

PCA Case No. 2021-26

**IN THE MATTER OF AN ARBITRATION UNDER  
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT  
("CUSMA"), CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE  
AGREEMENT ("NAFTA"),  
AND THE 2013 UNCITRAL ARBITRATION RULES**

- between -

**WINDSTREAM ENERGY LLC**

**(the "Claimant")**

- and -

**THE GOVERNMENT OF CANADA**

**(the "Respondent", and together with the Claimant, the "disputing parties")**

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**PROCEDURAL ORDER NO. 4**

**Document Production**

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**The Arbitral Tribunal**

*Ms Wendy Miles KC (Presiding Arbitrator)*

*Prof. John Gotanda*

*Rt. Hon. Beverly McLachlin*

**Administering Authority**

*Permanent Court of Arbitration*

**Tribunal Secretary**

*Mr José Luis Aragón Cardiel*

**1 May 2023**

## I. BACKGROUND

1. On 21 December 2021, the Tribunal issued Procedural Order No. 1. Section 13 thereof sets out the procedure governing document production in this arbitration. Pursuant to Section 13.1, the applicable dates that shall govern the request for and production of documents were indicated in the Procedural Calendar provided in Annex A attached to the Order. Said Procedural Calendar foresaw two separate calendar scenarios depending on whether the Tribunal would bifurcate the proceedings.
2. Following its decision not to bifurcate the proceedings by its Procedural Order No. 2 (Decision on Bifurcation), on 3 November 2022 the Tribunal issued Procedural Order No. 3 (Procedural Calendar), whereby it established the Procedural Calendar of the arbitration.
3. On 31 March 2023, in accordance with the Procedural Calendar, the Claimant submitted to the Tribunal for decision three outstanding document production requests in the form of a Redfern Schedule. The disputing parties noted that they had reached agreement on all of the Claimant's other document requests as well as the Respondent's document requests.

## II. ANALYSIS

4. In the **Annex** to this Procedural Order, the Tribunal rules on the Claimant's outstanding requests for document production as set forth in its Redfern Schedule and in accordance with the relevant standards set out in the 2013 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**") and Procedural Order No. 1.
5. When deciding disputes concerning the requests, the Tribunal has taken guidance from the IBA Rules on the Taking of Evidence in International Arbitration 2020 (the "**IBA Rules**") as provided in Procedural Order No. 1, at paragraph 13(6)(e). For instance, in accordance with Articles 3.7(i), 9.1 and 9.2(a) of the IBA Rules, the Tribunal considered the relevance and materiality of the requested documents on a *prima facie* basis. At this stage of the proceedings, the Tribunal is not in a position to rule on the ultimate relevance and materiality of the requested documents.

## III. DECISION ON DOCUMENT PRODUCTION

6. After having carefully reviewed the Claimant's outstanding requests for document production and corresponding objections and responses, and considered each request taking into account all relevant circumstances, the Tribunal decides:

- (a) To grant, for the reasons and to the extent set out in the Tribunal's decisions as incorporated in the Claimant's Redfern Schedule (enclosed as an **Annex** to this Procedural Order), the Claimant's document production request No. 4.
  - (b) Partially to grant, for the reasons and to the extent set out in the Tribunal's decisions as incorporated in the Claimant's Redfern Schedule (enclosed as an **Annex** to this Procedural Order), the Claimant's document production requests No. 7.
  - (c) To deny, for the reasons set out in the Tribunal's decisions as incorporated in the Claimant's Redfern Schedule (enclosed as an **Annex** to this Procedural Order), the Claimant's document production request No. 8.
7. In accordance with the Procedural Calendar established by the Tribunal's Procedural Order No. 3, the Respondent shall produce all documents as ordered no later than **Wednesday, 31 May 2023**.
8. As per Section 13.6(f) of Procedural Order No. 1, 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.
9. Pursuant to Sections 13.7-13.9 of Procedural Order No. 1:
  - (a) Documents produced in accordance with this Order 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 of Procedural Order No. 1 establishes the procedure for the submission as exhibits of documents disclosed to the requesting Party by the other Party.
  - (b) 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.

- (c) 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.

**Dated: 1 May 2023**

**Place of Arbitration: Toronto**



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Ms. Wendy Miles QC

(Presiding Arbitrator)

On behalf of the Tribunal

**IN THE MATTER OF AN ARBITRATION UNDER  
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT,  
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT,  
AND THE 2013 UNCITRAL ARBITRATION RULES**

**BETWEEN:**

**WINDSTREAM ENERGY LLC**

**Claimant**

and

**GOVERNMENT OF CANADA**

**Respondent**

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**DOCUMENT REQUESTS OF WINDSTREAM ENERGY LLC**

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1. This request for the production of documents (the “Request”) is made in the form of a Redfern Schedule (“Schedule A”) in accordance with Section 13 of Procedural Order No. 1.
2. The Request is made by reference to the criteria contained in Section 13.3 of Procedural Order No. 1. The Request is also informed by Article 3.3 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (the “2020 IBA Rules”), which may provide guidance to the Tribunal in accordance with Sections 5.2 and 13.6 of Procedural Order No. 1.
3. Through this Request, the Claimant seeks the production by the Respondent of specific documents or specific categories of documents that are in the Respondent’s possession, power or control and are relevant to the case and material to its outcome. In Schedule A, the Claimant provides a description of the documents or categories of documents that it is seeking, a reference to the submissions of the parties, and a description of the reasons for the request.
4. The term “documents” means electronic files, photocopies and hard copies of draft and final documents including, but not limited to, internal and external correspondence, memoranda and/or briefing notes, plans, reports, technical documents, technical reviews, engineering studies, design briefs, notes, presentations, minutes of meetings, transcriptions, facsimiles, corporate documents, financial documents, phone calls or voice mail messages, email messages, text messages (whether SMS texts, WhatsApp messages or otherwise), phone records, calendar entries, budgets, invoices, contracts, agreements, memoranda of agreement, memoranda of understanding, expressions of interest, forms of tender, requests for proposals, schedules, timelines, diagrams, models, charts, drawings, sketches, maps, photographs, sound recordings, videos, film or other documents regardless of physical form or characteristics along with any annexes, appendices or other appended documents. Copies of documents that have been altered (e.g., with marginalia or, handwritten notes) shall be considered to be separate documents from the original documents and shall be produced in the event they are responsive to a document request set out below.

5. Any capitalized term used in the Request shall bear the meaning attributed to it in the Claimant's Memorial on the Merits. A reference to the singular of any noun is to be understood as including the plural, and vice versa.

**SCHEDULE A**

(a) No.	(b) Documents or category of documents requested (requesting disputing party)	(c) Relevance and materiality, incl. references to submission (requesting disputing party)	(d) Reasoned objections to document production request (objecting disputing party)	(e) Replies to objections to document production request (requesting disputing party)	(f) Responses to replies to objection to document production request (objecting disputing party)	(g) Decision (Tribunal)
4.	<p>All documents in the possession, custody or control of the MOE, MEI, MNR, the Cabinet Office, the Premier’s Office, and the IESO, from September 27, 2016 to present, related to the regulatory framework applicable to offshore wind, including any discussions of amending that framework.</p>	<p>Windstream’s position is that the Project is feasible from a regulatory perspective. The regulatory framework continued to apply to and envisage offshore wind and after the <i>Windstream I</i> arbitration, and Ontario took no steps to change the applicability of that framework to offshore wind projects (see Memorial on the Merits, ¶¶ 209-217; Expert Report of Sarah Powell).</p> <p>In response, Canada claims Ontario has not developed an offshore wind policy framework on approval requirements or a process for obtaining Crown land site access, and Windstream did not have access to the proposed Project site to complete the required studies (see Counter-Memorial, ¶¶ 76, 77).</p> <p>The requested documents are relevant and material to the outcome of the case as they relate to the issue of the regulatory framework applicable to the Project and to Canada’s assertions that nothing has changed with respect to that regulatory framework.</p> <p>These documents are not in the possession, custody or control of Windstream. Windstream has identified a specific date range (the</p>	<p>Canada objects as follows:</p> <p>By requesting documents from “September 27, 2016 to present”, the request seeks irrelevant and immaterial documents.</p> <p>The Claimant asks for documents from when “the <i>Windstream I</i> award was released”, which was on September 30, 2016, not September 27, 2016. The Claimant’s request for documents to the “present” lacks specificity, and also fails to justify as relevant any documents post-dating the Claimant’s NOA. The NOA contains the Claimant’s statement of claims and marks the point in time at which the claims have been brought forth. As a result, Canada objects to producing any documents dated after the NOA as they cannot be relevant and material to the claims and/or allegations already put forth by the Claimant in its NOA. <i>IBA Rules</i> 3.3(a)(ii), 9.2(a).</p> <p>More importantly, the documents requested are irrelevant because the state of the regulatory framework is not a matter in dispute. The fact that “detailed regulations governing offshore wind specifically were never developed” was a matter plead and</p>	<p>The Respondent’s position that there is no dispute as to whether there has been material change to the regulatory framework for offshore wind does not affect the relevance of this request.</p> <p>This request relates to considered or proposed amendments that may have been discussed within the identified Ontario ministries and offices. The Respondent’s assertion, as stated in its objection, that an offshore wind policy framework was not “developed” has not been proven in this arbitration. In any event, this admission does not address whether any steps were taken to develop such a framework or whether any changes to the current state of affairs were considered. The Claimant requires the requested documents to determine whether the Respondent considered or began taking steps to change the applicable regulatory framework for offshore wind projects.</p> <p><u>Requested Relief:</u> The Tribunal order the production of the following request:</p> <p><b>All documents in the possession, custody or control of the MOE, MEI, MNR, the Cabinet Office, the Premier’s Office, from September</b></p>	<p>The Claimant bases the relevance of its request in the feasibility of its Project from a regulatory perspective. However, the Parties agree that no material changes were made to the regulatory framework during the time frame of the document request (Claimant’s Memorial, para. 474; Canada’s Counter-Memorial, para. 4, 76). As such, the Claimant has the relevant documents it needs from the <i>Windstream I</i> arbitration, and those available publicly, to address its argument. Whether the Government took steps to adopt or approve a regulatory framework, but ultimately decided not to, is not relevant to the Claimant’s allegation, as even if there were proposed changes (which Canada maintains there were not), draft regulatory changes would not have applied to the Project.</p> <p><b>Requested relief:</b> For the reasons above, Canada asks that the Tribunal order that Canada is not required to respond to this request.</p>	<p>Request No. 4 is granted, as amended by the Claimant.</p> <p>As to relevance to the case or materiality to the outcome, the Tribunal considers documents relating to the Respondent’s consideration of amending the regulatory framework applicable to offshore wind to be relevant to the case and/or material to its outcome.</p> <p>The Tribunal does not accept that the <i>IBA Rules</i> Article 3.3(a)(ii), 9.2(a) or indeed 3.3(a)(iii) limits disclosure strictly to “claims and/or allegations already put forward by the Claimant in its NOA”. Indeed the Parties’ respective subsequent submissions and evidence are relevant to the Tribunal’s decision as to relevance and materiality.</p> <p><b>Accordingly, the Tribunal orders that the</b></p>



		<p>time since the <i>Windstream I</i> award was released) and the specific Ontario ministries that it believes has the relevant and material documents.</p>	<p>decided in the <i>Windstream I</i> arbitration (Award, ¶ 379). The disputing parties agree that since the release of the Award, no material changes have been made to the regulatory framework. Canada argues that an offshore wind policy framework was “not developed” and the regulatory framework remains “unfinished” and in essence unchanged (Counter-Memorial, ¶¶ 76, 182). The Claimant submits that the regulatory framework “is largely the same as it was in 2010” and “there have been no material changes to the Regulatory Framework (including the Moratorium) since the conclusion of NAFTA 1” (CES-Powell, ¶¶ 130-131). Since the parties do not dispute that there has been no material change to the regulatory framework for offshore wind, and the documents will merely confirm this shared view, the documents requested are irrelevant and lack materiality to the outcome of the case. <i>IBA Rule 9.2(a)</i>.</p> <p>Finally, insofar as the request concerns documents held by the IESO, the request seeks documents that are not in Canada or Ontario's possession, custody or control. The IESO is an independent entity with its own separate legal personality. As a matter of domestic law, Canada has no power to compel the IESO to produce documents or otherwise participate in this arbitration. The IESO has advised Canada that the IESO does not have any responsibility for the regulatory framework</p>	<p><b>30, 2016 to February 18, 2020, related to the regulatory framework applicable to offshore wind, including any discussions of amending that framework.<sup>1</sup></b></p>		<p><b>Respondent conduct a reasonable and proportionate search for documents in the possession, custody or control of the MOE, MEI, MNR, the Cabinet Office, the Premier's Office, dating from September 30, 2016 to February 18, 2020, relating to any amendment or consideration of amendment of the regulatory framework applicable to offshore wind, and produce any responsive documents.</b></p>
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<sup>1</sup> Further to the Respondent's representation that the IESO does not have relevant documents responsive to this request, the Claimant has removed it from the scope of the request.

			applicable to offshore wind and it was not privy to any government discussions relating to amending such framework.			
7.	<p>All documents in the possession, custody or control of the MEI, the Premier’s Office, and the IESO related to (a) the settlement of the White Pines Wind Project; and (b) the FIT contracts cancelled by the IESO which received compensation of any form. This request includes but is not limited to all documents relating to the compensation provided to those Feed-in Tariff proponents.</p>	<p>Canada claims that the Project is valueless and had no value beyond what has already been awarded by the <i>Windstream I</i> arbitration (see Counter-Memorial, ¶ 16).</p> <p>As set out in the Counter-Memorial, the Minister of Energy directed the IESO to wind down over 750 renewable energy contracts for certain FIT projects (¶ 112). The amounts paid by Ontario to these project proponents is relevant and material to the outcome of the case in response to Canada’s assertions on the value of the Project. Any issues of confidentiality with respect to third-party projects can be addressed with an agreement on producing documents on a counsel-eyes only basis.</p> <p>These documents are not in the possession, custody or control of Windstream. Windstream has identified the specific Ontario ministries that it believes has the relevant and material documents.</p>	<p>Canada objects as follows:</p> <p>First, the Claimant’s request seeks documents that are irrelevant and immaterial to the dispute, contrary to s. 13.3(b) of Procedural Order No. 1. <i>IBA Rule 9.2(a). IBA Rules 9.2(a).</i></p> <p>The documents related to the White Pines project are not relevant to the case or material to its outcome. White Pines is an onshore wind project that had obtained notice to proceed and was in the midst of construction. It differs fundamentally from the Claimant’s offshore wind project, which had not obtained notice to proceed and remained in <i>force majeure</i>. The White Pines settlement is irrelevant to a determination as to the value of the Claimant’s Project.</p> <p>The other cancelled FIT projects were contracted under FIT 2 onwards, and documents pertaining to these approximately 750 projects are also irrelevant to the case. Except for two onshore wind projects, all of the contracts are for solar projects. The documents sought, which “include[] but [are] not limited to the compensation provided” to non-offshore wind projects at differing stages of development are irrelevant to a determination as to the value of the Claimant’s Project.</p> <p>Further, the timing of the cancellation of the White Pines and the other</p>	<p>The Respondent claims that the requested documents are not relevant because these projects are not similar to Windstream’s and are those not appropriate comparators of value. Again, the Respondent is asking the Tribunal to assume the correctness of its contested merits position.</p> <p>The Claimant’s position is that the MEI used its informal control powers to direct the IESO to settle disputes comparable to its dispute concerning the Project (Memorial, ¶ 490). The Claimant has identified White Pines Wind Project and holders of other FIT contracts as receiving different treatment than the Claimant (Memorial, ¶ 252). If the Respondent seeks to argue that these projects are not comparable, it must prove this on the merits. The requested documents are relevant to evaluating that argument, and the basis for the Respondent’s objection underscores their relevance.</p> <p>The Respondent’s objection regarding the burden of complying with the Claimant’s request mischaracterizes the request. The Claimant has requested only settlement documents relating to certain identified projects, and in particular the value of compensation paid to those proponents. The Claimant is not seeking all documents related to the wind down of the other FIT contracts.</p>	<p>The Claimant has not demonstrated the relevance of the requested documents. The Claimant seeks to justify its request on the basis that the requested documents are relevant to valuation. Yet, neither its expert nor Canada’s cite a single one of these projects in their valuation. The Claimant has failed to demonstrate how such documents are therefore relevant to the dispute.</p> <p>In reply, the Claimant seeks to justify its request on the basis that they will show that “MEI used its informal control powers to direct the IESO to settle disputes comparable to its dispute” [Mem para 490]. However, the Claimant has not made any argument in any of its submission that would demonstrate the relevance of the requested documents.</p> <p>The Claimant’s memorial refers only to a dispute with TransCanada Energy. With respect to White Pines, the Claimant also seeks to ground its request in an allegation of differential treatment on the basis of an extension to the contractual milestone completion date (not on the basis of compensation), but again, its memorial does not refer to White Pines. Rather, it refers to the Amherst Island project only, which achieved commercial operation. As such, any documents with respect to the White Pines Project are irrelevant.</p>	<p>Request No. 7 is partially granted.</p> <p>As to scope, the Tribunal:</p> <ol style="list-style-type: none"> <li>1. considers the Claimant’s Request 7, as amended, for all documents relating to the Respondent’s settlement of the White Pines Project and/or the 750 FIT contracts cancelled by the IESO to be overly broad and disproportionate; and</li> <li>2. accepts the Respondent’s representation at Request 4 (above) that the IESO is an independent entity with its own separate legal personality, that as a matter of domestic law, Canada has no power to compel the IESO to produce documents or otherwise participate in this arbitration.</li> </ol> <p>Nonetheless, insofar as the MEI may have used “<i>informal control powers</i>” to direct the IESO to settle disputes comparable to the</p>

			<p>projects also makes these documents irrelevant. The IESO informed WWIS of its decision to exercise its s. 10.1(g) termination rights on February 20, 2018, months before a newly elected Ontario Government directed the IESO to wind down certain contracts under FIT 2 onwards, and months prior to the introduction of legislation to wind down the White Pines project. The termination of these contracts took place in totally different circumstances, months after the IESO’s decision to terminate the Claimant’s FIT Contract. Documents related to categories (a) and (b) are therefore irrelevant to the termination of the Claimant’s FIT Contract, which was made by the IESO on February 20, 2018, but not effective until February 18, 2020, on account of the Claimant’s Domestic Application.</p> <p>The Claimant fails to justify the relevancy of these documents with its argument that the “amounts paid by Ontario to these project proponents is relevant and material to the outcome of the case in response to Canada’s assertions on the value of the Project.” Indeed, the Claimant’s valuation expert, Secretariat, does not mention a single one of these projects in its report. Canada does not rely on any of them either.</p> <p>Second, production of the requested documents would be unreasonably burdensome for Canada as it would have to search and organize a large volume of documents, contrary to s. 13.5 of the Procedural Order No. 1. The White Pines project, and the</p>	<p><b>Requested Relief:</b> The Tribunal order the production of the following request:</p> <p><b>All documents in the possession, custody or control of the MEI, the Premier’s Office, and the IESO related to (a) the settlement of the White Pines Wind Project; and (b) the FIT contracts cancelled by the IESO which received compensation of any form. This request includes but is not limited to all documents relating to the compensation provided to those Feed-in Tariff proponents.</b></p>	<p>With regards to the approximately 750 FIT contracts that were terminated, only two contracts were for wind projects (and both were small-scale onshore wind projects), and thus are not relevant to the Claimant’s arguments with respect to offshore wind. Also, the compensation paid in connection with the terminated FIT contracts was administered in a standard fashion, in accordance with the terms of the applicable FIT contract. The Claimant has not demonstrated how information related to these contracts would have any relevance to the Claimant’s FIT Contract.</p> <p>Further, information regarding the 750 FIT contracts and the White Pines Wind Project is publicly available in the Auditor General’s Public Accounts of Ontario Report from December 2020:  <a href="https://www.auditor.on.ca/en/content/annualreports/arreports/en20/20VFM_00publicacct.pdf">https://www.auditor.on.ca/en/content/annualreports/arreports/en20/20VFM_00publicacct.pdf</a></p> <p>Also, the Public Accounts of Ontario Ministry Statements and Schedules (2021-2022) provide details of funds for Decommissioning of the White Pines Wind Project and the Wind-Down of Renewable Energy Contracts (see Page 573):  <a href="https://www.ontario.ca/files/2022-09/tbs-public-accounts-2021-22-ministry-statements-schedules-en-2022-09-23-v2.pdf">https://www.ontario.ca/files/2022-09/tbs-public-accounts-2021-22-ministry-statements-schedules-en-2022-09-23-v2.pdf</a></p> <p>Finally, this request would be unreasonably burdensome for Canada as the Claimant’s request covers an undefined time period and relates to approximately 750 FIT projects.</p>	<p>Claimant’s dispute concerning the Project, documents relating to the existence and exercise of such control powers may be relevant to the case and/or material to its outcome, at least on valuation. The Tribunal does not consider Premier’s Office documents to be sufficiently relevant or material for this Request 7. Insofar as the Premier’s office exchanged correspondence with MEI relevant to Request 7, these should be identified and produced through the MEI searches.</p> <p><b>Accordingly, the Tribunal orders that the Respondent conduct a reasonable and proportionate search for documents in the possession, custody or control of the MEI, concerning (a) the settlement of the White Pines Wind Project; and (b) the FIT contracts cancelled by the IESO which received compensation of any form, to identify any MEI documents directing the IESO to settle comparable disputes, (including but not limited to documents relating to compensation provided</b></p>
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			<p>legislation to wind it down, resulted in the creation of many thousands of documents, and a search relating to other FIT contracts that the IESO was directed to wind down would concern approximately 750 contracts, which would involve searching a large volume of documents, be extremely time consuming and require significant resources. <i>IBA Rule 9.2(c)</i>.</p> <p>Insofar as the request concerns documents held by the IESO, the request seeks documents that are not in Canada or Ontario's possession, custody or control. The IESO is an independent entity with its own separate legal personality. As a matter of domestic law, Canada has no power to compel the IESO to produce documents or otherwise participate in this arbitration. The IESO has advised Canada that any compensation paid in connection with the approximately 750 terminated FIT contracts was administered in a standard fashion in accordance with the terms of the applicable FIT contract. The IESO has also informed Canada that the request captures third party confidential information. The disclosure of such information by the IESO would require it to obtain the consent of each of the former FIT contract counterparties to these 750 contracts, which would be highly</p>		<p>While the Claimant argues that its request relates only to “certain identified projects, and in particular the value of compensation paid to those proponents”, it has failed to identify which specific projects it refers to. Should the Tribunal order the production of the requested documents, Canada would not be in a position to meet the May 31<sup>st</sup>, 2023, deadline for production. An extension until at least July 31<sup>st</sup>, 2023 would be required.</p> <p>Additionally, as previously noted, documents in the possession of the IESO are not in the care, custody or control of Canada.<sup>2</sup> While Canada can make best efforts for production if ordered, Canada also notes that such documents contain third party information, which the IESO and Canada cannot produce in this arbitration without third party consent.</p> <p><b>Requested relief:</b> For the reasons above, Canada asks that the Tribunal order that Canada is not required to respond to this request.</p>	<p><b>to Feed-in Tariff proponents). The Respondent is ordered to produce any responsive documents.</b></p> <p><b>For the avoidance of doubt, the Respondent is not required to search or produce any publicly available documents.</b></p>
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<sup>2</sup> See *Mesa v. Canada* PO 4, paragraph 38: <https://pcacases.com/web/sendAttach/295> in which the tribunal held: “The Tribunal finds the approach taken by these NAFTA tribunals reasonable and in line with the duty of good faith in procedural matters. It has thus adopted it when deciding on the pending document requests. While the Parties themselves are to produce all responsive documents that are in their possession, custody or control, they should also use their best efforts to produce responsive documents which may be in the possession, custody or control of third parties with which the disputing Parties have a relationship. This means that the Claimant is to use its best efforts to produce responsive documents from Leader Resources Corporation. It further means that the Respondent is to produce all documents in the possession, custody, or control of all the "Government Entities" as per the modified definition of the Claimant, with the exclusion of the OPA, Hydro One and the IESO. For these latter entities, the Respondent is to use its best efforts to produce responsive documents.”; In *Windstream I*, the Claimant accepted that Canada would exercise best efforts to obtain documents from the OPA. See requests 9-10, 12-14, 30, 37-38, 44, 53-55 and 82 in “Final Resolution of Document Requests from *Windstream I*” (**R-0820**)

			burdensome, and in some cases impossible, such as where their contact information is no longer current.			
8.	All documents in the possession, custody or control of the MEI, the Premier’s Office and the IESO, from September 27 <sup>30</sup> , 2016 to <del>present</del> February 20, 2018, related to electricity supply need in Ontario, including predictions or estimations of electricity supply shortages and the consideration of utilizing long-term electricity contracts. <sup>3</sup>	Windstream’s position is that, contrary to the IESO’s stated basis for terminating the FIT Contract, Ontario will need more power to meet its capacity needs and the Project would have been beneficial to Ontario (see Memorial on the Merits, ¶¶ 359-366). In response, Canada has alleged that Ontario was in a strong position to address electricity demand outlooks, and that one of the reasons for terminating the FIT Contract was because it was inconsistent with the Government’s current direction to move away from long-term contracts (see Counter-Memorial, ¶¶ 54, 100). The requested documents are relevant and material to the outcome of the case as they directly relate to this issue and to the credibility of one of the purported bases for terminating the FIT Contract.  These documents are not in the possession, custody or control of Windstream. The document request is limited in time (to the period post the <i>Windstream I</i> award) and to documents in the possession of the relevant government ministries.	Canada objects as follow:  <del>First, by requesting documents from “September 27, 2016 to present”, the request seeks irrelevant and immaterial documents. The Claimant asks for documents from when “the <i>Windstream I</i> award was released”, which was on September 30, 2016, not September 27, 2016.</del>  <del>Also, the Claimant argues relevance based on electricity demand being “one of the purported bases for terminating the FIT Contract”. The IESO decided to exercise its termination rights on February 20, 2018 and ultimately terminated the FIT Contract on February 18, 2020, due to delays caused by the Claimant’s Domestic Application. However, the Claimant requests documents up to the “present”, a period in time that lacks specificity, and fails to justify as relevant any documents post dating the termination decision or the Claimant’s NOA. Therefore, documents dated prior to September 30, 2016 or after February 20, 2018 are irrelevant to the claims. <i>IBA Rules</i> 3.3(a)(ii); 9.2(a).</del>  Second, the request is not for a narrow or specific category of	The Respondent’s objection does not challenge the relevance of the Claimant’s request. The Claimant has argued that Ontario is facing an electricity shortfall, and it has supported this claim with the expert report of Mr. Chee-Aloy of Power Advisory. The Respondent has contested the Claimant’s argument regarding electricity supply in its Counter-Memorial (see ¶ 54, 56, 114). The requested documents are relevant to this issue.  The Claimant’s request is not overbroad. It asks for precisely that which is needed to determine whether Ontario is facing an electricity shortfall and is considering utilizing long-term electricity contracts.  To the extent that any responsive documents are publicly accessible, as the Respondent alleges, the Respondent need not produce those documents. However, to the extent it has internal documents addressing this issue, those documents are relevant and proportionate. For example, internal assessments of utilizing long-term electricity contracts to address the crucial electricity shortfall the province is facing may not yet be public and are highly relevant.	Canada reiterates that the Claimant’s request is irrelevant, overbroad and highly burdensome.  First, the Claimant’s request would capture documents that are entirely irrelevant to the dispute at hand. The Claimant has failed to demonstrate how all documents relating to electricity supply in the Province are necessary to make out its claim.  <del>Second, Canada reiterates that documents dated after February 20, 2018, are irrelevant as the IESO communicated its decision to terminate the Claimant’s FIT Contract on that date, after having taken into consideration the information available to it at the time of making the decision to terminate. The IESO did not revisit the decision or the underlying analysis in the intervening period before the termination was made effective on February 18, 2020, following the Claimant’s decision to abandon its Domestic Application.</del>  Third, Ontario’s electricity planning documents are publicly available, including through the following websites: <ul style="list-style-type: none"><li>• <a href="https://www.ontario.ca/document/2017-long-term-energy-plan">https://www.ontario.ca/document/2017-long-term-energy-plan</a></li></ul>	Request No. 8 is denied.  As to scope, the Tribunal:  1. considers the Claimant’s Request 8, as amended, for all documents relating to electricity supply need in Ontario to be overly broad and disproportionate; and  2. accepts the Respondent’s representation at Request 4 (above) that the IESO is an independent entity with its own separate legal personality, that as a matter of domestic law, Canada has no power to compel the IESO to produce documents or otherwise participate in this arbitration.  Insofar as information concerning Ontario’s estimated power needs in the relevant period may be relevant to the case and/or material to its outcome, the

<sup>3</sup> In an effort to narrow the issues between the parties and before the Tribunal, Windstream has narrowed the date range of its document request (without prejudice to the issue of what the relevant date range is). It has therefore made this amendment by underlining its changes and striking out the parties’ submissions on this issue.

			<p>documents, as required by s. 13.3(a) of the Procedural Order No. 1. It fails to describe the subject matter of the documents sought in sufficient detail, requests documents related “to electricity supply in Ontario” as opposed to the relevant region, and requests documents bearing no relation to the Claimants’ Project or claims. <i>IBA Rule 3.3(a)(ii)</i>.</p> <p>Third, the request is overbroad and it would be highly burdensome for Canada to search thousands of potentially responsive documents, contrary to s. 13.5 of the Procedural Order No. 1. This is particularly so in light of the fact that the key information sought by the Claimant in this request, including reports, resource plans, data sets, forecasts and planning outlooks, is available in publicly accessible documents. The Claimant has failed to justify its request for the Government of Ontario or the IESO’s internal documents related to these publicly available sources. <i>IBA Rule 9.2(c)</i>.</p> <p>Insofar as the request concerns documents held by the IESO, the request seeks documents that are not in Canada or Ontario’s possession, custody or control. The IESO is an independent entity with its own separate legal personality. As a matter</p>	<p><b>Requested Relief:</b> The Tribunal order the production of the following request:</p> <p><b>All documents in the possession, custody or control of the MEI, the Premier’s Office and the IESO, from September 27<sup>30</sup>, 2016 to <del>present</del> February 20, 2018, related to electricity supply need in Ontario, including predictions or estimations of electricity supply shortages and the consideration of utilizing long-term electricity contracts.</b></p>	<ul style="list-style-type: none"> <li>• <a href="https://www.ieso.ca/en/Sector-Participants/Planning-and-Forecasting/Annual-Planning-Outlook">https://www.ieso.ca/en/Sector-Participants/Planning-and-Forecasting/Annual-Planning-Outlook</a></li> <li>• <a href="https://www.ieso.ca/en/Corporate-IESO/Ministerial-Directives">https://www.ieso.ca/en/Corporate-IESO/Ministerial-Directives</a></li> </ul> <p>Fourth, the search and production could involve thousands of documents, hundreds of thousands of pages, and could come from many custodians. Should the Tribunal order the production of the requested documents, Canada would not be in a position to meet the May 31<sup>st</sup>, 2023, deadline for production. An extension until at least July 31<sup>st</sup>, 2023 would be required, at minimum.</p> <p>Finally, and as previously noted, documents in the possession of the IESO are not in the care, custody or control of Canada. If ordered to, Canada will make best efforts for production.<sup>4</sup></p> <p><b>Requested relief:</b> For the reasons above, Canada asks that the Tribunal order that Canada is not required to respond to this request.</p>	<p>Tribunal is not persuaded that sufficient information is not publicly available in Ontario’s electricity planning documents are publicly available, including through the following websites:</p> <ul style="list-style-type: none"> <li>• <a href="https://www.ontario.ca/document/2017-long-term-energy-plan">https://www.ontario.ca/document/2017-long-term-energy-plan</a></li> <li>• <a href="https://www.ieso.ca/en/Sector-Participants/Planning-and-Forecasting/Annual-Planning-Outlook">https://www.ieso.ca/en/Sector-Participants/Planning-and-Forecasting/Annual-Planning-Outlook</a></li> <li>• <a href="https://www.ieso.ca/en/Corporate-IESO/Ministerial-Directives">https://www.ieso.ca/en/Corporate-IESO/Ministerial-Directives</a></li> </ul> <p><b>The Tribunal orders that Canada is not required to take any further searches in response to this Request 8.</b></p> <p><b>Insofar as the Claimant conducts its own review of the publicly available information set out above and concludes that it does not contain information concerning</b></p>
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<sup>4</sup> See *Mesa v. Canada* PO 4, paragraph 38: <https://pcacases.com/web/sendAttach/295> in which the tribunal held: “The Tribunal finds the approach taken by these NAFTA tribunals reasonable and in line with the duty of good faith in procedural matters. It has thus adopted it when deciding on the pending document requests. While the Parties themselves are to produce all responsive documents that are in their possession, custody or control, they should also use their best efforts to produce responsive documents which may be in the possession, custody or control of third parties with which the disputing Parties have a relationship. This means that the Claimant is to use its best efforts to produce responsive documents from Leader Resources Corporation. It further means that the Respondent is to produce all documents in the possession, custody, or control of all the "Government Entities" as per the modified definition of the Claimant, with the exclusion of the OPA, Hydro One and the IESO. For these latter entities, the Respondent is to use its best efforts to produce responsive documents.”; In *Windstream I*, the Claimant accepted that Canada would exercise best efforts to obtain documents from the OPA. See requests 9-10, 12-14, 30, 37-38, 44, 53-55 and 82 in “Final Resolution of Document Requests from *Windstream I*” (**R-0820**)

			<p>of domestic law, Canada has no power to compel the IESO to produce documents or otherwise participate in this arbitration. The IESO has advised Canada that various reports, resource plans, forecasts and planning outlooks and data sets relating to electricity supply need in Ontario are available on the IESO's website at: <a href="https://www.ieso.ca/en/Document-Library">https://www.ieso.ca/en/Document-Library</a></p>			<p><b>Ontario's power needs in the relevant period, it may seek leave to make a further application to the Tribunal concerning this Request 8.</b></p>
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