

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH
AMERICAN FREE TRADE AGREEMENT AND THE 2010 UNCITRAL ARBITRATION
RULES**

- between -

WINDSTREAM ENERGY LLC

(the “Claimant”)

- and -

GOVERNMENT OF CANADA

(the “Respondent”)

CONFIDENTIALITY ORDER

September 16, 2013

**ARBITRAL TRIBUNAL:
Dr. Veijo Heiskanen (President)
Mr. R. Doak Bishop
Dr. Bernardo Cremades**

1. For the purposes of this Confidentiality Order:
 - (a) “disputing party” means either Windstream Energy LLC or the Government of Canada;
 - (b) “confidential information” means information designated by a disputing party as confidential on the grounds that it is:
 - (i) business confidential information;
 - (ii) business confidential information relating to a third party; or
 - (iii) information otherwise protected from disclosure under the applicable domestic law of the disputing State party.
 - (c) “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 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 or third party to which it relates; or
 - (iv) information the disclosure of which could interfere with contractual or other negotiations of the disputing party or third party to which it relates.
 - (d) “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 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 or third party to whom that information relates.
2. In order to designate information in a written submission as confidential information, a disputing party must clearly label the cover page of the submission “Confidential Information, Unauthorized Disclosure Prohibited”, or some variation thereof. The top of each particular page of the submission that the disputing party contends contains confidential information should be labeled “Confidential”, or some variation thereof. The alleged confidential information should then be enclosed in brackets. Equivalent measures should be used with respect to confidential information contained in material produced in electronic and similar media. One week after the filing of this confidential version of the written submission, a disputing party must also file a version of the written submission with the confidential information identified and redacted.
3. In order to designate information in a written submission as restricted access information, a disputing party must clearly label the cover page of the submission “Restricted Access

Information, Dissemination Prohibited”, or some variation thereof. The top of each particular page of the submission that the disputing party contends contains restricted access information should be labeled “Confidential – Restricted Access”, or some variation thereof. The alleged restricted access information should then be enclosed in brackets. Equivalent measures should be used with respect to restricted access information contained in material produced in electronic and similar media. One week after the filing of this restricted access version of the written submission, a disputing party must also file a version of the written submission with the restricted access information identified and redacted.

4. If upon receipt of a written submission, the receiving disputing party contends that it contains additional confidential or restricted access information that has not been appropriately identified and redacted by the submitting disputing party, it shall so inform the submitting disputing party the Tribunal, and the Registry within ten (10) days, and within twenty (20) days shall provide an electronic copy of the written submission with the additional information which it contends is confidential or restricted access information appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary.
5. In order to designate information as confidential information or restricted access information in a transcript, order or award, a disputing party must, within ten (10) days from its receipt of the transcript, order or award, notify the other disputing party, the Tribunal, and the Registry of its intent to do so, and within twenty (20) days, provide the other disputing party, the Tribunal, and the Registry with an electronic copy of the transcript, order or award, with the information that it contends is confidential or restricted access information appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary.
6. Materials already exchanged by the disputing parties before the execution of this Confidentiality Order can be designated as confidential by notifying the other disputing party of such designation within thirty (30) days of the execution of this Confidentiality Order. A redacted version of the materials shall also be provided to the other party at that time.
7. Where a disputing party does not agree that information designated as confidential or restricted access information by the other disputing party is confidential or restricted access information under the terms of this Order, it shall submit the issue for resolution to the Tribunal. In the case of a dispute concerning the appropriateness of a designation of information as confidential, the information in question shall not be publicly disclosed until the dispute is resolved by the Tribunal. In the case of a dispute concerning the appropriateness of a designation of information as restricted access, the elapse of time periods in the arbitration may be suspended by the Tribunal upon a reasoned request by the disputing party.
8. 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 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, to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary, and the Registry;

- (b) counsel to a disputing party (and their support staff), or counsel to provincial, territorial, or municipal governments, Crown corporations, or non-share capital corporations 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, Crown corporations or non-share capital corporations to whom disclosure is reasonably considered by the disputing party to be necessary;
 - (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; and
 - (f) court reporters and other hearing support staff.
9. 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 third parties, the owner of such confidential 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) counsel to a disputing party (and their support staff), counsel to provincial, territorial, or municipal governments, Crown corporations, or non-share capital corporations whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;
 - (b) independent experts or consultants retained or consulted by the disputing parties or by provincial, territorial, or municipal governments in connection with these proceedings;
 - (c) Members of the Tribunal (and their assistants, if any) to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary, and the Registry; and
 - (d) court reporters and other hearing support staff.
10. No disputing party shall file any confidential material covered by the terms of this Confidentiality Order in any Court without first bringing this Confidentiality Order to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality.
11. Filing or service of confidential information, as set forth in the present Order, does not constitute a waiver of the designation of the information as confidential.
12. All persons receiving confidential information shall be bound by this Confidentiality Order. Each disputing party shall have the obligation of notifying all persons receiving confidential information of the obligations under this Confidentiality Order.

13. It shall be the responsibility of the disputing party wishing to disclose confidential information to any person described in paragraphs 8(d) or (e) or paragraph 9(b) to ensure that such person executes a Confidentiality Undertaking in the form attached as Appendix A before gaining access to any such information. Each disputing party shall maintain copies of such Confidentiality Undertakings and shall make such copies available to the other disputing party upon order of the Tribunal or upon the termination of this arbitration.
14. Where confidential 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 Order; and (ii) originators of the confidential information; and
 - (b) transcripts of those portions of the hearing in which confidential information is used or discussed shall not be made public.
15. If the Tribunal's award discloses confidential information, the Tribunal shall issue two versions of the award:
 - (a) A private, confidential version of the award; and
 - (b) A public, non-confidential version of the award, with confidential information redacted.
16. Notwithstanding any other provision in this Confidentiality Order, any request for documents, or for the production of documents under the applicable domestic law of the Respondent including documents produced to Canada in these proceedings, shall be wholly governed by the relevant legislation.
17. Notwithstanding any other provision in this Confidentiality Order, the disputing parties may make such disclosure of documents or information as is required by law, including disclosure pursuant to Articles 1127 and 1129 of the NAFTA.
18. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law, or under national or provincial legislation.
19. This Confidentiality Order shall be effective and binding upon a disputing party upon the signature of the Confidentiality Order by the Tribunal.
20. The obligations created by this Order shall survive the termination of these proceedings.

21. A disputing party may apply for an amendment to, or a derogation from, this Order if compelling circumstances so require.

Dated: September 16, 2013



Dr. Veijo Heiskanen
On behalf of the Tribunal

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 Order 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 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 Order, 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 Southern District of New York; or
 - c. For residents of another jurisdiction, at their choice:
 in the Province of Ontario or in the Southern District of New York. [Please check one box]

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____ 20____.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)