entire opposite way.

As Rick Jennings has explained:

> "I think you were talking about treating people fairly or transparently, or whatever. If someone came to you with a proposal, in

effect, and you in effect stole it and shopped it around to other people, that wouldn't seem to be a very fair way of dealing with people..."

And as Sue Lo explained, it is inappropriate to provide the agreement to another competitor at the time the Korean Consortium is still working out their proposal.

That's the way commercial negotiations work. And even after the agreement is signed, there were reasons of commercial sensitivity to not fully release the terms. Sue Lo explained. She said even after its signature, it was necessary at least for a while to keep some of the negotiations and terms confidential in order not to prejudice the Korean Consortium, because they were still negotiating with manufacturing plants. They were still in deliberations with trying to assemble developers to develop their project.

If the specific terms had been released at that time during the negotiations when they are trying to assemble the consortium, or

during or immediately after where they are still trying to develop the partners, the Korean Consortium's negotiating position would be prejudiced with respect to those potential partners, because they would know exactly how much and what the Korean Consortium was getting from the government.

It is for these reasons that governments respect the commercial confidentiality of private businesses and will refuse to release that information without their consent.

But I want to think about it from the government perspective, as well. If the government always had to release the terms of its commercial deals with developers while they were being negotiated or even afterwards, all of the terms, the complete contract, it would be handicapping itself in any future negotiation with others.

And I think if we just pause on that, we can see why a position requiring complete transparency, releasing the full terms of whatever the agreement was while the negotiations were ongoing or even after it was signed, cannot be the correct position.

Think of it this way. If the government were to negotiate an initial deal with one developer on terms that it had to publicly release right away, there is little chance that it could ever be able to come to better or more advantageous terms with another developer, because it would be out there, what it gave up the first time.

Complete transparency in the sense that the claimant says is required would lock the government in and prevent it from being able to successfully conclude a better deal.

And, in fact, I would note that on the claimant's theory of most-favoured nation treatment, if it concluded a better deal, it could be in violation of its treaty obligations, because it wouldn't be according most-favoured nation for national treatment. That simply cannot be correct.

We saw the slide: Freedom of contract still prevails over MFN. The same is true of national treatment, and that is why that governments all over the world keep some terms of the commercial deals confidential.

As Rick Jennings explained in his testimony: If you are having a commercial

negotiation with someone, it would generally not be the case that we would be negotiating it in public.

But let's be totally clear here, because while not all of the details of the green energy investment agreement and its negotiation were released, the government was in fact as transparent as possible in the circumstances. Article 1105 does not require more.

Now, we have pulled the documents up at various times in the hearings and you have them in our opening slides. I don't need to go through them again. We don't need to look at the same exhibits.

We will recall there was a press release on September 26th. The claimant has said that that press release was in response to an accidental leak. Why or how that information released doesn't matter. It was released. The negotiations were acknowledged. The public was aware.

And a few days later we saw the Minister of Energy issued a direction to the OPA telling it to hold in reserve 500 megawatts of capacity for a renewable energy generating facility whose proponents have signed a province-wide

framework agreement.

Considering the press release just a few days earlier, there was no question or should have been no question who it was. Now, why isn't it specific here? Because the deal is not done yet. But nobody was being misled by that.

And as we saw, too -- we had it up on the screen numerous times -- a month later, on October 31st, 2009, five years ago today, the Toronto Star published another article in which it granted -- or which it was reported that the deal with the Korean Consortium would give them priority access to the grid.

All of this happened before the claimant applied to the FIT program. Now, we've heard some discussion this week and some discussion today about when the claimant's investments were allegedly made. We saw what evidence they've produced, a resolution. But the resolution is not approving. The resolution is authorizing something to be done.

We don't have the purchase agreement in the record. We don't have anything of that sort. There is a complete lack of evidence as to when they say their investment was made. So

their submissions are nice, but it is not evidence.

And I think even if we come back to this -- and I think my colleague Mr. Watchmaker will come back to this, because even if they had made their investments, there will become an issue of causation that they haven't actually addressed, if this lack of transparency was a breach.

He's going to come back to that in a minute.

Now, what did the claimant know? We heard Mr. Pickens say that he didn't believe he was aware of some of these negotiations that were ongoing.

I asked: Were you ever informed about them, about the press releases or the -- what was being published? He said, I don't recall. I said: You don't recall that ever happening? He said, No.

It is not that he couldn't have been aware. It is just that he wasn't briefed.

Then on January 21st, after these negotiations are out, after the claimant applies for two projects to the FIT program, the agreement with Samsung is finally signed.

There was a press release and a

detailed backgrounder that described the key terms of the GEIA. Sue Lo has given you evidence. The key terms were disclosed.

In his testimony, Mr. Robertson said, in explanation as to why they didn't really react to this: We knew it was a good deal, but what that meant for us all at the time, we didn't really know.

That claim just doesn't withstand scrutiny. We have seen a lot of it, but let's just pull it up again. It is the backgrounder that was released. It is R-076. I don't want to belabour this too much, because we have looked at it, but if we see on the bottom of the second page, it talks about assurance of transmission in subsequent phases.

Now, we have heard time and again this week, and everybody seems to agree, about the importance of transmission access, access to the grid.

Today and in their questions that were in front of this Tribunal, the claimant has suggested they could not understand what assurance of transmission capacity meant, and that they didn't know it meant priority transmission access.

Let's just think about what it means to be assured of something. It means to be guaranteed it. That's its ordinary meaning. No matter how the claimant might think about it, everyone would have understood what that meant, that the Korean Consortium was being guaranteed transmission capacity.

This is even more obvious because everyone was aware of the September 30th, 2009 direction months earlier that had reserved out of the FIT program 500 megawatts of transmission capacity.

With that in mind, there would have been no question what this language meant. It refers to that, the first phase, and talks about the next phases.

This morning, the claimant harped on the fact and came to the fact that it stated that even if it understood there was going to be priority access, it could not have known that the KC, the Korean Consortium, would seek projects in the Bruce region, because they hadn't done it yet.

But, again, it just doesn't make sense. We saw in the map that we had up on our screen in our opening presentation the Bruce region

has a strong wind resource. Bob Chow testified:

> "As soon as the agreement with the Korean Consortium was signed... for most people, they would know that the wind regime in the Bruce area was amongst the strongest in the province, and so that was the best area where one could have a wind contract. It was a recipe for success."

There would have been no surprise to anyone that the Korean Consortium, with a guarantee of transmission capacity, looking around the province, was going to the Bruce region.

Now, Mr. Pickens, again the ultimate alleged owner of the investment here, said he was unaware of what was going on. He testified about this January 21st announcement. I said, Do you recall being briefed on it? And he said, I don't recall.

But, again, Mr. Robertson was aware. And as we saw in the slide, he said:

> "I knew the minute these

releases were made. Well, maybe not the minute, but within a few hours that they were made, I was notified and reviewed."

So he was aware. And what did the claimant do after they were aware? Well, four months later they made more applications to the FIT program.

We're going to get to a little more of what they didn't do in a few minutes. But what I think I want to just focus your attention on here is we're not talking about a complete -- an obligation of complete transparency. There is no independent obligation under Article 1105 to be transparent about your commercial negotiations.

In this case, the government acted perfectly reasonably and as transparently as possible by disclosing the fact of the negotiations and the key terms of the deal at relevant times. People were aware as long as they were paying attention.

Now, let's turn to the second alleged breach associated with the green energy investment agreement, and that is that the Korean

Consortium was afforded priority transmission access in the Bruce region.

I can't completely tell, but it appears to me that the claimant is no longer alleging that the mere entering into of the GEIA is a violation of NAFTA, I think, and I think that is good, because we have explained in our written submissions any such claim would be frivolous.

But it does seem to be continuing to allege that the treatment accorded to the Korean Consortium under the GEIA and, in particular, the allocation of the 500 megawatts in the Bruce region is a violation, and, as I understand at this time, of national treatment and MFN treatment.

Now, Ms. Kam has explained to you why the concerns about the national treatment Article are improper. There is no Canadian investor involved here. But it really doesn't matter, because we both agree -- the claimant and Canada both agree the Korean Consortium is a foreign investor that would be subject to -- the treatment of which would be subject to MFN.

Let's be clear here on the things not in dispute. There is no dispute that both the Korean Consortium projects and the claimant's

projects would be wind projects. There is no dispute they would produce electricity and that that electricity would be fed into the grid.

And there is no dispute that the projects of the Korean Consortium and the projects of the claimant were competing for transmission capacity in the Bruce region. Of course, every generator competes for transmission capacity, even nuclear generators, and there are other types of generators, as well. There is only one transmission system.

And, finally, there is no dispute that the power purchase agreements that each received looks similar in most respects. It is actually provided for right in the green energy investment agreement.

The claimant wants to paint that as determinative of the like circumstances analysis for 1102 and 1103, but it is not. As Ms. Kam just explained to you, you can't compare the treatment accorded under an investment agreement with the treatment accorded to someone without an investment agreement for the purposes of national treatment and MFN. UNCTAD has had this position since 1999. We showed you the 2010 update, but it is over 15

years old now.

Why? Ms. Kam explained the reason is obvious, and we said it before. Investment agreements provide more favourable treatment than is available in the typical regulatory program. If they didn't, no one would sign investment agreements. They would just go into the standard regulatory program, but investment agreements are signed all over the world.

Put simply, the national treatment in MFN clauses in NAFTA do not deprive any NAFTA party of its ability to enter into investment agreements and provide the investors with those investment agreements with treatment that may offer additional benefits.

As Ms. Kam said, freedom of contract prevails. If this wasn't the rule, then tribunals would be required to assess what governments were doing to evaluate whether or not the investment agreements were good enough. That's not their role, and you can imagine the chaos if every investment agreement ever signed could be challenged on the grounds that the government did not get enough in return.

So let's look at what the record

is in this case. It is both programs, the GEIA procurement and the procurement pursuant to the FIT program, were separate and distinct. They are for the same product, but they are separate programs and distinct programs.

The claimant seems to try to avoid this problem by arguing, in essence -- and I heard it this morning -- that the GEIA is a bad deal for Ontario, and by arguing that the claimant would have, but was prevented from entering into a similar deal to get priority access.

Let's focus on those claims. On the first, the claimant seems to be pushing the idea that the GEIA was a bad deal for two reasons: One, because it was not needed; or, two, because the government should have, it seems, picked someone else to do it, maybe the claimant, maybe someone else.

They seem to be challenging the qualifications of Samsung to be a partner of the government in this regard.

Now, in challenging the idea that the agreement was not needed, the claimant has placed emphasis on the fact that the GEIA, in committing to 2,500 megawatts over five years, was

substantially less than the total megawatts offered in the end under the entire FIT program. But that's not the appropriate comparison.

If we wanted to compare, we would look at what the Korean Consortium and the claimant were committing to Ontario in 2009 when those commitments were made. So let's pay attention to that.

During the negotiation of the GEIA, the Korean Consortium committed to 2500 megawatts of wind and solar generation in five phases. In November of 2009, when that negotiation was ongoing, the claimant had two applications to the FIT program for a total of 265 megawatts, a tenth of the commitment being offered in terms of transmission or in terms of generation of the KC.

Now, a lot has been made also about what happened after these negotiations, and the claimant has suggested this week that Ontario, by the time it signed the GEIA, Ontario knew the FIT program was a success, that it had an overwhelming number of applications, lots of megawatts, and there was therefore no reason for the GEIA.

They have suggested today that

Ontario should have walked away from the deal before it was signed. Now, I'm not sure what the allegation is. I'm not sure that Ontario's failure to walk away from the GEIA is a breach of something in NAFTA.

It is clearly not. NAFTA does not require a government to walk away from a negotiation or an agreement. But let's even look at what Ontario knew about the FIT applications it had received in January of 2010 when the claimant says it knew the program was a success, because the claimant is right. During the FIT program launch, the OPA received about 1,000 applications. I think we heard 9,000, 10,000 megawatts of applications.

We have heard the claimant talk about a survey done by the OPA in the summer of 2009 saying there is going to be 15,000 megawatts of interest.

But the fact is that while the number -- on its face, the number makes -- of applications makes the FIT program appear quite successful in January, as Mr. Duffy has explained in his witness statement, approximately 95 percent of the applications would have failed and been rejected.

The launch period closed on December 1st, 2009. The OPA began evaluating. That is what it would have understood in 2010. There were lots of applications, but they weren't good applications.

What did Ontario know in January of 2010? They knew, as Mr. Duffy has explained, that the FIT program was at risk of becoming a massive failure.

Knowing the mistakes that were made and the failure rate amongst the applications, what confidence would the government have had, in January of 2010 when it signed the GEIA, that FIT applications would lead to projects?

Remember, the government wants to create jobs. Applications don't create jobs. Projects create jobs, and that's what the government wanted to assure.

And so let's compare the confidence it would have had in the FIT program at the time. Now, there's no dispute the FIT program ended up being successful and developers were able to bring their projects to completion, at least some of them. But hindsight is a wonderful thing. We're talking about what the government would have

believed and thought in January of 2010.

What did they know about the FIT program or about the Korean Consortium? They knew that the Korean Consortium had committed at least to 2,500 megawatts of wind and solar.

As Mr. Jennings has noted, the GEIA was for 2,500 megawatts in five phases, and quite ambitiously have those phases go ahead quite quickly, shovels in the dirt, jobs.

The Government of Ontario also knew that KC had at least committed to attract manufacturing plants on an accelerated schedule to Ontario. As Mr. Jennings testified earlier this week:

> "The Korean Consortium had agreed to make a commitment to bring in four manufacturing plants which was actually, from the government's perspective, seen as very crucial. That's what they wanted to demonstrate to the Green Energy -- they wanted to demonstrate the Green Energy

and Green Economy Act, and so they also agreed to do a very aggressive schedule of phases for bringing projects much more quickly than we could expect through the FIT or any other program."

So what they would have believed about the Korean Consortium in January of 2010 was that it could be an anchor or a marquis tenant for the province at a time when the FIT program was still at the risk of being a failure and at a time when we're still suffering the effects of a severe financial crisis.

As Mr. Jennings further testified:

"The Korean Consortium was seen as a marquis project that would show that Ontario was pursuing green energy in a large way."

Now, the claimant has said, well, that's not enough, and this morning they relied upon Mr. Adamson, who they said showed that the obligations in the Green Energy investment agreement were not significant enough, in his view.

They said his evidence is uncontroverted, but that is not true.

His evidence is controverted by Mr. Jennings and Ms. Lo, who were involved in the negotiation of the GEIA rather than looking at the deal in hindsight, and who have told you, both, what value Ontario saw in the green energy investment agreement.

There was nothing wrongful about the government deciding to enter into the GEIA while the FIT program was ongoing. Governments are allowed to pursue separate procurement initiatives at the same time.

It was a rational and reasonable policy choice and not one adopted in order to effect some sort of nationality-based discrimination.

Now, as I said earlier, this morning the claimant also seemed to advance an argument -- I think they did in some of their questioning, as well -- that NAFTA's been violated because Ontario should have picked someone else other than Samsung to do this because Samsung wasn't qualified, or that they should have somehow controlled the partners that Samsung brought in.

They said that the government didn't seek a better deal and that it should have. But it is not the role of an international tribunal to pick the partners that a government enters into investment agreements with. Again, think of the havoc that would be wreaked in the international system if every time a government signed an investment agreement the competitors of that company could bring a challenge to investor-state arbitration that the government should have picked someone else.

Of course competitors are going to say that, and that's why that is not what these provisions on national treatment and MFN are about.

Now, on to the second criticism that they've offered on the 500-megawatt set-aside for the Korean Consortium, and that's that the claimant somehow couldn't have entered into an agreement similar to the GEIA.

But let's be clear here. The answer is we will never know, because they did not try. They could have, but they did not. As we saw during the week and in our opening -- and I won't pull it up again here -- when the GEIA was entered into, the Premier of Ontario invited companies to

make proposals. The claimant's own expert, Mr. Adamson, also acknowledged there was nothing stopping other investors from approaching the government to propose an investment agreement that would include priority transmission access.

And even Cole Robertson acknowledged they could have approached the government to negotiate a deal. It is just they didn't see the need to.

Specifically, he said, We felt -- and this is after he was aware of the January 21st backgrounder. He said:

> "We felt good about our projects, so we didn't feel the need to go on a, forgive the term, 'wild goose chase' on trying to find something else as opposed to sticking in the process that we were in, that we thought would be carried out fairly, and that's where we were."
>
> [As read]

Now, that's the claimant's choice to make. Nobody can force them to try to negotiate

an investment agreement with the government, just like nobody can force the government to negotiate an investment deal with them, but it now has to live with that choice.

It has tried to avoid this choice by arguing that it couldn't have gotten the exact terms of the GEIA without knowing what they were. Well, that's not relevant to an Article 1102, 1103 analysis of whether they were prevented from negotiating.

As explained by Sue Lo, investors come forward all the time to the government with their own proposal. It's not about copying somebody else's proposal. That's not what investment proposals are about. Different companies have different strengths.

Further, in arguing even that they couldn't get the exact same deal the Korean Consortium got, the claimant forgets one obvious fact. Circumstances change over time.

The claimant waited. It didn't move. It never tried to negotiate a deal. Might the terms and conditions of anything the claimant tried to negotiate have been different than the GEIA? Well, of course they could, but that's

because the needs and requirements of Ontario with respect to electricity change over time. Circumstances change and circumstances impact the terms that you are going to get.

MFN and national treatment does not require the government to enter into the exact same deal with investors every single time someone approaches, regardless of the current situation in which the government finds itself.

The fact is that the claimant still could have tried to negotiate a deal, even if they weren't sure they could get the same terms.

Here I do want to pull up a document, because I think we haven't seen it yet -- we have seen the document. It is the GEIA, but we haven't looked at this clause yet. It is clause 8.7, and it is Exhibit C-0322.

The clause says that:

> "Ontario will not provide to any other renewable energy project or developer the benefit of an economic development adder or similar incentive which is greater than the one it gave to the

> Korean Consortium, unless the developer has entered into an agreement with Ontario or one of its agencies with a value and scope comparable to or greater than that provided for in this agreement, the GEIA."

The GEIA itself contemplates that the Ontario government might negotiate other deals with other investors and that, in fact, the benefits of those other deals might exceed even what the Korean Consortium was able to obtain.

Now, as Mr. Jennings has also confirmed, the government would potentially have been open to negotiating another deal. He said the decision obviously would be the government.

Now, somebody who works in the government as a public servant, the decision is always the government's. And it would have been ultimately cabinet at the time. He said:

> "I think the province continued to talk to people because there remained an interest in promoting green

energy jobs and
manufacturing."

Despite all of this, despite the announcements, despite the fact it was aware someone else was negotiating a deal, a deal that it says it wanted, Mesa never even asked, as Mr. Pickens has said when I asked him. I said:

"In fact, to your knowledge, neither you nor anyone in any of your companies ever asked about negotiating such an agreement with Ontario?"

He said "yes." And I clarified: You didn't do that. Nobody asked; right? And he said, "Right".

THE CHAIR: Mr. Landau has a question for you, and I think it is easier if he asks it now while we're on the topic.

MR. SPELLISCY: Sure.

MR. LANDAU: I didn't want to break your flow and we have been holding back generally, actually, but this is -- just give me a moment. If you are moving on to the next --

MR. SPELLISCY: I will move on next to the Bruce-to-Milton allocation.

MR. LANDAU: What you have addressed at the moment on the last subheading in terms of the fact of the priority access that was given under the GEIA, the way I have understood your submissions is really focussed upon MFN, is what you're saying is that according to your case, a government has a right to enter an investment agreement. Once the government enters into an investment agreement, it is on a different track, and that track is separate from a non-investment agreement track, and, therefore, it is not like circumstances, to put it in a very, very broad-brush way.

But I think what you haven't addressed is whether or not there is an Article 1105 issue, because if you take it out of the criteria of like circumstances, one with an investment agreement and one with not, what about a situation where the fact of concluding investment agreement adversely encroaches on the other track. So you are not talking about MFN. You're just talking about the possibility of 1105 treatment, because it has now been undermined by an investment agreement.

MR. SPELLISCY: I think you

are -- this is what I mentioned. I wasn't sure the claimant was even still pursuing this, because most of what I heard was 1102 and 1103.

MR. LANDAU: Yes.

MR. SPELLISCY: But I think it comes back and we have argued this in our written submissions, as well, that to say a government cannot enter into an investment agreement because of the customary international law minimum standard of treatment, we see no merit to that.

Governments must be allowed to contract, procure to obtain what it is that they need to get to serve their populations.

And if the question comes down to whether or not what the government did here was so manifestly egregious or arbitrary, which it would have to in the minimum standard of treatment, you have the explanations of Ms. Lo, of Mr. Jennings as to why the government did what it did.

It entered into, the government, the green energy investment agreement because it saw value in it. It saw value in the circumstances in which it was. It believed they would be a marquis tenant, which would increase investor confidence. It believed they would be an anchor

tenant, which would bring in manufacturing, manufacturing that could help to serve not only the Korean Consortium, but also the FIT proponents.

When we had that slide up there, that Siemens slide, the press release from Siemens, that was proven out. They came for Samsung, but said we can help FIT proponents, as well.

And you've got the government understanding that they will help bring in manufacturing commitments, not that they are necessarily going to manufacture themselves, but, as I said I think at one point during this week, jobs are jobs for the government. If Samsung or Korean Consortium attracts somebody, brings them in, that still creates the jobs for people to start working in Ontario.

I think in response to that, I would say for Article 1105 violation, it then falls back to: Is the government's decision to enter into the investment agreement manifestly arbitrary? Is it discriminatory?

You have more than sufficient evidence, I would submit, to say that it was not. Now, people might disagree about whether it is or is not a good enough deal for Ontario, but, as we

saw from some of the case law that was up before, governments have to make controversial choices.

Just because they have to make controversial choices doesn't mean it is a violation of Article 1105. We saw the slides, and the claimant has put some of them up as proof of something wrong, but I don't think that they go there.

Yes, it was a controversial deal. It was debated hotly even within the government's own party, but that's what governments do. They get the input. They have the policy. They need to debate. They need to discuss. They need to make a decision.

And here you have the reasons why they made the decision they made. The claimant may disagree. The claimant may think they should have gotten a better deal, but that is not a basis for an Article 1105 violation, and it shouldn't be the role of international tribunals to start second guessing the wisdom without the proof of some sort of egregious behaviour that would rise to a violation of Article 1105.

THE CHAIR: Does that answer you?

MR. LANDAU: Yes.

MR. SPELLISCY: I am happy to come back to it.

MR. LANDAU: Sorry, I didn't want to take very much time, but just I'll be very, very quick. Your answer has focussed upon whether or not it was a good decision to enter into the GEIA, but my question is more focussed upon treatment to the investor.

Maybe if you could take away the focus from whether or not it was a good decision. If, just for the sake of argument, if that decision adversely impacts on an investor or an investment, aren't we then in Article 1105 territory?

MR. SPELLISCY: Article 1105 is not meant to protect investors from any adverse impact that they might have from government decision-making. Again, we're in a world of limited resources here.

Transmission capacity is not unlimited. So any time that the government gives a contract to one generator, it necessarily is going to adversely impact another generator.

And so when we talk about when there is a distinction between entering into an investment agreement versus a treatment accorded

under the investment agreement, it is a pretty fine distinction we're making, because I would say exactly the same thing I said to you with entering into the investment agreement.

The reason why they gave -- we know the reason why they gave Samsung 500 megawatts of priority transmission access, and that's because in order for Samsung to develop their projects, you have the evidence of Ms. Lo and Mr. Jennings that's what the negotiation was. And it was in exchange for the benefits and the value that Ontario wanted. It was a negotiated solution.

You've also had the testimony of people as to why, because when you're trying to develop 2,500 megawatts, you need to make sure that those 2,500 megawatts can get on the grid, and so priority transmission access for large projects is essentially a must.

You don't want them to be squeezed out by smaller projects which aren't giving you the same value in return.

So I think what I would say to that is that the reasons for entering into the investment agreement apply equally to the reasons why the particular treatment was accorded under

that investment agreement. I don't want to have any dispute.

Yes, we have shown in our slides, in our damages, and I was surprised that the claimant seemed surprise here that our damages expert had concluded that if the green energy investment agreement, the treatment accorded under it, was wrongful, that it did affect and impact the claimant. We have had that position since our counter memorial. We never said that the transmission capacity set aside for the Korean Consortium didn't impact the claimant. Of course it did. It is just it wasn't wrongful for the government to grant that treatment to the Korean Consortium in these circumstances.

THE CHAIR: That's clear, yes. Thank you.

MR. SPELLISCY: Let's move on, then, to the claimant's allegations regarding the Bruce-to-Milton allocation.

Now, throughout this hearing the claimant has focussed on the fact that other developers were awarded FIT contracts and it was not offered one, and specifically it has focussed on the fact that it did not obtain a FIT contract

as a result of the Bruce-to-Milton allocation process because of the decision on June 3rd to allow a change in connection points.

We showed you in our opening, and I won't go back to it here, but the fact is the claimants did not submit good applications. If you don't submit good applications, you don't end up with contracts.

But I think to think carefully about the allegations about the change in connection point that was permitted, which is an allegation -- again, it is 1102, 1103 and 1105 -- that it was discriminatory and that it was a violation of the minimum standard of treatment, but I think my answer to both, and the evidence has shown this week, would be the same.

The change in the connection point window, which allowed developers within the Bruce and west of London region to pick a connection point in either region, was not manifestly arbitrary or evidence of nationality-based discrimination, because the fact is that it was always part of the FIT program.

And it all starts with one thing the claimant I think has been consistently confused

on: There's no such thing as an independent area ranking. It was one ranking, the provincial ranking.

The borders that were drawn between the areas by the OPA, they are imaginary lines on the map. They never were intended to affect how projects could make use of the rights that they had in the FIT program. And this is a case that starts with the FIT rules themselves.

It starts with how projects were ranked. If we pull up -- it's article 4. -- I think it is 4.2(d) and 5(d). You'll see it there. It says:

> "A project is assessed in the order of its time stamp, and for projects that fail the initial connection test, they go to the economic connection test, the connection availability management section."

And it says again that they are assessed in the order of time stamp. For launch period projects, we have heard the time stamp was adjusted based on how many criteria points they

received -- they obtained, and for post launch it was just the time the application was received.

But there was only one time stamp. You can look through every single FIT rule. There is no time stamp for the area. There is one. Each project got one and only one, and it reflected the ranking the project had in the province.

Now, when the OPA published the rankings of the projects that had failed the initial connection availability test, which was all of the projects in the Bruce, because the line wasn't in service yet, it ordered the projects into areas to help developers understand who was closest to them.

That's for informational purposes. That didn't somehow give them a new time stamp. They had only the one time stamp. That was the ranking in the province. As Bob Chow has explained, it is again for the purpose of information display. There is no regional ranking, per se. There is only a provincial ranking. The testing, the connection testing, is in the sequence of the provincial ranking. Regional ranking is for information purposes.

When the OPA would go back to do

its connection tests, it didn't do it region by region. It found the highest ranked in the province and started with that one, and then just went down the list.

So with this in mind, let's come back to talk about the connection-point change window that was part of the Bruce-to-Milton allocation process.

And I think we should first talk about the OPA's views and what they had been saying on it. And you have seen some of these slides, but I think we should pull at least some of them, two or three of them, up again, because it starts in March of 2010, in our presentation that we looked at by the OPA with some the witnesses.

This was the OPA's presentation to FIT developers on how the OPA would run the economic connection test process. As we can see from page 14, the OPA says:

> "An applicant, after an applicant receives a TAT result, they may request a change in connection point for their project."

There is no limitation at all

presented. It doesn't say that they could only do so within a region, because of course in November or March of 2010, nobody knew their region. The OPA hadn't published the rankings and hadn't grouped them into those regions for informational purposes.

This statement was clearly directed towards all applicants. It was not a fetter or some sort of chain on their ability.

So now let's go to the December 21, 2010 rankings in the three-point font, and we can look at it again. We have looked at it many times this week, and we have seen they say, in note number 3, which is a header to the entire table, not just to Bruce, not just to west of London, to the entire table, and it says:

> "FIT applicants will have the opportunity to request a change of connection point prior to the ETC. Connection-point changes could impact the ECT outcome for other applicants requesting a nearby connection point."

A nearby connection point. Not all nearby connection points happen to be in the same regions. Electricity doesn't work that way. There is no limitation on connection-point changes, none at all.

And I think it is important to remember that this is almost a fundamental tenet of the approach to how we do law in regulation. As Jim MacDougall explained:

> "There was no explicit restriction on how connection-point changes could be permitted or prohibited or limited. But, in general, with the FIT rules and the FIT contract, if it is not prohibited, then people can do it."

That is the way it usually works. If something is not prohibited, then it is allowed. There was no prohibition anywhere in the FIT rules that would have prevented people from changing across these artificial lines created by the OPA.

That is why Shawn Cronkwright confirmed in his testimony when I said:

"I'd just like to clarify. Did the OPA think they needed a direction from the Minister to allow the connection-point changes?

He said:

"No, because that was envisioned as part of the rules in the original design." [As read]

MR. BROWER: Why did there need to be anything done, a direction or anything else? If people could apply any time, they could apply any time.

MR. SPELLISCY: So the direction comes out because of the need to allocate the Bruce-to-Milton capacity. And we have to remember there is a change here. The connection-point change window is only allowed for the Bruce and west of London, and it imposes a cap on the procurement. Those things were different.

That was not contemplated in the FIT rules, but, as I come back now in the Bruce region where the claimant applied, we have heard the cap was physical. There was 1,250 megawatts,

1,200 megawatts of capacity. 500 went to the Korean Consortium. It is just math. That is what is left.

It wasn't true for the west of London; right?

So now I think we've looked at what the OPA had been telling...

THE CHAIR: I understand there was a change in the rules in the sense that those who were in other regions could not make a connection-point change, whereas under the rules actually everyone should have been able to make such a change.

MR. SPELLISCY: Yes.

THE CHAIR: Is this correct?

MR. SPELLISCY: Yes, this is one of the changes of the direction. This is one of the changes that direction made. But, again, as I talked about in the very beginning of my remarks this morning, that didn't matter to the claimant. They were in a region where they could make a change.

THE CHAIR: I understand your point about that not affecting the claimants, yes.

MR. SPELLISCY: So now let's come

to the other side of the equation, to the developers, and how they understood what the OPA had been telling them. And we come to a slide that we've seen again and again, and it is the letter from the president of CanWEA to the Minister of Energy. It is on May 27th.

Again, we've seen this. I don't need to go through it. He wrote to express the majority view of the members that the OPA should immediately do what they have been promising to do and open the change window.

They make no mention here of their understanding about some sort of regional limitation on connection-point changes, none at all. In fact, as we'll see in a second, their actions showed they didn't believe one existed.

CanWEA confirmed to the Minister on this date that its members had invested significant resources in the previous months to prepare their interconnection strategies.

And we're going to look at what that preparation entailed in a second, but I would just like to pause, because we've gone around on this, and there is a question. On June 3rd the direction is issued. That's the Ministerial

direction.

The claimant has said that the CanWEA letter, that this couldn't have mattered, because people from the OPA believed that the decision had been made on May 12th.

But the claimant has also said and acknowledged it wasn't an OPA decision. It was a government decision. So we should be looking not at what the OPA believed. We should be looking at what the Government of Ontario believed.

And we've pulled up the documents in the opening slide. There was e-mails after this, after May 12, on May 20th between Andrew Mitchell at the Ministry of Energy in the Minister's office and Sue Lo and Rick Jennings on May 20th, still debating about whether there would be a connection-point change window, bouncing ideas back and forth.

The people at the OPA may not have been aware of that, but the fact is the government was still deciding it. And in fact, as anybody in government knows, a decision is not made until the elected official in charge makes the decision.

That decision was made on June 3rd, and there is no reason to think if CanWEA, the

industry association, had come out differently than they had, that the Minister's reaction might not have been different. But they came out in full support.

MR. APPLETON: Excuse me, Mr. Spelliscy, sorry. The live feed has gone down for half of the room.

MR. SPELLISCY: You mean the transcript feed? Is that something that can be reset by the court reporter?

--- Technical difficulty

--- Upon resuming at 3:38 p.m.

THE CHAIR: Ready to start again?

MR. SPELLISCY: Before you begin, would you like us to give you the documents?

THE CHAIR: We have one, so we're fine. I am happy, Mr. Spelliscy.

MR. SPELLISCY: I was just about to start talking about what developers would have understood from what the OPA had been saying for several years, and I think -- remember they had said to the Minister that they had been investing significant resources in the previous months to prepare their interconnection strategies.

Let's see what those strategies

were. When the connection-point change window opened up ten days later, 39 developers changed connection points and a very significant number moved from the west of London to the Bruce region.

What does that show? That would show that for months developers had been preparing to change their connection points in this way, without regard to regional boundaries, obviously understanding that this was permitted.

And if we think about the system electrically, this is just common sense. Remember Mr. Chow's testimony that it is not about some sort of hard geographical line. It is about how the electricity system works together.

So to understand this, I want to take a look at a map, and it was a map that was actually prepared by the claimant and we showed it to Mr. Robertson, because I think in looking at that map, we can understand some of the problem with the claimant's theory is.

The map shows that Bruce region. You can see at the call-out there at the dotted line is the bottom of the Bruce region.

It shows a number of projects, including the claimant, which is the pink one

there, and that is the Twenty Two Degree project, according to the claimant's map. It also shows at the bottom straddling that region is the Goshen project, and I want to focus on the one in the middle, the Bluewater project.

That project was ranked by the OPA in the west of London area in the December rankings. But the TTD and the Goshen projects which surround it were located by the OPA in the Bruce area.

When Ms. Squires questioned Mr. Robertson about this map, his explanation was that he didn't know why NextEra decided to locate the Bluewater project in the west of London region.

But that is just not how it works in the FIT rules. When the applications are made, the applicants didn't specify a region. The regions were the construct of the OPA. Developers merely picked connection points, or, in the case of the Bluewater project, didn't pick a connection point. It had the OPA just put them in a region.

Now, why was the OPA willing to put people in regions without consulting developers in advance? Bob Chow has explained in his witness statements because the regional lines didn't

matter. If they did -- if they did, if they were going to have the impact that the claimant says they do, then obviously the OPA would have wanted for developers to determine the region they were applying to.

I think if we look at this map, we can actually see just why the claimant's position on how connection point changes would be allowed just makes no sense electrically.

In essence, the claimant's position would be that the region's represented boundaries and that meant that the Bluewater project, which the OPA had placed into the west of London area, could not connect in the Bruce region.

Despite being surrounded by Bruce projects and despite having the Seaforth transmission station, which is the Bruce region connection point, practically on its property, under the claimant's interpretation that project could not connect to that station.

There would have been no reasonable justification for the OPA to prevent developers from changing connection points across regional lines when it just might have made sense for them to do so.

Now, I want to pause very briefly, because the claimant has suggested that the Minister shouldn't have paid attention to the letter of CanWEA, that it should have paid attention to a letter that the claimant wrote on its own behalf with nobody else contesting the CanWEA letter.

But we've heard time and again complaint letters come in. Governments can't make everybody happy with every regulatory policy decision that they make. It is just not possible, and it is not what is required by Article 1102, 1103 and 1105.

The fact is, with the Bruce-to-Milton allocation and the change in connection points, the OPA and the Government of Ontario, in directing them to do so, respected the expectations that developers had had for years as to how this process would play out, at least for those developers in the Bruce and west of London regions, which are the only ones that matter in this arbitration.

And with that, I will segue to my colleague, Mr. Watchmaker, who will now discuss damages.

THE CHAIR: Thank you.

Mr. Watchmaker.

SUBMISSIONS BY MR. WATCHMAKER AT 3:43 P.M.:

MR. WATCHMAKER: Madam Chair, good afternoon. My goal today will be to give you additional comfort in disposing of these claims. Of course, what I hope to convince you off is that you should feel at ease in dismissing the claimant's case in its entirety.

With respect to damages, the claimant in a sense had a straightforward burden: Show how the measures caused it actual loss.

Instead, what you have before you is a claim based on a fundamentally flawed theory of damages, including absent or improbable causation, and a valuation that does not even pass a modicum of reliability.

Like the jurisdictional issue of consent, if the claimant fails to prove causation or fails to present credible valuation, whether there's merit to its claims or not, its case must fail.

Let's quickly situate ourselves. I don't intend to spend too much time here, but let's just look at the claims of loss that the

claimant makes.

So we have seen these dollar figures before. The only thing I want to indicate to you are two things. First, as you know, we right now do not know how much the Article 1105 claim is, because that claim has been conceptually altered and there are no accurate figures in the record as of this date for that claim.

The other thing to notice is that the Article 1106 claim of $110.8 million, as was confirmed by Mr. Low yesterday, is included in the sums of the other figures there above.

Okay, that by way of background. This is how I would propose to proceed through these issues today. First, I will present the key legal principles relevant to your assessment of damages. Second, I will demonstrate the flaws in the claimant's damages claim. Finally, I will address the conclusions we can draw from our discussion.

Now, there should be no great debate on what the appropriate legal standards are in this case, and yet there is. It should go without saying that the objective of an award of damages is reparation; that is, it is a remedy that

seeks not to reward, but to correct the economic harm suffered as a result of the alleged breaches.

It should also go without saying that causation is a necessary condition of reparation. Furthermore, the evidentiary standard to be applied is plain: The claimant bears the burden of demonstrating proof of causation and quantum.

Beginning with the evidentiary standard, the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion. This is well-settled law.

For instance, the tribunal in Thunderbird held that with respect to the burden of proof, tribunals must apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion.

Of course this evidentiary standard is also codified in the rules governing these proceedings. Article 24 of the UNCITRAL arbitration rules requires that each party shall have the burden of proving the facts relied on to

support his claim or defence.

So why is this evidentiary standard relevant here? Because despite filing two expert valuation reports and two memorials, you on the last day of the hearing are still waiting for the claimant to provide evidence of how the measures at issue caused actual quantifiable harm, as well as evidence of quantum.

The second relevant legal principle is the standard for awarding damages, and that standard revenue requirement a damages award to repair the harm caused.

So the objective of the award of damages, again, to repair the harm actually caused by the wrongful conduct, indeed, this objective is provided for in the text of NAFTA and by the applicable rules of international law that we are all familiar with. Again, this is well-settled law.

Article 1116 is clear. The claim can only succeed if liability is established and the investor has incurred loss or damage by reason of, or arising out of, that breach.

And of course this is a standard recognized in international law more broadly, as

well going back at least close to 90 years to the factory of Chorzow case. The oft-cited finding in that case was:

> "Reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

We need to pause here. With respect to every alleged measure, then, keep in mind the situation, which would in all probability have existed if that act had not been committed. And let's remind ourselves this case has been cited and applied by hundreds and hundreds of international tribunals, including investment tribunals just like this one.

And if we were not certain enough of this standard, it was confirmed by the ILC in its articles on state responsibility, as well. What is required by international law is full reparation for the injury caused by the internationally wrongful act.

This is also consistent with more recent jurisprudence. For example, in Duke Energy, the tribunal essentially enunciated, quoting, in fact, the Chorzow factory case.

In fact, this is so well settled that both the claimant and Canada referred to this legal standard in their respective pleadings. However, while the claimant invoked these well-settled propositions of international reparation in its written pleadings, it then assesses damages without regard to them.

Instead of repairing the alleged harm, the claimant proposes an approach to damages that extends the wrongful conduct to the claimant and only the claimant, in effect rewarding it.

In cross-examination yesterday, Mr. Low said, in relation to the claimant's discrimination allegations, that:

> "The 'but-for' test under Article 1103 is not to put the investor back into the position of what it had, but the 1103 test is to provide the better treatment."

Later, in response to a question

from Judge Brower, he responded that the compensation for that breach is the treatment.

This position contradicts 90 years of international legal jurisprudence. In support of this unusual position, the claimant appears to posit two untenable and vague theories of how NAFTA constitutes some form of, perhaps, lex specialis on reparation because of Articles 1103, which we heard about, or 1104, which it pleads in its written pleadings.

Neither of these provisions says what the claimant believes they do. As we know, Article 1103 provides for most-favoured nation treatment. Article 1104, which does not in and of itself impose any substantive legal obligation, simply ensures that where there is a difference in treatment provided to Canadian nationals and investors of third party states, that US and Mexican investors must be provided the better of the two.

On their face, neither provision requires the provision of the best treatment in the jurisdiction as the claimant espouses. But, more importantly, neither provision alters a century, almost a century, of international jurisprudence on

reparation.

In response to Judge Brower's request for some legal authority for its unusual damages theory, the claimant this morning suggested you read three NAFTA cases. As Mr. Spelliscy has already told you, you should indeed read these authorities, because they don't support the claimant's theory.

Canada is unaware of any case directly on point. However, Canada can identify at least one case in which a similar theory of damages was advanced and rejected concerning an improbable "but-for" theory of damages.

That case was Merrill & Ring Forestry v. Canada. Merrill & Ring involved allegations of Articles 1102, 1105, 1106 and 1110 violations by Canada arising out of treatment of exporters under Canada's log export control regime.

That regime required log exporters to offer their logs up for domestic auction before being permitted to offer them into allegedly more lucrative export markets. The claimant in Merrill advanced a "but-for" theory of damages based on it, and it alone, being freed from Canada's log export regime, while all of its competitors would continue

to be subject to that regime.

As a result, the claimant's "but-for" world estimated significant premium prices for exported logs that would not be subjected to the competition of other Canadian log exporters who were still subject to the export restrictions of the regime.

The claimant's valuator calculated damages on the basis of these premium-priced export logs for both past and future losses.

The Tribunal in Merrill & Ring recognized this "but-for" scenario was improbable. The Merrill tribunal held:

> "Here, again, Canada's criticism is persuasive. Either all log exporters are outside the regulatory regime or they are all in. One cannot selectively place different exporters in different categories of the scenario. Thus, if the log export control regime was contrary to NAFTA, the probable counter factual

would be to remove the harm. You remove the harm by eliminating the regime not only for the claimant, but for all exporters."

Canada notes that the counsel and the damages value in Merrill & Ring are the same counsel and valuator in the case before you. The "but-for" theory was wrong then and it is wrong now. Yesterday the claimant sent Mr. Low up to defend its unusual theory of damages. Mr. Low was forced to disagree with the very international legal principle of reparation that the claimant itself relied on in its reply memorial.

By contrast, Mr. Goncalves's valuation is entirely consistent with that legal principle of reparation.

Also yesterday, I think I heard Judge Brower plead: Just don't tell us any stories.

Yet a day later, there is yet another story, a lesson in ABCs, as it were, about how the normal international legal principle of reparation would somehow leave a foreign investor without a remedy. It is just not right.

But even in the ABC scenario posited by the claimant, Mr. Goncalves's approach would be exactly the same: Examine the most probable "but-for" scenario by removing the wrongful conduct.

So let's go back to the proper standard, and I think I am going to skip ahead on a couple of slides you have there and go straight to the slide that is causation, Duke Energy.

Here is the Chorzow factory test again:

> "Any award should wipe out all of the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

Keep this in mind, as well. Even if the claimant wanted to propose its unusual theory of damages, it could have -- could have -- alternatively presented a much more reasonable theory based on this 90 years of jurisprudence, but it hasn't done that.

And, as a result, if you find no liability as a result of the GEIA, then Mr. Low's entire base case falls apart. And if that happens, then the claimant's entire proof of loss is invalidated and any finding of liability is meaningless.

But let's presume for a second that that is not the outcome. There are other reasons to dismiss much of the claimant's damages case, and that brings me to the flaws in the claimant's damage claim.

And to see these flaws, let's apply the factory of Chorzow standard. What is the situation which would, in all probability, have existed but for the wrongful conduct?

When we do that, we see that assumed breaches of NAFTA could not have caused many of the damages claimed. And we see that the claimant's approach to valuation is flawed and biassed.

Now, Canada has already mapped out the causal problems with the claimant's case in its counter memorial and rejoinder memorial. Mr. Goncalves has, in great detail, also mapped out these problems in both of his expert reports.

I don't propose to repeat these pleadings, but we will refer you to them in our post-hearing submissions.

We have also established in our pleadings that the claimant's valuation reports are entirely unreliable. Again, I don't propose to repeat these submissions here. Right now, I would like to focus on what you have heard this week.

So let's look at whether the claimant here has demonstrated that each of its allegations of harm has caused specific losses that are sufficiently clear, direct and certain.

Recall the claims that Mr. Spelliscy has mapped out for you earlier. I present them in a slightly different way here for the purposes of damages assessment. The first is the claimant's Article 1106 claim that the domestic content requirements caused the claimant to use undesirable wind turbines and, as a result, it lost $110.8 million.

Specifically, they claim that the domestic content requirements caused them to use a less efficient GE 1.6xle turbine instead of the GE 2.5xl turbine. As a result, they claim as losses the alleged future revenues that the larger turbine

would return.

However, the claimant has not shown and cannot show that these alleged future losses were caused by the FIT program's domestic content requirements, and I would like to slip into confidential session for just one second.

--- Upon resuming confidential session at 4:01 p.m.
under separate cover

--- Upon resuming public session at 4:02 p.m.

MR. WATCHMAKER: So let's look at another one of the claims. Second is the Article 1105 claims which we have heard this week, that the negotiation of the GEIA was cloaked in secrecy and that, as a result, the claimant could not negotiate a similar deal, causing it to lose some as of yet uncalculated 1105 losses.

But, again, what actual losses could have possibly been caused by the confidentiality of the GEIA? The confidentiality of the negotiations could only have resulted in any actual harm during the period in which the claimant first made its investment up to the time it first became aware or should have become aware of the negotiations.

The GEIA negotiations were

publicly disclosed on September 26th, 2009. The only plausible losses that could have been caused by the secrecy of the GEIA, assuming it's a breach, were any investment costs spent by the claimant up to this date.

But of course the claimant has failed to prove any such causation or any quantifiable losses arising from this alleged breach.

You have not seen a single invoice on the record from this period of time. The only invoice in the entire record relates to the GE turbine agreement.

Let's look at the third claim. What about the claimant's broader GEIA claim? This is the main claim in this case, that the GEIA is discriminatory under Articles 1102 and 1103. As Mr. Goncalves explained to you yesterday, both in direct testimony and in response to questions from Judge Brower, the only way in which the GEIA could have caused the claimant any losses was in the application of the 500-megawatt priority access set aside that caused the TTD and Arran projects not to receive FIT contracts on July 4th, 2011. The Summerhill and North Bruce projects were ranked far

too low to obtain FIT contracts.

However, the issue of causality with respect to this claim is more complicated than just obtaining contracts. While Mr. Low ignores all of the significant completion and project risks in his valuation, Mr. Goncalves rightly analyzes and assesses their impacts.

The result is a vastly-reduced quantum valuation of no more than 19.4 million, and it is further complicated because, as Mr. Goncalves has found, the quantums of past losses claimed are based on unaudited and unverified information from the claimant without sufficient documentary support.

Remember, again, except for the turbine deposit, there isn't a single invoice in the record of this arbitration, not one.

Finally, what about the connection-point change window? How could it have caused the claimant harm? Here the allegation is that but for the connection change window, projects in the west of London would not have been permitted to change connection points causing the claimant to lose contracts for its TTD and Arran projects.

Again, as Mr. Goncalves confirmed

in his direct testimony yesterday, when you remove the connection change projects, TTD and Arran fall down below the 750 megawatts available capacity and get contracts, but Summerhill and North Bruce do not.

Now, the same comments I just made with respect to the quantum of valuation problems also apply to this scenario. Where does that leave you? There are significant and substantial flaws in the claimant's case that can be usefully summarized as follows, and I apologize these are not up on a slide.

First, the claimant proposes a theory of damages and causation that is at odds with 90 years of international jurisprudence on reparation. If you find a breach of NAFTA, your duty is to repair any actual and proven harm caused by removing the harmful conduct, not by rewarding the claimant with a windfall.

Second, in considering an appropriate "but-for" counter factual scenario on which to base a valuation, jurisprudence directs you to consider what the most probable position the claimant would be in, but for the breach.

The claimant's "but-for" position

is simply improbable. Priority access cannot be provided to all FIT proponents. If we have learned nothing from this case, we now know that transmission capacity is a limited resource.

Third, the claimant has not only failed to provide you with evidence that the challenged measures have caused it any loss. It has also failed to provide you with sufficient verifiable evidence that it has suffered losses of those quantums.

And, fourth, when afforded the ability to cross-examine Canada's expert, the claimant took hours to ask him not a single question of substance. That should be a clear indication of the veracity and strength of Mr. Goncalves's testimony.

For these reasons, you are perfectly justified to deny the claimant's case for wont of proof, causation and quantum of loss.

Thank you for your attention, and I will turn Canada's argument over to Mr. Spelliscy to conclude.

MR. SPELLISCY: Thank you. I think unless the Tribunal has any questions they would like to ask me at this time, then we would

just reserve our remainder of time in rebuttal, but it is up to the Tribunal.

THE CHAIR: Any questions at this stage? No. Thank you.

So would the claimants wish to rebut?

MR. APPLETON: Yes, I am sure we do. Perhaps we might get a time update just to make sure that we're aware. We know on the other side there were a number of interruptions, Mr. Donde, along the way.

THE CHAIR: What is Canada?

MR. DONDE: Twenty-three.

MR. APPLETON: Do you want a moment?

MR. MULLINS: Can we take five seconds to --

THE CHAIR: No. You can have a few minutes just to prepare your rebuttal, if you wish. I think it would be more efficient. Absolutely.

--- Recess at 4:09 p.m.

--- Upon resuming at 4:13 p.m.

REPLY SUBMISSIONS BY MR. MULLINS:

MR. MULLINS: Members of the

Tribunal, I will try to be brief. I learned from Ms. Squires that we have the same Irish heritage and apparently, when I ended up in North Florida, we have the same speed of speech. So I will try to be careful.

I am going to try to deal with some issues that I talked about, and then Mr. Appleton will talk about those issues and try to be efficient.

I thought it was telling that Canada started response with damages. Just so we're clear, there's been a lot of talk by the front and end of the argument that we haven't proven causation.

Causation has been admitted. Mr. Goncalves has said that if it weren't for -- "but-for" the reservation of the 500 megawatts in Bruce, we would have gotten contracts, at least two of our projects.

Mr. Goncalves has admitted but for the reservation -- the change in the window for the FIT -- we showed this on the slide -- we would have gotten the contracts.

Mr. Goncalves put them both together and said the two -- you find both of them,

we would still get contracts. There's no question that we have proven causation, and this wasn't a surprise. It was in Mr. Goncalves's rejoinder report. We can read it. It is in paragraph 45. We understood that.

So we came here today -- this week, we weren't focussed on causation. He admitted it. What surprised us was some of the testimony coming from Canada's witnesses. And the arguments we hear today, we're still hearing that somehow it's a province-wide ranking and the areas don't make a difference.

That is completely inconsistent with what Mr. Goncalves is saying. If it was all province wide, how come, then, if we show a violation, we automatically are entitled to a contract? In other words, by him admitting we have shown causation, he's saying that our rank at eight and nine is enough to get us the contract, period, period. There is no more analysis you need to think about.

So we hear all of this discussion about our applications, and did you get these extra credit points, you should have been ranked higher. It is all irrelevant, because Mr. Goncalves has

admitted our eight, nine ranking was fine, because he's saying we got ranked eight and nine, and if you hadn't given that stuff to Korea, you would have gotten the contract.

So that's what surprised us. That is what surprised us. It had nothing to do with causation.

What Mr. Watchmaker is confusing is causation and methodology. What you heard him say is, Well, we haven't shown you how we have lost damages. We haven't shown you causation.

We have proven causation; they have admitted it. The distinction is methodology. How do you calculate lost profits? That is not a causation issue. Mr. Brower?

MR. BROWER: Excuse me. Isn't the distinction also between two projects and four projects?

MR. MULLINS: There is a distinction and the evidence will show two things. First, as Mr. Low suggested or testified, on the MFN causation essentially is assumed. Our interpretation of MFN, if -- we're entitled to the most-favoured nation, and so, therefore, if we're not given it, there is your causation. So that is

the four projects.

On the Article 1105, on the two projects it is -- again, it's been admitted. On the other two projects, our position is the evidence shows there was sufficient capacity to award more capacity. If you go through the whole record of it, then you award all of the capacity in Bruce. They reserved it.

We believe that based on that evidence, and Mr. Low testified about this, that by management expectations, there was sufficient capacity in order to award more projects.

Now, the other critical point, but just not to leave this point, by Mr. Goncalves admitting in his expert report that the reservation of the transmission to the Korean Consortium caused harm to Mesa, he says this. He says that is causation, right? You reserved it. That happened in September 2010.

So remember these arguments, how we're wrong about when the damages are? He's basically admitting we were damaged in 2010, because he's admitting causation occurred, because that happened in September 2010.

If you have any doubts about that,

any question whether or not we suffered real damages when Bruce came in, all you need to listen to is read Mr. Edwards' deposition, because once -- once we were lower-ranked on some of our projects, Mr. Edwards came calling to try to get some of our low-hanging fruit.

Obviously if you are lower ranked, you have damages, and so what happens is by shutting us out of the first 500, it's not a great project. Those guys in Bruce automatically, on that day, it's not worth as much a value.

But of course the irony is, if they hadn't done what they did with NextEra, we still -- we could have gotten a contract, but it is what it is.

Now, I am trying to go through my notes to make sure I don't repeat myself and so I will be efficient.

Now, Mr. Spelliscy also accused us. He made a lot of accusations and said: You back them up. You better be careful what you say, Mr. Mullins.

There is no -- we have proven our case. There is no innuendo here that decisions were made on politics. Ms. Lo sat in front of you

and admitted it. She admitted that the main reason that this thing was sped up on the FIT program, for example, was politics, not any legitimate reason other than politics to make you look good.

This is not about innuendo. Here is some of the evidence we have seen. The Ministry of Energy obtained confidential results of the regional rankings, got them. Ms. Lo denied she got them. Originally, Mr. Cronkwright showed them to the Minister of Energy.

The Minister of Energy had high governmental meetings with NextEra. Sue Lo, in an e-mail -- you saw the e-mail -- was worried about protecting IPC, which was owned by Mike Crawley, the president Mike Crawley, the liberal party leader.

This letter is showing NextEra knew the change window beforehand. We asked Mr. MacDougall about that. There was evidence NextEra gave political funds. There is evidence Sue Lo, after the decision was made on May 12, met NextEra immediately after and decided -- and talked to them.

There is evidence, asked by Ms. -- found by a document from Arbitrator Brower that

she asked NextEra for the rankings.

And what is really disturbing about this is this is supposed to be an even process where people are trying to act in good faith. Why in the world is the Ministry of Energy finding the results? Why are they looking at the results of the dry run? Why are they getting where the rankings were for NextEra?

Now, we heard a lot about that there was -- what the developers' expectations were with the CanWEA situation. The undisputed evidence from developers, from testimony, is Colin Edwards and Cole Robertson.

They testified that the change with the -- going to different regions was new. That is what the testimony is.

And Mr. Spelliscy was talking about, well, you know, it looks like Article 1105 is only about non-disclosure. Arbitrator Landau saw through that in his questioning. It is not just about non-disclosure. There are misrepresentations here.

Just to give you an example, in the press backgrounder we keep on hearing about, they talk about 16,000 green energy jobs. That's

not true. There is nothing in the GEIA about that. They talk about $7 billion of revenue. There is nothing in the GEIA about that.

And beyond that, the most egregious misrepresentation is the Premier telling us, Well, we're all ears.

The truth is that everybody that showed up and asked for a GEIA-like deal was told to go pound sand, and it got to the end where the last e-mail we showed you said, We can't do this deal. It says, We cannot give you a special deal under the GEIA.

And why? Why is that? Well, Mr. Spelliscy showed us in his slide at page 120, paragraph 8.7, the government -- he didn't highlight this part of the sentence. It says:

> "The Government of Ontario agrees that it shall not provide or permit to be provided by its agencies..."

It's not just the Government of Ontario, its agencies:

> "... to any other renewable energy project or developer the benefit of an economic

development adder or similar incentive which is greater than the economic development adder, unless that developer agrees to have the same scope."

In other words, what they are saying is they couldn't enter into another agreement unless the scope was identical, and that was not possible. He just told you that was not possible.

And they are telling me, well, you know, we're being criticized we couldn't get out of it. Well, you know, what could we have done?

I'll tell you what you could have done. You could have done the feasibility study you were supposed to do in the MOU. You could have done the contingent agreement you were supposed to do. You didn't do that either.

You could have done, you know, maybe a stakeholder comment period on it. You didn't do that either. There was a lot of things you could have done.

They entered into an agreement. The Premier is telling us, We're all ears. He

doesn't tell you his hands are tied.

It is not just about transparency, but, by the way, we're supposed to compete when it is confidential for 2008 to 2009. We're supposed to guess this thing is going on. They were contractually required in the MOU not to disclose it to anybody, and then they regret it comes out.

They don't tell you all of the terms. They skip the fact in early fall of 2009 all of the terms have not been given. Then they give the press backgrounder, and then they don't release their agreement. And they are telling we're supposed to go to you and give you the same deal, and then they say, Well, we couldn't release it then, because now we had to protect Samsung.

And they are saying, Well, you know, gosh, nobody called us and asked for it.

And that's the other thing. My client is being criticized for believing in the FIT program. He's looking at this deal. He's being told, Well, Samsung is going to make 16,000 jobs and $7 billion of revenue, and Mr. Robertson is saying, I just want the 540 megawatts. I figure I got a fair deal here.

Now he is being criticized for

believing in Ontario's good faith, you know, and this idea that we're supposed to predict that assurances is automatically ten -- a year down the road, we're going to be kicked out.

When I was a kid, I used to go to Disney World all the time, and this is what this is. The Korean Consortium was told, You can go into Disney World first. You get to go on Splash Mountain, okay?

Meanwhile, my client is waiting in line in Space Mountain, and we're supposed to know when you say, Look, you got -- the Korean Consortium has access to Disney World. That meant we're supposed to know that after Space Mountain, the Korean Consortium, they can go to Space Mountain, kick my client out of the line, and then they shut down the park. They can still keep it open. That's what they are supposed to predict a year down the road.

It is insane. You know, at the end of the day, the Korean Consortium did not have to do anything. We weren't told they didn't have to build anything. We weren't told any of this stuff. And clearly now, if we look at the agreement, there is no way they could enter one,

anyway.

THE CHAIR: Mr. Mullins, it would really help us if you try to answer, you are rebutting, you are not repeating what you've said already in the opening and this morning, because we know it. I mean, you can trust us. We take notes of everything. Now I've stopped because it was repetitious.

MR. MULLINS: I thought those points were rebuttal to some of the stuff I heard.

THE CHAIR: Yes, yes, of course, but if it is nothing new, then there is no need to repeat.

MR. MULLINS: I can follow up as I stand here. Mr. Watchmaker chided us on our ABC model. We said, well -- you know, that hypothetical we gave.

But he said under Goncalves's "but-for" model, it would still work. I didn't hear how ABC gets damages. He didn't say. He said it would still come out. There was no analysis of how ABC gets any damages under the so-called Goncalves rule. There is nothing.

With the comments from the Chair, I don't want to repeat myself.

THE CHAIR: Thank you.

MR. MULLINS: I hope I was responding to the question. I really intended to do so, especially with the idea about the causation, which I really --

THE CHAIR: You made your point very clear.

MR. MULLINS: If there is any other questions on the factual issues or causation issues, otherwise I will turn it over to my colleague.

THE CHAIR: No, we have heard a lot of information a few days now. Of course we could ask many questions, but I think it is smarter if we go home and we analyze what we have heard.

MR. MULLINS: Okay, thank you so much for your time.

THE CHAIR: Thank you. It was clear.

MR. MULLINS: Thank you so much.

MR. APPLETON: Just before, a procedural question. Where are we for the time just so we're all clear?

MR. DONDE: Fourteen minutes have been used.

MR. APPLETON: That means 14 minutes are left?

MR. DONDE: Yes.

REPLY SUBMISSIONS BY MR. APPLETON:

MR. APPLETON: Excellent. All right. We will go from there. Thank you very much. Can you hear me now?

All right. I will try to raise specific questions that have arisen in the commentary this afternoon.

First of all, Canada took us to look at the testimony of Mr. Robertson. If you recall, Canada didn't take you to page 214 at line 20 and 21 when Mr. Robertson was asked:

> "Did you mean procurement in the legal sense under NAFTA?"

He said:

> "I am not a lawyer. I'm definitely not an international trade lawyer. I did not mean definition of procurement as I heard it used in the openings of both Canada and Mr. Appleton."

I think we're all pretty clear the

selective bits that came out was not accurate or appropriate. With respect to the testimony of -- I believe this is the testimony of Mr. Cronkwright. Was it Mr. Cronkwright? Yes. This would be on October 29th.

MR. MULLINS: Yes.

MR. APPLETON: Page 21. Here it's absolutely clear that he has confirmed that -- I will just read through:

"... and so anything the OPA procures would not be government procurement. Is that correct?"

Is the question. Sorry. Excuse me, I will start further back. "Are you a government employee", is basically the question.

"ANSWER: Not that -- I'm an employee, but I work with the government. Thank you."

"QUESTION: And then you would agree the OPA -- you said you are basically saying the OPA is not government per se?

"ANSWER: That's right.

"QUESTION: And so anything the OPA procures would not be government procurement; is that correct?

"ANSWER: It's procurement under the opex and obligations we have.

"QUESTION: But not government procurement, because OPA is not government; correct?

"ANSWER: I'm not a government employee. I don't draw a pay cheque from the Ontario government." [As read]

Just to identify that everybody can take something from the record, twist it and turn it and make it -- all around.

You are the Tribunal. You need to decide in substance, in pith and substance, what this is, and we know that there is a definition, a simple definition. In fact, I believe maybe even both sides have said something about this definition, and that what we have, it does not meet

the definition of procurement in its ordinary sense.

It also doesn't meet the definition in the NAFTA, and Canada has still not answered -- maybe they will do it in their time left today -- if the definition to them in the UPS case was to follow Article 1001(5) and to apply all of it, including its exceptions for UPS for this very same exception, why does the definition of NAFTA change some six or seven years later?

It doesn't. It can't. And in any event, other NAFTA tribunals have applied Chapter Ten to give meaning, and that is completely consistent with the Vienna Convention.

And then we might look at special meanings under things like Article 31(3)(c) of the Vienna Convention, which is exactly why we might want to look to the WTO definition.

And all of these definitions tell us the same thing. If you don't buy it, if you don't get it, if you don't use your money, you're using somebody else's money, it is something else. That's the key thing about the procurement. That is why it just doesn't work. It is something different.

And by the way, this argument made by Mr. Neufeld -- if you recall, he's the gentleman that told you about Catch-22 and Joseph Heller. I felt we were in the twilight zone. His suggestion to you is that fundamentally procurement can't be applied from the Czech Treaty because somehow the Czech Treaty itself is procurement and, therefore, it is covered by the exemption. That makes no sense.

I looked at the transcript. I mean, maybe --

THE CHAIR: I don't think that was the argument. The argument is that you cannot use MFN to get into the MFN provision, I think.

MR. APPLETON: No, not apply. In fact, the procurement was involved, and unless Canada is buying a bit from the Czechs, that wouldn't apply.

The exception under Article 1108(7)(a) only applies to procurement itself. It doesn't exempt it. Sectoral agreements are covered by annex 4. Annex 4 covers international agreements. It covers bilateral investment treaties.

All international investment

treaties which were negotiated before the NAFTA came into force were excluded under annex 4, I believe annex 4(1), but under -- and then there is a sectoral -- if you remember in my opening, I believe I took us through the sectoral exclusions. I believe it is annex 4, part 3.

THE CHAIR: I don't think that was the issue, but you will go back to the record for your post-hearing brief, and then you can address this if you think it is necessary. I think the argument was somewhat different.

MR. APPLETON: Sure. So let me respond to a point made by Mr. Watchmaker about damages.

Canada has raised the issue about the GEIA being inconsistent with Article 1105 in its pleadings. There is no question that it has raised that. There is no question it is on the record.

Also, Canada has raised the issue the investor has been unable to separately quantify the Article 1105 damages here. The investor has always stated it was prepared to do so in advance of this hearing. The investor is still prepared to do so now if the Tribunal wants to wait and have it

in that way.

But that information can be obtained from the reply report of Mr. Low and the models that were provided to Canada's expert.

So there is no conceptual or new issues raised here, and we leave it to the Tribunal to determine how to proceed with this issue, to deal with it now or to leave it to post-hearing briefs, but Mr. Low testified that each project's losses are broken down in his report, and I think that is important to identify.

Canada has challenged the documentary evidence with respect to past costs. The only person who has testified in these proceedings with professional qualifications and business valuation -- that was Mr. Low -- has clearly confirmed he had all the evidence that he would ordinarily require to verify past costs.

And the fact that we only had 48 minutes left to examine Mr. Goncalves should not be in some way interpreted that somehow we didn't put questions to him. We put a lot of questions to him and he told us a lot of things; in fact, far more than I would have expected and, in many respects, far less.

So, you know, it was clear in our submission he is not the right expert to be able to provide the type of information to this Tribunal, and his professional judgment with respect to issues does not seem to extend properly to the business valuation.

Then to make a fundamental assertion that we should apply the standard which, in his opinion, without any proof, without any other support, just his opinion, is the difference of $500 million is very problematic, which brings me to the issue of the Chorzow factory case.

The theory of damages which has been advanced by the investors in this case is consistent with the Chorzow factory case, because Chorzow tells us that reparation is to correct the harm of the breach and to bring you back to where you would have been, in probability, if the breach had not occurred. And the obligation here, the wrongful act, is not providing the treatment that was required to be provided. That's the breach.

So where you would have been if that had not occurred would be to have that treatment, not the absence of that treatment. It's exactly that.

Now, quickly, very, very quickly, about Merrill. I believe that Mr. Watchmaker's comments are completely inappropriate about Merrill.

The issue in Merrill was that the Government of Canada did not provide information that was machine readable, about hundreds of thousands of export transactions.

It was only provided to counsel and an expert by sitting in the viewing room for a day and we could write down anything we wanted, but nothing would be provided to us in machine readable form.

Therefore, it was impossible to do a market calculation based on the best available information, and, therefore, an alternative had to go in. The alternative was based on the only information available in that market, which was based about an export premium, and that tribunal found that that alternative was not good enough.

It wasn't good enough, but the answer really should have been to give us the information in a way that could be assessed. It is not reasonable to have to write down hundreds of thousands of data points in a very short period of

time.

I don't think it is fair and appropriate to take it out of context, and the cases here have been taken out of context. The Mobil case would suggest to you Article 1105. The parties agreed on what the meaning of Article 1105 would be by special agreement. It is not a basis of a finding. It is a basis of a special agreement by the parties.

Let me turn to the turbine deposit, Article 1106. The law of damages asks: What is the most proximate cause? The amended MTSA was entered for the purpose of the FIT program. That evidence is clearly on the record.

The turbines were required for domestic content requirements of the FIT program and required an adequate supply of turbines to meet that criteria. By the way, the criterion, that is extra credit. That is extra credit. You don't need it to have a FIT contract. Many people got a FIT contract without having those extra criteria.

So the fact that we might not have focussed that much on the criteria is because it simply wasn't necessary since we knew our ranking and we knew, from the dry run, we would have been

in a position to be able to get contracts.

But the application was filed days within the amended MTSA. Obviously this is the proximate cause of the loss. Canada's contention on this is simply not reasonable and, in light of the facts, it just ignores them.

Now, Canada is simply wrong on the issue of state responsibility where here the idea is to remove the better treatment of Samsung. I think it is worth sending you back with that point before we finish.

The NAFTA tribunal can only provide a monetary award. It cannot provide specific performance, and it cannot order the removal of more favourable treatment. That is just not a power you have. The NAFTA says that you must give a monetary award here.

The means of achieving restitutio in integram through damages must be to award damages that put the investor in the position it would have been if it received the more favourable treatment.

Secondly, the test of the NAFTA makes clear that the primary obligation here is to provide treatment no less favourable. It is not to

refrain from the granting of favourable treatment. Do I have any time left?

MR. DONDE: You have four minutes.

MR. APPLETON: Okay, excellent.

On jurisdiction, Canada's counsel is reading the word "all" into all -- into the six-month requirement, but it does not say all events giving rise to the claim. It simply says those events or sufficient events, events giving rise to a claim. And they ignore the issues.

They ignore the evidence and say somehow we haven't proven our claim. We have lots of evidence about that. It is completely irresponsible at this point to not narrow the issues and to somehow not take into account what we have heard through this process, again, an issue that could be addressed by costs.

Canada says the decision of the OPA on the contracts and connection were made without governmental authority. How could an entity ever accomplish the results of giving an entitlement to market actors to receive a price that is not voluntarily offered by other market actors but that is required to be paid by virtue of governmental regulatory program, in this case,

the FIT. That is governmental. Everything about that is governmental.

And of course the FIT has a provision under the Electricity Act. Powers were delegated to the OPA under section 25.3(2). These are powers, governmental powers, that are delegated to them. And that covered all types of issues, including the decisions that were made about the FIT contracts and how to accord that. I believe it is the September, I believe, 24th direction. We will obviously deal with that when we get the post-hearing brief.

Canada forgets that the only government procurement is covered by an exception, that they don't have the relevant meaning here shown by Canada's counsel, is that by contracting energy by the Samsung consortium, that would also be procurement. And that just emphasizes that the exception only applies to procurement by a party or state enterprise.

And of course someone who was procuring renewably generated electricity in Ontario, Mr. Robertson said that it was just that the someone is not the government or the OPA.

I am not sure if that came out

right.

I probably have one minute left?

MR. DONDE: One-and-a-half.

MR. APPLETON: One-and-a-half, thank you.

--- Laughter.

MR. APPLETON: Let's talk about the international law standard of treatment.

The conduct that violates international law standard of treatment is completely present in this case. We did not spend a lot of time talking about the Free Trade Commission interpretation, because I have written about it extensively in the submissions, particularly the 1128 response. It is one of my favourite topics, so I am happy to talk about it. But the fact of the matter is --

THE CHAIR: You have one minute left.

--- Laughter.

MR. APPLETON: But the fact of the matter is is that the conduct here in this case, while we believe does not need to meet an outrageous threshold, unlike a due process threshold, it does in fact meet it.

The violation of what we see is egregious and outrageous and should make anyone on the Clapham omnibus be upset and angry and not be pleased, because it is an outrage and a willful and egregious set of actions.

People in Ontario that came here to invest should have expected a program to be run fairly and openly and not without this type of thing.

If Canada does not believe that that type of behaviour, that lack of disclosure, that lack of candour is somehow not outrageous, then I seriously question the time I spent in the public service and all of those other very fine people who work for the public service who do cherish those things, because our public and the people who are engaged, the people who invest, deserve better and deserve more. And that is a fundamental issue that I am sure you are going to have to consider as you decide what Article 1105 means.

Whether it is a modern context or an old context, this would always, always be off-side with that type of thing. This behaviour is abominable and is exactly the type of behaviour

that, in the worst situation.

Neer, in my view, is the highest standard you could ever find. Even for Neer, which is a denial of justice case, that would violate Neer. It is completely unacceptable. And with that, I thank you for your time.

THE CHAIR: Thank you.

Does Canada wish to rebut? Do you need -- do you want to do it like that? Do you need a few minutes?

REPLY SUBMISSIONS BY MR. SPELLISCY:

MR. SPELLISCY: I can do it right now. Thank you, Madam Chair, Ms. Kaufmann-Kohler, Mr. Landau, Judge Brower. I actually don't think I need to make remarks in response to that unless there are specific questions. I think all of our submissions have been made already. I think that you have heard all of these arguments before. I think you understand it.

I will come back to something I said at the beginning of the week. This is a case about an investor who is disappointed that he didn't get more favourable treatment than everybody else in the FIT program, but NAFTA isn't there to protect against that.

You see that in their damages analysis. They want more favourable treatment than everybody in the FIT program. You see that in their 1102 and 1103. That is not what NAFTA is for.

If there is no other questions, that's fine.

THE CHAIR: I don't think we have further questions.

MR. SPELLISCY: Okay.

--- Whereupon submissions conclude at 4:45 p.m.

THE CHAIR: Thank you. So I thank you very much. This was very helpful and, as I said before, we will have to now go home and reflect on all of this, digest and analyze.

MR. SPELLISCY: I have a question of procedure.

PROCEDURAL MATTERS:

THE CHAIR: Yes. I was about to come to this. We will, of course, now issue an order that summarizes what was agreed yesterday.

Is there anything that needs to be added on the record? I mean, in the sense of any questions, any additions on procedure, any complaints, because this is the time to complain if

you have any complaints about the procedure?

MR. BROWER: You have one minute.

THE CHAIR: Thirty seconds.

Anything further?

MR. APPLETON: I would like to add something to the record just before we finish, but I don't know if you want to do it now or after you do your procedural matter. And it is a small one.

THE CHAIR: Is there any procedural issues that are still outstanding on your side?

MR. APPLETON: No. So I would just like to add something to the record before we close off. Why don't we deal with the procedural things, and we would like to just note something on the record?

THE CHAIR: I think you can do it now, because unless there are other things, we have nothing further.

MR. APPLETON: We just wanted to formally thank those watching the NAFTA proceeding, either live or by closed-circuit, because eventually this will come out on the Internet through the rebroadcast.

We think it is important there be

a transparent process, and we want to identify the support of the Tribunal in making sure that that was done. I think it is important that the public know that, and they should hear that from the parties involved in the process.

I also wanted to just make sure we thank the secretary, the team at Arbitration Place, Teresa and Lisa, who did wonderful jobs with the transcripts, and the Permanent Court of Arbitration who has been working very hard behind the scenes to make all of this happen.

And I would like to just thank my colleagues, both those at Appleton & Associates and Astigarraga Davis, and our experts and witnesses, and also counsel from the Government of Canada and counsel from the Government of the United States and the Government of Mexico that have been here, because they have all been part of this process and I think it is important to acknowledge it on the record.

And of course we want to thank the Tribunal. I got Mr. Donde at the beginning, I believe, yes? Yes. But I would like to thank the Tribunal. It is obviously a complex case, and we all value the work that you have done to date and

what you will need to do to be able to sort through this. So thank you very much.

THE CHAIR: Thank you.

MR. SPELLISCY: I do actually have one procedural question.

THE CHAIR: Yes, please.

MR. SPELLISCY: The closing statement presentations that you have, my understanding is that some of the transcript references in there are probably from the rough versions of the transcripts and that there are also parts where the page numbering on the confidential versions and the public versions was different.

And so I am wondering if the Tribunal, for your reference, I leave it to you, but there are references on there, on the pages on the closing argument, to transcript references, and if you are not looking at the right transcript it might be difficult.

So I am wondering if you would like the parties, after the final, final transcript comes out, to reprovide you with the closing sides -- no changes in substance, of course, but with the references to the transcript corrected so that they are appropriate to the final record.

THE CHAIR: I think that would be helpful to us, so when we work on it we will have the right references to the transcript. If both parties could do this within a week from getting the final transcript, would that be acceptable?

MR. APPLETON: No. I would like to change it slightly, if that is possible.

THE CHAIR: Yes.

MR. APPLETON: I think that the slides should not be touched. However, we have no problem if each side wanted to file an errata sheet just to note if there is something. In that way, we don't touch any of the slides in any way, but if there is something that changes and a party would like to deal with that, I have no problem conceptually with it. I just think the record should be closed in this way as to what was produced, and that way there is no risk of that and so that's why I have a slightly different approach. I thought I was going to get out of here without any procedural discussion, I'm sorry.

THE CHAIR: No. That is fine, I suppose. So we have -- we freeze what we have today, but you can add extra pages where you have changes, I mean changes to the transcript

references; of course no other changes goes without saying.

MR. APPLETON: My suggestion would be an errata page.

MR. LANDAU: A list.

MR. APPLETON: Yes, thank you, a list. I am trying to learn from Judge Brower.

THE CHAIR: Whatever is easy for us to consult, you will find out.

Good. Is there anything else on Canada's side? Fine. Then it remains for me to thank all of those who participated in this hearing. Certainly the court reporters, PCA, the Arbitration Place, the technicians, as well, who did a very good job, the public that we have not seen, but has seen us, the party representatives who have been sitting here for long hours very patiently, the non-disputing parties, as well.

The counsel teams, of course. It was a long week and very intense week, and we are grateful for all of the work you did for explaining the case to us in a very efficient, diligent manner, also in a very friendly manner, which is nice, because it allows us to focus on the real issues and not be distracted by procedural

skirmishes.

So I hope I have forgotten no one when thanking everyone. It allows me now to close this hearing and wish safe travels to everyone and a very restful and well deserved weekend. Goodbye to everyone.

--- Whereupon the hearing adjourned at 4:52 p.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided transcription and transcribed therefrom, the foregoing proceeding.

Teresa Forbes, CRR, RMR,
Computer-Aided Transcription

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided Transcription and transcribed therefrom, the foregoing proceeding.

Lisa M. Barrett, RPR, CRR, CSR
Computer Aided Transcription