

**IN THE MATTER OF AN ARBITRATION UNDER
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT (CUSMA),
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA),
AND THE 2013 UNCITRAL ARBITRATION RULES**

-between-

**WINDSTREAM ENERGY LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “disputing parties”)**

PROCEDURAL ORDER NO. 1

The Arbitral Tribunal

Ms. Wendy Miles QC (Presiding Arbitrator)

Prof. John Gotanda

Rt. Hon. Beverly McLachlin

Administering Authority

Permanent Court of Arbitration

21 December 2021

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1. BACKGROUND

- 1.1 This first procedural order sets out the procedural rules to which the Claimant and the Respondent (the “disputing parties”) have agreed, or which the Tribunal has determined shall govern this arbitration.
- 1.2 Following the first procedural meeting with representatives of the disputing parties and the Tribunal on 8 December 2021, and after having consulted with the disputing parties, the Tribunal hereby **ORDERS** and **DIRECTS** as follows:

2. DISPUTING PARTIES AND THEIR REPRESENTATIVES

The Claimant	Counsel for the Claimant
Windstream Energy LLC 20 Pine Brook Road Bedford, NY 10506 United States of America	Mr. John Terry Ms. Rachael Saab Ms. Emily Sherkey Mr. Jake Babad Torys LLP 79 Wellington St. W., 30 th Floor Box 270, TD Centre Toronto, Ontario, M5K 1N2 Canada Tel.: 416 865 8245 Fax: 416 865 7380 E-mails: jterry@torys.com rsaab@torys.com esherkey@torys.com jbabad@torys.com

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

The Respondent	Counsel for the Respondent
The Government of Canada Office of the Deputy Attorney General of Canada 284 Wellington Street Ottawa, ON, K1A 0H8 Canada	Mr. Rodney Neufeld, Counsel Ms. Heather Squires, Counsel Mr. Azeem Manghat, Counsel Ms. Catherine Menard, Counsel Ms. Shawna Lesaux, Paralegal Trade Law Bureau (JLT) Global Affairs Canada 125 Sussex Drive Ottawa, ON, K1A 0G2 Canada E-mails: Rodney.Neufeld@international.gc.ca Heather.Squires@international.gc.ca Azeem.Manghat@international.gc.ca Catherine.Menard@international.gc.ca Shawna.Lesaux@international.gc.ca

- 2.2 All hard copy correspondence and documents in this arbitration will be delivered to the attention of Mr. Rodney Neufeld at the mailing address of counsel for the Respondent, and all e-mail correspondence will be delivered to the five email addresses listed above.
- 2.3 Any change or addition to a disputing party's representatives listed above shall be made promptly in writing to the other disputing party, the Tribunal and the Administering Authority.

3. THE ARBITRAL TRIBUNAL

- 3.1 The Tribunal is composed of:

Ms. Wendy Miles QC (Presiding Arbitrator)

20 Essex Street
London, United Kingdom
WC2R 3AL
Email: wmiles@twentyessex.com

Professor John Gotanda
President

Hawai'i Pacific University
500 Ala Moana Blvd., Suite 4-510
Honolulu, HI96813
Honolulu, HI 96813
E-mail: jgotanda@hpu.edu

The Right Honourable Beverly McLachlin

Arbitration Place
Bay Adelaide Centre West
333 Bay Street, Suite 900
Toronto, ON M5H 2R2
E-mail: bmclachlin@arbitrationplace.com

- 3.2 The disputing parties confirm that the members of the Tribunal have been validly appointed in accordance with Annex 14-C of the Canada-United States-Mexico Agreement (“CUSMA”) and Article 1123 of the North American Free Trade Agreement (“NAFTA”).
- 3.3 Each member of the Tribunal confirms that they are, and shall remain, impartial and independent of the disputing parties. Each of the members of the Tribunal confirms that they have disclosed, to the best of their knowledge, all circumstances likely to give rise to justifiable doubts as to their impartiality or independence and that they will promptly disclose any such circumstances that may arise in the future. Each arbitrator has provided the disputing parties with a Statement of Independence, and the Tribunal will take into account the IBA Guidelines on Conflict of Interest, 2014.
- 3.4 The disputing parties confirm that they have no objection to the constitution of the Tribunal and to the appointment of any member of the Tribunal on the grounds of conflict of interest or lack of independence or impartiality in respect of matters known to them at the date of signature of this Procedural Order.
- 3.5 In order for the members of the Tribunal to fulfil their continuing disclosure obligations under Article 11 of the 2013 UNCITRAL Arbitration Rules, the Tribunal seeks the cooperation of each disputing party in promptly drawing to the Tribunal’s attention any such circumstances known to that disputing party in respect of which it considers that further information would be appropriate as soon as such circumstances become known to that disputing party.
- 3.6 If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the reconstituted arbitral tribunal decides otherwise.

4. PLACE OF ARBITRATION

- 4.1 The disputing parties agree that the place of arbitration shall be Toronto, Ontario.
- 4.2 Meetings and hearings may take place virtually or at any location so decided by the Tribunal after consultation with or hearing from the disputing parties and taking into account all relevant circumstances. The Tribunal may meet at any location it considers appropriate for deliberations.
- 4.3 Irrespective of the place where an award is signed, it will be deemed to have been made at the place of arbitration.

5. APPLICABLE ARBITRATION RULES

- 5.1 In addition to the provisions of this Procedural Order, the procedure in this arbitration shall be governed by the 2013 UNCITRAL Arbitration Rules (“UNCITRAL Rules”) as modified by the provisions of Annex 14-C of the CUSMA and Chapter Eleven of the NAFTA (per Article 1120(2) of the NAFTA).
- 5.2 Subject to the CUSMA, NAFTA and the UNCITRAL Rules, if the provisions and rules in this Procedural Order do not address a specific procedural issue, the Tribunal shall, after consultation with the disputing parties, determine the applicable procedure. In addition, the Tribunal may seek guidance from, but shall not be bound by, the 2020 IBA Rules on the Taking of Evidence in International Arbitration (“2020 IBA Rules”).

6. PROCEDURAL LANGUAGE, TRANSLATION AND INTERPRETATION

- 6.1 The procedural language of this arbitration is English.
- 6.2 Any Written Submissions, as defined in s. 9.1, and all administrative or procedural correspondence shall be submitted in English.
- 6.3 A witness statement or expert report may be submitted in the principal language of the witness or expert, provided it is accompanied by an official English translation.
- 6.4 If any disputing Party submits into evidence a document in any language other than English, an English translation of the document – or of the relevant portions, in the case of lengthy documents – shall be submitted simultaneously with the original text. If a lengthy document is only translated in part, the Tribunal may require a fuller or a complete translation at the request of any disputing Party or on its own initiative. Where a document produced in the course of document production has been prepared in a language other than English, no translation of such document shall be required unless and until it is submitted into evidence as an exhibit.
- 6.5 With the exception of witness statements and expert reports, the disputing parties are not required to produce certified translations; a confirmation from counsel that the document is a translation will suffice. Each disputing party reserves its right to: (i) challenge the accuracy of the English translation submitted by the other and submit a new translation that clearly identifies the differences; and (ii) submit additional translated parts of any document not submitted or translated in its entirety. Should a disputing party challenge the accuracy of the translation submitted by the other disputing party, the challenging disputing party may request that the Tribunal order that a certified translation be prepared. Should the wording of the certified translation substantially match that of the uncertified one, its cost shall be borne by the challenging disputing party.
- 6.6 Any witness giving oral evidence may give such evidence in the language of their choosing, in whole or in part, provided that such evidence is interpreted simultaneously in its entirety into English. Any disputing party intending to present oral evidence in a language other than English shall notify the Tribunal and the other disputing party at least thirty days in advance and shall be responsible for providing suitable interpretation of such evidence into English.
- 6.7 As a general principle, each disputing party shall bear the costs of translation of documents and interpretation of testimony on which it intends to rely, without prejudice to the decision of the Tribunal as to which disputing party shall ultimately bear those costs and in what amount.

7. PROCEDURAL CALENDAR

- 7.1 The procedural calendar for this arbitration (the “Procedural Calendar”) is attached as Annex A and shall be made an integral part of this Order.
- 7.2 Unless otherwise provided, all time limits shall refer to midnight at the place of arbitration on the day of the deadline.

8. PROCEDURAL REQUESTS

- 8.1 If a disputing party introduces a procedural request, the other Party shall have five business days to reply, not including the day on which the request was made, unless otherwise agreed by the disputing parties or ordered by the Tribunal. No further submissions on a request shall be made by either disputing party without the express authorization of the Tribunal.

9. WRITTEN SUBMISSIONS

- 9.1 For the purposes of this order, “Written Submission” includes all substantive written submissions made by either disputing party, all Memorials (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial).
- 9.2 A Written Submission shall be filed and exchanged by the date indicated in the Procedural Calendar provided in Annex A.
- 9.3 In the first exchange of Written Submissions within each phase, the disputing parties shall set forth all the facts and legal arguments on which they intend to rely. Allegations of fact and legal argument shall be presented in a detailed, specific and comprehensive manner, and shall respond specifically to all allegations of fact and legal arguments made by the other disputing party. Together with such submissions, each disputing party shall produce all evidence upon which it wishes to rely, including documentary evidence, such as facts and legal authorities, written witness statements and experts reports, if any, with the exception of documents to be obtained during the document production phase.
- 9.4 In the second exchange of Written Submissions within each phase, the disputing parties shall limit themselves to responding to allegations of fact and legal arguments made by the other disputing party in the first exchange of Written Submissions, or arising from evidence obtained in the document production phase unless new facts have arisen after the first exchange of submissions. Together with this second exchange of submissions, the disputing parties may file additional documentary evidence, including fact exhibits and legal authorities, witness statements and expert reports only insofar as relevant to the adverse disputing party’s preceding submission (including documents, witness statements and expert reports produce therewith) or the documents produced by the disputing parties during the document production phase. The Respondent may not introduce a new expert witness in the Rejoinder Written Submission unless it is solely responsive to a new issue raised for the first time by the Claimant in the Reply Written Submission.
- 9.5 On the date any Written Submission is due, the disputing party in question shall send an electronic version of the Written Submission, together with any witness statements and expert reports, and indices of exhibits and legal authorities by e-mail (in searchable PDF format) to the Tribunal, with a copy simultaneously to opposing counsel and the Administering Authority. Within three (3) business days following the filing of its Written Submission, the disputing party in question shall upload to the data-sharing electronic platform of the Administering Authority, the Written Submission, together with any witness statements and expert reports, all exhibits and authorities as well as hyperlinked indices of exhibits and authorities. No hard copies of documents are to be exchanged.
- 9.6 A Written Submission shall be consecutively paragraph-numbered and page-numbered in Arabic numerals and shall contain a table of contents. To facilitate filing, citations, and word processing, a Written Submission, including witness statements and expert reports or opinions, shall be provided as searchable Adobe Portable Document Format (“PDF”) files, and preceded by a hyperlinked table of contents.
- 9.7 For any simultaneous Written Submissions, each side shall submit all electronic copies only to the Administering Authority. The Administering Authority will then distribute copies to the Tribunal and opposing counsel once both submissions have been received.
- 9.8 Neither disputing party shall be permitted to submit additional or responsive documents or evidence after the filing of its respective last Written Submission, unless the Tribunal determines

that exceptional circumstances exist based on a reasoned written request followed by observations from the other disputing party. Exceptional circumstances include but are not limited to the inability of a party to respond to a new point raised in the last round of submissions or where a new document comes into existence following the last submission.

- (a) Should a disputing party request leave to file additional or responsive documents or evidence, that disputing party may not annex the documents or evidence that it seeks to file to its request.
- (b) If the Tribunal grants such an application, the Tribunal shall ensure that the other disputing party is afforded sufficient opportunity to make its observations concerning such documents or evidence.

10. EXHIBITS AND LEGAL AUTHORITIES

- 10.1 The record of Written Submissions, witness statements, expert reports, exhibits and legal authorities in *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (“*Windstream I*”) shall form part of the record in this proceeding. Information that was designated confidential in *Windstream I* shall be deemed to constitute confidential information pursuant to the Confidentiality Order in this proceeding.
- 10.2 The disputing parties shall identify each exhibit submitted to the Tribunal with a distinct number. Each exhibit submitted by the Claimant shall begin with a letter “C” followed by the applicable number (i.e., C-001, C-002, etc.); each exhibit submitted by the Respondent shall begin with a letter “R” followed by the applicable number (i.e., R-001, R-002, etc.). The disputing parties shall use sequential numbering throughout the proceedings, commencing with the number immediately following the final exhibit number filed by that disputing party in *Windstream I*.
- 10.3 The disputing parties shall identify each legal authority submitted to the Tribunal with a distinct number. Each legal authority submitted by the Claimant shall begin with the letters “CL” followed by the applicable number (i.e., CL-001, CL-002, etc.); each legal authority submitted by the Respondent shall begin with the letters “RL” followed by the applicable number (i.e., RL-001, RL-002, etc.). The disputing parties shall use sequential numbering throughout the proceedings, commencing with the last authority filed by that disputing party in *Windstream I*.
- 10.4 An index of exhibits must set forth for each exhibit: (a) the exhibit number; (b) the date of the exhibit; and (c) a brief description of the exhibit. The disputing parties shall submit all exhibits in chronological or other appropriate order.
- 10.5 An index of legal authorities must set forth for each legal authority: (a) the legal authority number; (b) the date of the legal authority; and (c) the title of the legal authority.
- 10.6 The disputing parties shall submit their exhibits together with the Written Submissions, witness statements, and/or expert reports that make reference to or rely upon them.
- 10.7 Following submission of the Reply and Rejoinder Memorials, the Tribunal shall not consider any evidence that has not been introduced as part of a Written Submission of a disputing party, unless the Tribunal grants leave on the basis of exceptional circumstances. Should such leave be granted, the other disputing party shall have an opportunity to respond, including by submitting new evidence.

- 10.8 The use of demonstrative exhibits in aid of argument (such as charts or tabulations) will be allowed at oral hearings, provided that no new evidence is contained therein, and that such exhibits include citations to the relevant record. The disputing party relying on the demonstrative exhibit shall provide an electronic copy to the other disputing party and the Tribunal, prior to its use.
- 10.9 All evidence submitted to the Tribunal shall be deemed to be authentic, including evidence submitted in the form of copies, unless a disputing party disputes within a reasonable time its authenticity.
- 10.10 The disputing parties shall submit all evidence to the Tribunal in complete form or indicate the respects in which any document is incomplete.

11. WITNESSES

- 11.1 A disputing party may present any person as a witness, including a disputing party or a disputing party's officer, employee, or other representative.
- 11.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. No witness shall be heard orally at the hearing who has not provided a witness statement in accordance with the Procedural Calendar in Annex A. A witness who has not submitted a written witness statement may provide testimony to the Tribunal only in exceptional circumstances, with leave of the Tribunal and in accordance with the Tribunal's directions, following submissions from the other disputing party with respect to the leave application.
- 11.3 Each witness statement shall contain at least the following:
- (a) the full name and present address of the witness;
 - (b) a description of the witness's position and qualifications, if relevant to the dispute or to the contents of the statement;
 - (c) a description of any past and present relationship between the witness and the disputing parties, counsel, or members of the Tribunal;
 - (d) a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge;
 - (e) copies of all evidence upon which the witness relies unless already exhibited;
 - (f) the signature of the witness and the date it was given.
- 11.4 Witness statements shall be numbered separately as "CWS-" for Claimant's witness statements, and "RWS-" for Respondent's witness statements, followed by the applicable name and number (for example, CWS-Mars-3). The disputing parties shall use sequential numbering throughout the proceedings, commencing with the number immediately following the final statement filed by that disputing party in *Windstream I*.
- 11.5 Only witnesses that are called to be cross-examined by the other disputing party, or who are directed to appear by the Tribunal, shall testify at the hearing. Notwithstanding the above, at the request of a disputing party, the Tribunal may allow, in limited circumstances where it is reasonable and appropriate to do so, a witness offered by that disputing party but not called to be

cross-examined by the other disputing party, or directed by the Tribunal to appear, to testify at the hearing.

- 11.6 The facts contained in the written statement of a witness whose cross-examination has been waived by the other disputing party shall not be deemed established simply by virtue of the fact that no cross-examination has been requested. The fact that a disputing party may not request the presence of a witness for cross-examination will not be deemed as an admission by that disputing party nor will it imply that the disputing party accepts the substance of that witness's witness statement(s) as correct or proven. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the witness statement taking into account the entire record and all the relevant circumstances.
- 11.7 Each disputing party shall be responsible for ensuring attendance of its own witnesses to the applicable hearing, except when the other disputing party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 11.8 If a witness cannot appear during the scheduled dates or without notice fails to appear at a hearing, the Tribunal may, at its discretion, summon the witness to appear at a later date, if it is satisfied that: (1) there was a compelling reason for the witness' failure to appear; (2) the testimony of the witness is relevant to the adjudication of the dispute; and (3) providing a further opportunity for the witness to appear will not unduly prejudice the opposing disputing party.
- 11.9 The Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear at a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. A witness who is not called for cross-examination has a valid reason not to appear. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason.
- 11.10 At any hearing, the examination of each witness shall proceed as follows:
 - (a) the witness shall make a declaration of truthfulness;
 - (b) although direct examination will be given in the form of witness statements and expert reports, the disputing party presenting the witness may conduct a brief direct examination for the purpose of introducing the witness, including to confirm and/or correct that witness's written statement, and addressing matters that have arisen after the witness statement was given, if any;
 - (c) the adverse disputing party may then cross-examine the witness on relevant matters;
 - (d) the disputing party presenting the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross-examination limited to the witness's testimony on re-examination at the discretion of the Tribunal; and
 - (e) the Tribunal may examine the witness at any time, either before, during or after examination by any of the disputing parties.
 - (f) if requested by either disputing party, and in exceptional circumstances, the Tribunal shall, direct that a witness be recalled for further examination.

- 11.11 It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare for examination.
- 11.12 Unless the disputing parties agree otherwise, a factual witness shall not be present in the hearing room during the hearing of oral testimony, discuss the testimony of any other witness, or read any transcript of any oral testimony, prior to their examination. This limitation does not apply to expert witnesses or to a witness of fact if that witness is the designated disputing party representative.¹
- 11.13 In the event the inability of a witness to physically appear at an in-person hearing, the witness may be examined by videoconference if the disputing parties so agree or upon the acceptance of the Tribunal.

12. EXPERTS

- 12.1 Each disputing party may retain and submit the evidence of one or more experts to the Tribunal.
- 12.2 Expert reports shall be numbered separately as “CER-” for Claimant’s expert reports, and “RER-” for Respondent’s expert reports, followed by the applicable name and number (for example, RER-Green Giraffe-2). The disputing parties shall use sequential numbering throughout the proceedings, commencing with the number immediately following the final report filed by that disputing party in *Windstream 1*.
- 12.3 The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, unless the disputing parties agree otherwise, expert witnesses shall be allowed to be present in the hearing room at all times.
- 12.4 After the first round of expert reports, the Tribunal and the disputing parties shall discuss the option of (without prejudice) joint expert meetings between experts of like disciplines in order to seek to narrow the issues in dispute between them, as appropriate.
- 12.5 At the request of the disputing party presenting the expert, an expert may provide a brief presentation on their report(s) prior to cross-examination. The duration of such a presentation is to be determined at the Pre-Hearing Conference by the Tribunal in consultation with the disputing parties. The expert shall not be permitted to introduce new evidence during this presentation, subject to the ability to address matters that have arisen after the report was given, if any.
- 12.6 In addition to the requirements provided in paragraph 11.3, each expert report shall contain:
- (a) a description of the instructions pursuant to which they are providing their opinions and conclusions;
 - (b) a confirmation that this is the expert’s own, impartial, objective, unbiased opinion which has not been influenced by the pressure of the dispute resolution process or by any disputing party;
 - (c) a statement that the expert understands that, in giving their opinion, their duty is to the Tribunal, and that they are complying with that duty;

¹ A “representative” means the individual(s) designated as a disputing party’s agent charged with giving instructions to counsel at the hearing

- (d) a statement of the facts and/or assumptions on which they are basing their expert opinions and conclusions;
- (e) a description of the methods used in arriving at the conclusions, to the extent applicable;
- (f) a statement of the qualifications of the expert in the claimed area of expertise and an attached current curriculum vitae evidencing the expert's qualifications; and
- (g) a statement that, if the expert subsequently considers that his or her opinions require any correction, modification or qualification, they will notify the disputing parties to this arbitration and the Tribunal forthwith.

13. DOCUMENT PRODUCTION

- 13.1 The applicable dates that shall govern the request for and production of documents in this proceeding are indicated in the Procedural Calendar provided in Annex A attached to this Order.
- 13.2 All documents produced in *Windstream 1* to the other disputing party may be used by the disputing parties in this arbitration, subject to the terms of this Order.
- 13.3 Each disputing party's request for production shall identify:
- (a) a description of each requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
 - (b) a statement as to how the documents requested are relevant to the case and material to its outcome;
 - (c) a statement that the documents requested are not in the possession, custody or control of the requesting disputing party; and
 - (d) a statement of the reasons why the requesting disputing party believes the documents requested are in the possession, custody or control of the other disputing party.
- 13.4 Each disputing party's request for production shall identify each document or category of documents sought with a sufficient degree of precision and establish its relevance and materiality to the dispute, and shall take the form of a Redfern Schedule, as attached at Annex B to this Order (Redfern Schedule).
- 13.5 A disputing party shall not be required to produce certain documents if it is demonstrated that such production would be unreasonably burdensome.
- 13.6 If the disputing party receiving a request objects to production of a document or category of documents, the following procedure shall apply:
- (a) The disputing party shall submit a response in column (d) of the requesting disputing party's Redfern Schedule stating which documents or category of documents it objects to producing. The response shall state the reasons for each objection and shall indicate the documents, if any, that the disputing party would be prepared to produce instead of those requested.

- (b) The requesting disputing party shall respond to the other disputing party's objection in column (e) of its Redfern Schedule, indicating, with reasons, whether it continues to maintain its original request.
 - (c) The disputing parties shall seek agreement on production requests to the greatest extent possible.
 - (d) To the extent that agreement cannot be reached between the requesting and the requested disputing party, the disputing parties shall submit all outstanding requests, together with objections and responses, to the Tribunal for decision in the form of the completed Redfern Schedule. All other correspondence or documents exchanged in the course of this process shall not be copied to the Tribunal.
 - (e) The Tribunal shall rule on any such application in column (f) of the disputing parties' Redfern Schedule and may for this purpose refer to the 2020 IBA Rules for guidance. Documents ordered by the Tribunal to be disclosed shall be produced within the time limit set forth in the Procedural Calendar.
 - (f) Should a disputing party fail to produce documents as ordered by the Tribunal, at the request of a disputing party, the Tribunal may draw any inferences it deems appropriate, taking into consideration all relevant circumstances.
- 13.7 Documents produced according to the above procedure shall not be considered part of the evidentiary record unless and until a disputing party subsequently submits the document as evidence in this arbitration. In such a case, Section 10 above establishes the procedure for the submission as exhibits of documents disclosed to the requesting Party by the other Party.
- 13.8 The production of documents under this Order shall be made electronically through a secure FTP site established by the Administering Authority, which can be accessed only by counsel to the disputing parties. Documents are to be provided in PDF format or some other similar format to which the disputing parties may later agree. Each individual document shall be clearly labelled with a unique identifying number. Each disputing party shall provide the other disputing party, on the date of the production, with an index of the documents that it is producing.
- 13.9 Each disputing party may withhold from production documents that it considers not subject to production based on specific grounds of privilege. However, if the claim for such privilege can instead be protected by means of redaction, the disputing party shall produce a redacted copy wherever possible. The redactions must identify the specific claim of privilege being made. The entirety of a privileged document must be produced in the event that part of it is material and relevant, and sections that are subject to a claim of privilege may be redacted.
- 13.10 In addition to the above, the Tribunal may on its own motion order a disputing party to produce documents.

14. NON-DISPUTING PARTIES

- 14.1 The Governments of Mexico and the United States may attend hearings and make submissions to the Tribunal within the meaning of Article 1128 of the NAFTA by the dates to be determined in Annex A. Each non-disputing Party shall be entitled to receive a copy of the evidence and submissions referred to in Article 1129 of the NAFTA.

15. AMICI

- 15.1 If a request for the submission of an amicus curiae brief is filed, the Tribunal will give the appropriate directions in the exercise of its powers under Article 17 of the UNCITRAL Rules and in accordance with the NAFTA Free Trade Commission Statement on non-disputing party Submissions.
- 15.2 By the relevant dates to be indicated in Annex A, the disputing parties shall have the opportunity to: (1) make submissions on any request for the submission of an amicus curiae brief; and (2) file simultaneous observations on issues raised in any amicus curiae brief submitted pursuant to a decision of the Tribunal following such a request for submission.

16. TRANSPARENCY

- 16.1 Any Written Submission with its list of exhibits and authorities, hearing transcript, order or award generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information and in accordance with the Confidentiality Agreement attached at Annex B and to redactions made pursuant to the Confidentiality Order in *Windstream 1*.
- 16.2 Hearings shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information.
- 16.3 Verbatim transcripts shall be made of any hearing other than hearings on procedural issues, and be made available to the public subject to protection of confidential information.
- 16.4 Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the disputing parties and the Members of the Tribunal but will not be made available to the public.
- 16.5 Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the disputing parties and the Tribunal in the hearing room. Rough transcripts of proceedings should be made available on a same day service basis where practicable.
- 16.6 The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the disputing parties disagree on corrections to be made to transcripts, the Tribunal shall determine whether any such corrections are to be adopted.

17. PRE-HEARING CONFERENCE

- 17.1 A pre-hearing conference shall be held on a date to be determined by the Tribunal in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.
- 17.2 The pre-hearing conference will be held by telephone or videoconference.
- 17.3 The Tribunal shall make best efforts to provide the disputing parties with a list of questions that it wishes the disputing parties to address in their oral submissions at least 30 days in advance of the hearing.

17.4 Following the pre-hearing conference call and after hearing the position of each disputing party, the Tribunal shall issue a procedural order convening the meeting, establishing its place, time, agenda, format (i.e. in-person or virtual) and all other technical and ancillary aspects.

18. HEARINGS

18.1 Neither disputing party shall advance any factual allegation, call any witness or advance any evidence at the hearing that has not already been filed with the Tribunal as part of a Written Submission, except under exceptional circumstances and as expressly permitted by the Tribunal.

18.2 Should the Tribunal grant leave to a disputing party to present new factual allegations, witnesses, or evidence in the course of the hearing, it shall grant the other disputing party the opportunity to respond and introduce new evidence to rebut the same.

18.3 In principle, each disputing party will have an equal time allocation to examine witnesses and/or experts at the hearing, subject to adjustments if due process so requires.

18.4 At or before the hearing, the Tribunal shall decide, in further consultation with the disputing parties, whether and when the disputing parties shall submit post-hearing submissions and replies to post-hearing submissions.

18.5 Post-hearing submissions may be used in substitution for oral closing arguments at the hearing, if so decided by the Tribunal in consultation with the disputing parties.

18.6 If ordered, the Tribunal may fix a page-limit for post-hearing submissions, in consultation with the disputing parties.

18.7 Unless otherwise modified by this Order, the hearings will be considered closed as outlined in Article 31 of the UNCITRAL Rules.

19. ADMINISTRATIVE AND PROCEDURAL COMMUNICATION WITH THE TRIBUNAL

19.1 No *ex parte* communications shall take place between any disputing party and the Tribunal.

19.2 Each disputing party shall send any administrative or procedural correspondence for the attention of the Tribunal by e-mail, with a copy simultaneously to opposing counsel and the Administering Authority, subject to paragraph 9.7.

19.3 The Tribunal should not be copied on inter-disputing party correspondence. The Tribunal should be sent only those communications that the disputing parties intend the Tribunal to read and/or act upon.

20. STATUS OF ORDERS

20.1 Procedural orders made by the Tribunal shall remain in force for the duration of the proceeding unless expressly amended or terminated by the Tribunal.

20.2 The Tribunal shall be free to decide any issue by way of an order, a partial or interim Award, or a final Award, as it may deem appropriate.

20.3 Any order made by the Tribunal (including this Order and the Procedural Calendar in Annex A) may, at the request of a disputing party or upon the Tribunal's own initiative, be varied where the circumstances so require, following consultation with the disputing parties. Requests by a disputing party for such a modification shall be made in accordance with Paragraph 8.1.

21. DECISIONS OF THE TRIBUNAL

21.1 In accordance with Article 33 of the UNCITRAL Arbitration Rules, any award or other decision of the Tribunal shall be made by a majority of the Members of the Tribunal.

21.2 Procedural decisions may be taken by the Presiding Arbitrator after consultation with the remaining Members of the Tribunal whenever possible. An order signed by the Presiding Arbitrator shall be taken to be an order of the Tribunal.

21.3 The Tribunal will draft all rulings, including an award, within a reasonable time period. If a ruling, other than an award, has not been issued within one month after the final submission by the disputing parties, the Tribunal will provide the disputing parties with status updates every month. If an award has not been issued within six months after the final submission, the Tribunal will provide the disputing parties with status updates every three months.

22. EXTENSIONS OF TIME

22.1 The Tribunal may fix and extend time limits for the completion of the various steps in the proceeding. If the matter is urgent, the President may fix or extend the time limits without consulting the other Members of the Tribunal, subject to possible reconsideration of such decision by the full Tribunal.

22.2 Neither disputing party should request an extension of time to the Tribunal without first having attempted to seek agreement from the other disputing party, if reasonably possible to do so. Any request should, to the extent reasonably practicable, be made to the other disputing party at least five (5) days before the relevant deadline.

22.3 Any request for an extension to the other disputing party, or to the Tribunal if no agreement is reached, should detail the reasons for such a request.

22.4 For requests where an agreement has not reached by the disputing parties, the procedures outlined in Paragraph 8.1 shall apply to such a request.

22.5 It is imperative that extension requests be notified to the other disputing party and the Tribunal as soon as possible, and at the latest, before the expiry of the time limit.

23. CASE ADMINISTRATION

23.1 The International Bureau of the Permanent Court of Arbitration ("the Administering Authority") shall act as registry and administer the arbitral proceedings on the following terms:

- (a) The Administering Authority shall maintain an archive of filings of correspondence and submissions.
- (b) The Administering Authority shall manage disputing parties' deposits to cover the costs of the arbitration, subject to the Tribunal's supervision.

- (c) If needed, the Administering Authority shall make its hearing and meeting rooms at the Peace Palace in The Hague, or elsewhere available to the disputing parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings shall be borne by the disputing parties.
- (d) Upon request, the staff of the Administering Authority shall carry out administrative tasks on behalf of the Tribunal, the primary purpose of which would be to reduce the costs that would otherwise be incurred by the Tribunal carrying out purely administrative tasks. Work carried out by the Administering Authority shall be billed in accordance with the PCA's schedule of fees. PCA fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses.

23.2 The contact details of the Registry are as follows:

Permanent Court of Arbitration
Attn: José Luis Aragón Cardiel
Peace Palace
2517 KJ The Hague
The Netherlands
Tel: +31 70 302 4155 Fax: +31 70 302 4167
Email: jaragoncardiel@pca-cpa.org

24. TRIBUNAL'S FEES AND EXPENSES

- 24.1 The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the Schedule of Fees set by the International Centre for Settlement of Investment Disputes ("ICSID") and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
- 24.2 Under the current Schedule of Fees, each Tribunal Member receives:
 - (a) US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or pro rata; and
 - (b) subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
- 24.3 Each Tribunal Member shall submit her or his claims for fees and expenses to the Administering Authority on a quarterly basis.
- 24.4 All payments to the Tribunal shall be made from the deposit administered by the Administering Authority.

25. DEPOSIT

- 25.1 In order to assure sufficient funds for the Tribunal's fees and expenses, each disputing party shall establish an initial deposit of US\$ 100,000. The deposit shall be made by wire transfer to the Administering Authority within 30 days from the issuance of this Order to the following account:

Bank:	ABN Amro Bank N.V. Gustav Mahlerlaan 10 1082 PP Amsterdam The Netherlands
BIC:	ABNANL2A
Account number:	0533 5127 51
IBAN:	NL61 ABNA 0533 5127 51
Beneficiary:	Permanent Court of Arbitration
Reference:	PCA Case N° 2021-26

- 25.2 The Administering Authority will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the disputing parties to make supplementary deposits.
- 25.3 Any transfer fees or other bank charges will be charged to the deposit. No interest will be paid on the deposit.
- 25.4 The unused balance held on deposit at the end of the arbitration shall be returned to the disputing parties by the Administering Authority as directed by the Tribunal.

26. IMMUNITY FROM SUIT

- 26.1 Neither disputing party shall seek to make the Tribunal or any of its members, or the Registry, liable in respect of any act or omission in connection with any matter related to this arbitration, except where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing.
- 26.2 Neither disputing party shall require any member of the Tribunal to be a party or witness in any judicial or other proceedings arising out of or in connection with this arbitration

27. DISPOSAL OF RECORD

- 27.1 Twelve months after the Tribunal has notified the final award to the disputing parties, the Members of the Tribunal shall be at liberty to dispose of the record of the arbitration, unless the disputing parties ask that the documents be returned to them or to their counsel. The cost of such return will be borne by the requesting disputing party.

Dated: 21 December 2021

Place of Arbitration: Toronto



Ms. Wendy Miles QC

(Presiding Arbitrator)

On behalf of the Tribunal

Annex A: Procedural Calendar

<u>Event</u>	<u>Date</u>
<i>Initial Phase</i>	
Procedural Meeting	TBD
Claimant’s Memorial on Jurisdiction/Admissibility, Merits and Damages with Witness Statement(s) and Expert Report(s)	FEBRUARY 18, 2022
Respondent’s Request for Bifurcation and Objection to/Memorial on Jurisdiction and Admissibility	MAY 12, 2022
Claimant’s Response to the Respondent’s Request for Bifurcation	JUNE 16, 2022
Bifurcation Hearing	+TBD
Tribunal’s Decision on Request for Bifurcation	TBD

<u>Event</u>	<u>Date</u>
<i>1. Should the proceedings be bifurcated</i>	
<i>Further Written Pleadings on Jurisdiction</i>	
Claimant’s Counter-Memorial on Jurisdiction & Admissibility	+90 DAYS FROM DECISION GRANTING REQUEST FOR BIFURCATION
Parties to confer, based on materials exchanged, whether document production is required. If so, or the Tribunal is ultimately required to rule on the issue, schedule to be adjusted accordingly	
Respondent’s Reply on Jurisdiction and Admissibility	+60 DAYS
Claimant’s Rejoinder Memorial on Jurisdiction	+60 DAYS
Submissions of United States and Mexico Pursuant to NAFTA Article 1128	+30 days
Responses to 1128 Submissions	+15 days
<i>Oral Pleadings</i>	
Pre-hearing Conference	APPROXIMATELY 1 MONTH BEFORE HEARING
Oral Hearing	TBD
Decision on Jurisdiction	TBD

<u>Event</u>	<u>Date</u>
<i>2. Should the proceedings not be bifurcated</i>	
Respondent's Counter-Memorial on Merits and Damages, including any jurisdictional objections to which the Respondent did not Request Bifurcation with Witness Statement(s) and Expert Report(s)	+90 DAYS FROM DECISION TO DENY BIFURCATION
<i>Document Production</i>	
Simultaneous requests for document production to the other Party, if any	+30 days from the Respondent's Counter-Memorial
Objections to production, if any	+30 days
Replies to objections to production, if any	+21 days
Responses to replies to objections to production, if any	+14 days
Reasoned applications for an order on production of documents in the form of a Redfern Schedule (Annex II), if necessary	+14 days
Tribunal's decision on document production, if necessary	TBD
Production of documents	+30 days
<i>Further Written Pleadings</i>	
Claimant's Reply Memorial with any Reply Witness Statement(s) and Expert Report(s)	+75 days
Respondent's Rejoinder Memorial with any Rejoinder Witness Statement(s) and Expert Report(s)	+ 75 days
Submissions of United States and Mexico Pursuant to NAFTA Article 1128	+30 days
Responses to 1128 Submissions	+15 days
<i>Oral Pleadings</i>	
Pre-hearing Conference	Approximately 2 months before hearing
Oral Hearing	TBD

Annex B
Confidentiality Agreement

**IN THE MATTER OF AN ARBITRATION UNDER
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT (CUSMA),
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA),
AND THE 2013 UNCITRAL ARBITRATION RULES**

-between-

**WINDSTREAM ENERGY LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “disputing parties”)**

CONFIDENTIALITY AGREEMENT

The Arbitral Tribunal

Ms. Wendy Miles QC (Presiding Arbitrator)

Prof. John Gotanda

Rt. Hon. Beverly McLachlin

Administering Authority

Permanent Court of Arbitration

20 December 2021

DEFINITIONS

1. For the purposes of this Confidentiality Agreement:

- a. “Business Confidential Information” includes:
 - i. trade secrets;
 - ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party, provincial, territorial or municipal government or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
 - iii. information the disclosure of which could result in material financial loss or gain to the disputing party, provincial, territorial or municipal government or third party to which it relates;
 - iv. information the disclosure of which could interfere with contractual or other negotiations of the disputing party, provincial, territorial or municipal government or third party to which it relates; or
 - v. other communications treated as confidential in furtherance of settlement between the disputing parties.
- b. “Confidential Information” means information that is not publicly available and is designated by a disputing party as confidential on the grounds that it is:
 - i. Business Confidential Information of a disputing party or of a provincial, territorial or municipal government;
 - ii. Business Confidential Information relating to a third party;
 - iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended, Canada's *Access to Information Act*, the *Canada Evidence Act*, Canada's *Privacy Act*, and Ontario's *Freedom of Information and Protection of Privacy Act*; or
 - iv. information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated in a confidential manner by those third parties.
- c. “Confidential Version” means the version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, transcript, order, or award that contains Confidential Information that has not been redacted and contains no Restricted Access Information or has been redacted to remove all Restricted Access Information.
- d. “disputing party” means either Windstream Energy LLC or the Government of Canada.
- e. “Public Version” means the version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, transcript, order, or award that has been redacted to remove all Restricted Access Information and Confidential Information.

- f. “Restricted Access Information” means Confidential Information within the meaning of paragraph 1(b) that is designated by a disputing party as restricted access on the grounds that:
 - i. the disclosure of this information to the other disputing party could result in a serious material gain or loss which could potentially prejudice the competitive position of the disputing party, provincial, territorial or municipal government or third party to whom that information relates; or
 - ii. the information is highly sensitive Business Confidential Information that belongs or relates to a disputing party, provincial, territorial or municipal government or third party.
- g. “Restricted Access Version” means the version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, transcript, order, or award that contains Restricted Access Information and Confidential Information that has not been redacted.
- h. “Tribunal” refers to the members of the Tribunal, whether acting collectively or individually.
- i. “Written Submission” includes all substantive written submissions made by either disputing party, all Memorials (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial), and accompanying documents filed with the Memorial, including but not limited to: expert reports, written statements, and exhibits.

GUIDING PRINCIPLES, OBJECTIVE AND PURPOSE

- 2. The Tribunal (and their assistants, if any), the disputing parties and the Permanent Court of Arbitration (the “Administering Authority”) agree to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of this Confidentiality Agreement and, for this purpose, to adopt and maintain appropriate communications modalities and secure data storage systems as adopted by the Permanent Court of Arbitration in *Windstream I*.
- 3. Pursuant to the provisions of this Confidentiality Agreement, a disputing party may designate Confidential or Restricted Access Information contained in any Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, transcript, order, award and in any other document produced by a disputing party to the other disputing party.
- 4. A disputing party shall not designate as Restricted Access Information any information belonging to the other disputing party which that disputing party has not also designated as Restricted Access Information.
- 5. The Tribunal may, either *proprio motu* or on application of a disputing party, after affording the disputing parties an opportunity to be heard, designate Confidential or Restricted Access Information contained in any document produced to or generated by it. Such designations shall be made in accordance with the procedures set out in this Confidentiality Agreement.

DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION

- 6. A document produced by a disputing party to the other disputing party shall be protected from disclosure as though it contained Confidential Information in its entirety, except that (a) should the

document be filed by one of the disputing parties as part of a Written Submission, the disputing parties must follow the process for designating Confidential Information as set out in this Confidentiality Agreement; and (b) any produced documents that are already publicly available need not be treated as Confidential Information protected from disclosure.

7. If a disputing party contends that a document that it produces to the other disputing party contains Restricted Access Information, the disputing party shall provide its proposed designations of Restricted Access Information by clearly labelling each page of the document as “Restricted Access” at the time that it produces the document. A document produced by a disputing party to the other disputing party containing such proposed designations shall be deemed to constitute Restricted Access Information in its entirety unless an objection is filed under paragraph 8 or the document is filed by one of the disputing parties as part of a Written Submission, in which case the disputing parties shall follow the process for designating Restricted Access Information as set out in this Confidentiality Agreement. A disputing party's designation of Restricted Access Information in a document shall be presumed valid until such time as a final designation is determined through the resolution of any objection or the completion of the process for designating Restricted Access Information in a Written Submission.
8. A disputing party may object to a proposed designation of Restricted Access Information in a document that it obtains through the other disputing party's document production. If such an objection is made, the disputing parties shall attempt to agree within fourteen (14) calendar days from the date of the objection on the final designations of Restricted Access Information in the document. If the disputing parties do not agree on the final designations of Restricted Access Information, a disputing party may submit the objection to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access Information in documents.

WRITTEN SUBMISSIONS AND PROCEDURAL OR ADMINISTRATIVE CORRESPONDENCE

9. This section encompasses Restricted Access and Confidential Information filings for all Written Submissions and procedural or administrative correspondence sent to and received from the Tribunal.

Restricted Access Information Filings

10. Information that Canada has designated as Restricted Access Information shall be surrounded by double brackets {**||**} highlighted in red. Information that the Claimant has designated as Restricted Access Information shall be surrounded by double brackets {**||**} highlighted in green.
11. Upon filing a Written Submission or procedural or administrative correspondence which a disputing party contends contains Restricted Access information, a disputing party shall provide a preliminary Restricted Access Version containing the proposed designations of Restricted Access Information, if any, of the disputing party making the filing. A preliminary Confidential Version shall also be provided on the date the filing is due, with the Restricted Access information redacted.
12. Where proposed designations of Restricted Access Information are made in a Written Submission, the disputing party must clearly label the cover page of the Written Submission “Restricted Access Information – Unauthorized Disclosure Prohibited” upon filing. A heading labeled “Restricted Access” should also be included on each particular page of the Written Submission that the disputing party contends contains Restricted Access Information. Equivalent measures should be used with respect to Restricted Access Information contained in the material produced in electronic and similar media.

13. A disputing party shall have twenty-one (21) calendar days from the date of receiving the other disputing party's proposed designations of Restricted Access Information to object to those proposed designations and to provide its own further proposed designations of Restricted Access Information. The disputing parties shall use the attached Disputed Designations Schedule (Appendix "C") for filing these objections.
14. Within fourteen (14) calendar days, the filing disputing party shall file its responses to the objecting disputing party's objections. The disputing parties shall then attempt to reach an agreement on the objected designations. If no such agreement is made within twenty-one (21) calendar days, the disputing parties shall submit the Disputed Designations Schedule to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access information.
15. If a disputing party does not object to the designation of Restricted Access Information pursuant to paragraphs 8 or 13, the disputing party is deemed to have accepted the designation.

Confidential Information Filings

16. Information that Canada has designated as Confidential Information shall be surrounded by double brackets {[[]] } highlighted in yellow. Information that the Claimant has designated as Confidential Information shall be surrounded by double brackets {[[]] } highlighted in blue.
17. A disputing party has twenty-one (21) calendar days from the date of filing of a Written Submission to designate Confidential Information. Where proposed designations of Confidential Information are made in a Written Submission, in addition to identifying the information with the appropriate double brackets, the disputing party must clearly label the cover page of the Written Submission "Confidential Information - Unauthorized Disclosure Prohibited". A heading labeled "Confidential" should also be included on each particular page of the Written Submission that the disputing party contends contains confidential information. Equivalent measures should be used with respect to confidential information contained in the material produced in electronic and similar media.
18. A disputing party shall have twenty-one (21) calendar days from the date of receiving the other disputing party's proposed designations of Confidential Information to object to those proposed designations and to provide its own further proposed designations of Confidential Information. The disputing parties shall use the attached Disputed Designations Schedule (Appendix "C") for filing these objections.
19. Within fourteen (14) calendar days, the filing disputing party shall file its responses to the objecting disputing party's objections. The disputing parties shall then attempt to reach an agreement on the objected designations. If no such agreement is made within twenty-one (21) calendar days, the disputing parties shall submit the Disputed Designations Schedule to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Confidential Information.

All Filings

20. Within thirty (30) calendar days from the date on which the final designations of Confidential and Restricted Access Information have been confirmed by agreement of the disputing parties, by the failure of a disputing party to make or object to any designation, or by order of the Tribunal, the disputing party that originally filed the Written Submission shall file with the Tribunal:
 - a. a final Restricted Access Version of the Written Submission reflecting the final designations of Restricted Access and Confidential Information and the applicable cover letter and headings required by the terms of this Confidentiality Agreement;

- b. a final Confidential Version of the Written Submission reflecting the final designations of Confidential Information but with all Restricted Access Information redacted and the applicable cover letter and headings required by the terms of this Confidentiality Agreement; and
 - c. a final Public Version of the Written Submission, with all Confidential and Restricted Access Information redacted. The cover page of the Public Version of the Written Submission shall be clearly labelled "Public Version."
21. Once the Public Version of the Written Submission has been received, the Administering Authority shall post it on the PCA website as soon as possible.
 22. Where whole documents or multiple pages of Restricted Access Versions or Confidential Versions have been redacted entirely, such pages need not be reproduced in redacted form in the Public Version. Instead, a summary page stating the number of pages that have been redacted in their entirety will suffice.

TRANSCRIPTS, ORDERS, AWARDS

23. The disputing parties shall have twenty (20) calendar days from the receipt of an order or award from the Tribunal to designate information as Confidential or Restricted Access Information and to exchange such designations. The disputing parties shall have thirty (30) calendar days from the date of receipt of a transcript to designate information as Confidential or Restricted Access Information in the transcript and to exchange such designations.
24. The disputing parties shall have an additional twenty-one (21) calendar days from the receipt of such designations to raise any objections to the other disputing party's designations. After that period, if the disputing parties are unable within twenty-one (21) calendar days to agree on any designations of Confidential or Restricted Access Information, a disputing party may submit the issues to the Tribunal for resolution. The disputing parties shall use the attached Disputed Designations Schedule (Appendix "C") for filing these objections.
25. Within twenty-one (21) calendar days from the date on which the final designations of Confidential or Restricted Access Information have been confirmed by agreement of the disputing parties or by order of the Tribunal, the disputing parties shall consolidate their final designations and file with the Tribunal, as appropriate, a final Restricted Access Version, Confidential Version, and Public Version of the transcript, correspondence from the Tribunal to the disputing parties, order or award.

TREATMENT OF RESTRICTED ACCESS AND CONFIDENTIAL INFORMATION

26. Until the final designations of Restricted Access Information have been confirmed by the agreement of the disputing parties or by order of the Tribunal, each disputing party's proposed designations of Restricted Access Information shall be presumed valid. For greater certainty, the disputing parties and the Tribunal shall not disclose the preliminary Restricted Access Version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, transcript, order, or award to any person not authorized to receive Restricted Access Information under the terms of this Confidentiality Agreement until the final designations of Restricted Access Information have been confirmed in accordance with the terms of this Confidentiality Agreement.

27. The time periods set out in this Confidentiality Agreement may be amended by agreement of the disputing parties, or by order of the Tribunal after hearing the disputing parties and taking into account all relevant circumstances.
28. All documents produced in the *Windstream Energy LLC v. Government of Canada*, (PCA Case No. 2013-22) (“*Windstream I*”) may be used by the disputing parties in this arbitration, subject to the terms of this Agreement. Information that was designated as Confidential or Restricted Access Information in the *Windstream I* shall be regarded as Confidential or Restricted Access Information under the terms of this Agreement.
29. Except with the prior written consent of the disputing party that claimed confidentiality with respect to the information, and, in the case of materials from provincial, territorial or municipal governments or third parties, the owner of such Confidential Information, Confidential Information may be used only in these proceedings and may be disclosed only for such purposes to and among:
 - a. Members of the Tribunal (and their assistants, if any) and officials of the Administering Authority to whom disclosure is reasonably necessary;
 - b. counsel to a disputing party (and their support staff) and counsel to provincial, territorial or municipal governments whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;
 - c. officials or employees of the disputing parties or of provincial, territorial, or municipal governments to whom disclosure is reasonably considered by the disputing party to be necessary in connection with preparation of the disputing party's case;
 - d. independent experts or consultants retained or consulted by the disputing parties or by provincial, territorial, or municipal governments in connection with these proceedings;
 - e. witnesses, who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings but only to the extent material to their expected testimony;
or
 - f. court reporters and other hearing support staff.
30. Except with the prior written consent of the disputing party that claimed confidentiality with respect to the information, and, in the case of materials from provincial, territorial or municipal governments or third parties, the owner of such Restricted Access Information, Restricted Access Information may be used only in these proceedings and may be disclosed only to and among the following people, where their access to the information is necessary for the preparation of the conduct of the case:
 - a. Members of the Tribunal (and their assistants, if any) and officials of the Administering Authority to whom disclosure is reasonably necessary;
 - b. Counsel to a disputing party (and their support staff) and counsel to provincial, territorial or municipal governments whose involvement in the preparation or conduct of these proceedings is reasonably considered by a disputing party to be necessary. Counsel to a disputing party that is also an employee or officer of a disputing party (*i.e.*, “in-house counsel”) and counsel to provincial, territorial, or municipal governments shall be entitled to Restricted Access Material provided they confirm that they are a member in good standing of a North American bar;

- c. A single official, director or employee from the disputing party to whom disclosure is necessary to obtain instructions to prepare the disputing party's case;
 - d. independent experts or consultants retained or consulted by the disputing parties; or
 - e. court reporters and other hearing support staff.
- 31. No disputing party shall file any confidential material covered by the terms of this Confidentiality Agreement in any Court without first bringing this Confidentiality Agreement to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality. A disputing party shall notify the other disputing party and any affected parties prior to requesting such direction from the Court.
- 32. Inadvertent or improper disclosure of Confidential or Restricted Access Information, as set forth in the present Agreement, does not constitute a waiver of the designation of the information as Confidential or Restricted Access.
- 33. All persons receiving Confidential Information or Restricted Access Information shall be bound by this Confidentiality Agreement. Each disputing party shall have the obligation of notifying all persons receiving Confidential Information or Restricted Access Information of the obligations under this Confidentiality Agreement and to ensure that such persons receiving Confidential Information pursuant to paragraphs 29(d) or (e) or Restricted Access Information pursuant to paragraph 30(c); execute a Confidentiality Undertaking in the form attached as Appendix A, or a Restricted Access Information Confidentiality Undertaking in the form attached as Appendix B, as appropriate, before gaining access to any such information. Each disputing party shall maintain copies of Confidentiality Undertakings under Appendix A and shall make such copies available to the other disputing party upon order of the Tribunal or upon the termination of this arbitration. Each disputing party shall maintain copies of Restricted Access Information Confidentiality Undertakings.
- 34. Where Confidential Information or Restricted Access Information is used or discussed at any hearing, the following rules shall apply:
 - a. the Tribunal shall restrict access to that portion of the hearing only to: (i) authorized persons in accordance with the terms of this Agreement; and (ii) originators of the Confidential or Restricted Access Information; and
 - b. transcripts of those portions of the hearing shall not be made public.
- 35. Notwithstanding any other provision in this Confidentiality Agreement, any request for documents (other than those made in this arbitration), or for the production of documents under the applicable domestic law of the disputing State party, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant federal or provincial legislation.
- 36. In light of the Note of Interpretation of the NAFTA Free Trade Commission issued July 31, 2001, a disputing party shall be free to disclose the Public Version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, transcript, order, and award.
- 37. Notwithstanding any other provision in this Confidentiality Agreement, the disputing parties may make such disclosure of documents or information as is required by law.
- 38. In accordance with Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend the oral hearings and may have access to transcripts, orders, awards and Written Submissions, including those designated as Restricted Access and Confidential Information under this Agreement. In accordance with NAFTA Article 1129, such non-disputing NAFTA Parties shall treat such

information as if they were a disputing Party and shall therefore have the same obligations of confidentiality, as set out in this Agreement, as the Respondent.

39. Nothing in this Confidentiality Agreement shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information under or on the basis of: (a) national or provincial legislation; (b) a privilege; or (c) other grounds for exemption or non-disclosure.
40. The obligations created by this Agreement shall survive the termination of these proceedings.
41. This Confidentiality Agreement shall be effective and binding upon a disputing party upon the signature of the Confidentiality Agreement and incorporation of the signed Agreement by the Tribunal as Annex B in its Procedural Order No. 1 dated 9 December 2021.
42. A disputing party may apply for an amendment to, or a derogation from, this Agreement if compelling circumstances so require.

Signed by both disputing parties in acknowledgement of the obligation to abide by this Confidentiality Agreement:



On behalf of the Government of Canada

December 20, 2021

Date

Mr. Rodney Neufeld, Lead Counsel
Trade Law Bureau (JLTB)
Global Affairs Canada
125 Sussex Drive
Ottawa, Ontario KIA OG2
Canada



December 20, 2021

Date

WINDSTREAM ENERGY LLC

Mr John Terry
Torys LLP
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario, M5K 1N27

APPENDIX A

CONFIDENTIALITY UNDERTAKING

TO: The Government of Canada (and its legal counsel) and Windstream Energy LLC (and its legal counsel).

FROM: _____

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Windstream Energy LLC and the Government of Canada, over which claims for confidentiality have been advanced (“Confidential Information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Agreement that has been agreed to by the disputing parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Confidential Information received by me to the disputing party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Agreement, to enforce the terms and provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Province of Ontario; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice [check one box]:
 - In the Province of Ontario
 - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this __ day of _____, 2021.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)

APPENDIX B

RESTRICTED ACCESS INFORMATION CONFIDENTIALITY UNDERTAKING

TO: The Government of Canada (and its legal counsel) and Windstream Energy LLC (and its legal counsel).

FROM: _____

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Windstream Energy LLC and the Government of Canada, over which claims for confidentiality have been advanced (“Confidential Information”) and for which access has been restricted (“Restricted Access Information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Restricted Access Information Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Agreement that has been agreed to by the disputing parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Restricted Access Information and Confidential Information received by me to the disputing party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Agreement, to enforce the terms and provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Province of Ontario; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice [check one box]:
 - In the Province of Ontario
 - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this __ day of _____, 2021.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)

APPENDIX C

DISPUTED DESIGNATIONS SCHEDULE

No.	Ref. to Designation	Objections to Designation		Reply to Objections	Tribunal's Decision
		Reasons	Designation Requested		
CHALLENGES TO [CLAIMANTS'/RESPONDENTS'] CONFIDENTIALITY DESIGNATIONS IN [MEMORIAL XX]					
1.					

