

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”)  
AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES (“ICSID”) ARBITRATION (ADDITIONAL FACILITY) RULES**

BETWEEN:

**MERCER INTERNATIONAL INC.**

*Claimant*

AND

**CANADA**

*Respondent*

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**PROCEDURAL ORDER NO. 9**

**ICSID Case No. ARB(AF)/12/3**

**13 July 2015**

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**TRIBUNAL:**

**Mr. V.V. Veeder (President)  
Professor Francisco Orrego Vicuña  
Professor Zachary Douglas**

## **I. PROCEDURAL BACKGROUND**

1. Following the Tribunal's Procedural Order No. 8, the Parties exchanged correspondence on the production of new documents and the procedural organisation of the hearing commencing on 21 July 2015. The Tribunal refers, in particular, to the matters raised in the Respondent's communications of 18, 19 and 30 June 2015 and the Claimant's communications of 23, 24 and 30 June 2015.

2. On the basis of: (i) Procedural Order No. 1; (ii) the Parties' joint procedural proposals of 11 June 2015; (iii) Procedural Order No. 8; (iv) the Parties' additional joint procedural proposals of 30 June 2015; and (v) the Parties' respective communications listed above, the Tribunal (having deliberated) orders as follows:

## **II. THE TRIBUNAL'S ORDER**

### **A: The Respondent's Application of 19 June 2015 to File 14 New Exhibits**

3. The Respondent requested permission from the Tribunal to file 14 new exhibits identified in its letter of 19 June 2015. By letter of 23 June 2015, the Claimant confirmed that it had no objection to The Respondent's request. Accordingly, the request is granted by the Tribunal; and these 14 new exhibits are admitted into the evidential file.

### **B: The Respondent's Application regarding Mr. Michael MacDougall**

4. The Respondent proposes to conduct a direct examination of Mr. MacDougall to: (i) "ensure that the Tribunal has an accurate understanding of the technically complex evidence that Mr. MacDougall provided in his witness statement with respect to U.S. renewable electricity markets, potential U.S. third party sales and the available transmission capacity in the United States"; and (ii) to "afford Mr. MacDougall an opportunity to respond to any new arguments or evidence the Claimant raises concerning these issues".

5. The Claimant opposes this request on the basis that (i) Procedural Order No. 1 does not allow witnesses to explain or revisit their original testimony during direct examination; and (ii) the length of direct testimony of non-damages related factual and expert witnesses is limited to a maximum of 15 minutes. Alternatively, should the Tribunal permit this extended direct examination, the Claimant requests that it be on the condition that Mr. Robert Friesen be called by the Claimant to testify as well, and that the testimony of both witnesses be governed by section 67 of Procedural Order No. 1 and the time limit for direct examination.

6. The Tribunal confirms that Mr. MacDougall may be called by the Respondent to testify in accordance with section 61 of Procedural Order No. 1 and that Mr. Friesen may also be called by the Claimant to testify in accordance with the same provision. The testimony of these witnesses shall be governed by section 67 of Procedural Order No. 1, save that direct examination of these

witnesses may not exceed 15 minutes each on the assumption that neither will be cross-examined at the hearing. If there were now to be any cross-examination intended for either witness, the Tribunal should be notified as soon as practicable.

### **C: Daily Hearing Start- and End-Times**

7. Daily hearing start- and end-times: The Tribunal remains concerned at what the Parties intend for this hearing, given the time available. The Tribunal confirms the start-time for the hearing's first day (21 July 2015) as 0930 hours. Thereafter, subject to further discussions with the Parties, the Tribunal would prefer to start each hearing day at 0900 hours. The Parties have jointly proposed that the end-times for each hearing day should be left to the discretion of the Tribunal. The Tribunal decides that, in principle, each hearing day should end by 1730 hours. From the hearing's second day onwards, in consultation with the Parties, the Tribunal may reassess the start- and end-times depending on the progress made each day.

8. Start-time on the last hearing day: The Parties disagree on the start-time of the last day of the hearing. The Claimant considers that the last hearing day should start at 1030 hours and the Respondent considers that it should start earlier at 0930 hours. The Tribunal will decide this issue during the course of the hearing, in further consultation with the Parties.

### **D: Chess-Clock and Provisional Schedule**

9. Block times: The Parties disagree on whether the hearing schedule should be structured in blocks of time. The Tribunal does not find it useful to set specific times in advance during which a Party must undertake to complete certain tasks. The Tribunal prefers to leave each Party to decide for itself how to expend its own allocated overall time (subject to maximum time-limits for certain tasks), to be controlled by the 'chess-clock' method administered by the Tribunal during the hearing.

10. Nevertheless, the Tribunal decides that, for administrative purposes only, it would be useful for the Parties jointly to prepare a provisional schedule, to be updated on a daily basis, with a running order of factual and expert witnesses that estimates the hearing days and times on which they will be examined. Accordingly, the Parties are requested to confer and submit such a joint provisional schedule by Friday, 17 July 2015, that includes a running order of factual and expert witnesses and takes into account the Parties' additional joint procedural proposals of 30 June 2015 and this Order.

### **E: Order of Witnesses and Sequestration**

11. Order of examination of the damages experts: The Parties disagree on the order of examination of their two expert witnesses on damages (Messrs Kacsmarek and Rosenzweig). The Claimant considers that these expert witnesses should give evidence on the same day, and the Respondent considers that all the Claimant's witnesses should be presented in full before beginning with the examination of any of the Respondent's witnesses.

12. The Tribunal considers that the damages experts should be examined as a group back-to-back, that is, sequentially and continuously, at a time after the Parties' respective factual witnesses have completed their oral testimony. The Tribunal will consider further with the Parties at the hearing whether and, if so, how a "damages day" can be scheduled for their two expert witnesses on damages.

13. Sequestration: The Tribunal considers that a situation where a witness is barred from discussing his or her testimony or the Parties' dispute during that witness' examination should be maintained at all times (including a week-end), subject to prior special permission by the Tribunal. The Tribunal will address this matter again if and when a reasoned application is made during the hearing in regard to a specific witness (whether it be Mr Lester Dyck or any other witness) by reference to the joint provisional schedule to be submitted by the Parties

#### **F: Length and Scope of Direct Examination**

14. Length of direct examination: The Parties disagree on the length of direct examination. The Claimant considers that direct examination should be limited to 15 minutes, in accordance with the Parties' joint procedural proposals of 11 June 2015. The Respondent considers that, now that the Parties are assuming a maximum of 40 hours to be shared between them for all purposes, direct examination should be limited to 5 minutes, with the possibility to apply for a 15-minute direct examination of specific witnesses and subject matters.

15. The Tribunal decides that direct examination of non-damages factual and expert witnesses should be limited to a maximum of 10 minutes, with the exception of Mr. MacDougall and Mr. Friesen (see paragraph 6 above). The Tribunal will consider further, in consultation with the Parties at the hearing, the length of direct examination for each of the Parties' expert witnesses on damages.

16. Scope of direct examination: The Parties agree that the scope of direct examination is governed by section 67(a) of Procedural Order No. 1, but disagree on how this provision is to be implemented.

17. Section 67(a) of Procedural Order No. 1 establishes that: "the disputing party summoning the witness may briefly examine the witness, only for the purposes of confirming that the witness affirms his or her prior written witness statement and/or allowing the witness to address new arguments or evidence introduced into the case since the time of the witness's last written witness statement."

18. As to its implementation, the Tribunal decides that a Party that wishes to conduct the direct examination of any factual or expert witness for the purposes of "allowing the witness to address new arguments or evidence introduced into the case since the time of the witness's last written witness statement" shall make an application for permission to do so as soon as practicable: (i) identifying the particular witness and (ii) providing a brief summary of the new arguments or new evidence that is sought to be addressed during the direct examination that witness.

Dated: 13 July 2015

For the Tribunal:

[SIGNED]

**V.V. Veeder, President**