

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**MESA POWER GROUP, LLC**

Investor

**v.**

**GOVERNMENT OF CANADA**

Respondent

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**REPLY WITNESS STATEMENT  
OF COLE ROBERTSON**

**April 28, 2014**

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Appleton & Associates  
International Lawyers  
77 Bloor St West Suite 1800  
Toronto, Ontario M5S 1M2  
Tel.: (416) 966-8800  
Fax: (416) 966-8801  
Counsel for the Investor

1. My legal name is Lee Allison Robertson III. I am generally known as Cole Robertson. I made a Witness Statement in this arbitration on 19 November, 2013. I have made this Reply Witness Statement to supplement matters raised in my first Witness Statement and to address matters raised by Canada and its witnesses since the filing of my Witness Statement.
2. My residential address and birth date were set out on the first page of my Witness Statement of November 19, 2013. There are no changes to this information since my last statement and I incorporate them by reference into this statement.
3. I have worked with Mesa Power Group, LLC ("Mesa") since June, 2008. My duties involved the development of Mesa's wind generation assets in North America.
4. Prior to joining Mesa, I worked for Ernst & Young in their Assurance and Advisory Business Services' asset management practice. I hold a Bachelor's degree in Business Administration in accounting and a Masters of Science degree in finance. Both of my degrees are from Texas A&M University. I am a licensed Certified Public Accountant in the State of Texas.
5. I am the Vice President of Finance for Mesa Power Group, LLC. In this capacity I am responsible for the day-to-day operations of the company, as well as overseeing company financing, analytical finance, accounting, financial reporting and tax activities. In my job, I assess the financial viability of potential investments. I oversee the company's operations and financing, including all financial reporting and tax activities. I analyse and assess Mesa's potential investments and attend to the research and screening of clean and renewable energy projects throughout North America.
6. Unless stated otherwise, the statements made within this Reply Witness statement reflect my direct knowledge arising from my responsibilities for day-to-day operations of Mesa Power Group.
7. In addition to my responsibilities in running the day-to-day operations of Mesa Power Group, I also served as an officer and board member of the American Wind Alliance (AWA). This LLC was originally a joint enterprise between Mesa and GE Global Development and Strategic Initiatives (GEDSI), a subsidiary of General Electric (GE). Mesa and GEDSI collaboratively managed the American Wind Alliance which was co-owned by these two American companies until General Electric sold its interest to Mesa on [REDACTED].
8. I was involved with the developing and financing of Mesa's FIT projects from the beginning in my capacity as Vice President of Finance for Mesa Power Group, LLC. In this

role, I am involved with the day-to-day operations of Mesa, as well as its long-term vision and strategy.

9. The Mesa Group of Companies is ultimately owned and controlled by T. Boone Pickens, a well-known energy industry veteran who is based in Dallas, Texas. Like many corporate groups, The Mesa Group of Companies has a complicated organization. At our direction, our Canadian lawyers incorporated four Alberta holding companies which each held four Alberta wind project companies.
10. At the time of the investments being formed in Alberta, and the applications submitted in Ontario, Mesa Power Group, LLC owned and controlled each corporate entity within the corporate chain, with the exception of American Wind Alliance LLC, which it co-owned with GEDSI and which was jointly co-managed by them with us. This arrangement continued until [REDACTED], when we acquired all of General Electric's interest American Wind Alliance, including any interest that General Electric had in the Canadian wind investment companies at issue in this arbitration. None of the companies up or down the corporate chain (between the Alberta wind project companies and Mesa) ever changed during this period of time.
11. At all times from November 17, 2009 onwards, Mesa Power Group, LLC indirectly owned the two launch period wind projects (the Twenty Two Degrees and Arran Wind projects) and then the other wind projects (North Bruce and Summerhill). From the time AWA LLC was formed in 2009, it was always the intention to establish several hundred MW of wind power projects in Canada and it was known that TTD and Arran were only the first phase and, as such, North Bruce and Summerhill were always a planned expansion.

**I. WIND POWER PROJECTS**

12. Mesa's investment in the Ontario FIT Program arose from our corporate decision to focus on the development of clean energy solutions in North America. Our Founder and Principal, Mr. Pickens, has been an outspoken advocate in favour of clean energy and our company worked hard to develop clean energy solutions in North America.
13. Mesa started to realize on the promise of clean energy investment in 2008. We started first in Texas with the Pampa wind project. We also developed the 377 MW Stephens Bor-Lynn wind project. This project was subsequently sold to Starwood Capital in 2013 before the project's completion. Mesa also developed the 78 MW Goodhue Wind Project in Minnesota, the 99 MW Monterey Wind Project in Michigan and the 99 MW Greenfield Wind Project in Missouri before each project was sold.
14. In the context of all of these wind investments, our company has accumulated expertise in this area of clean power.

15. Each wind development site is unique. As a result, development and construction costs vary from one wind site to another, as the availability and speed of wind, availability of transmission, the altitude and air density at the site, and the geography can all be different in different regions. The project and development risks are also not the same. The unique challenge of wind energy is that one ultimately cannot control its source. While certain areas might be prone to more wind, and more constant wind streams than others, there is only so much certainty one can rely on when assessing potential wind-energy sites. There are, however, ways to mitigate this uncertainty. Variables in wind, resulting from the altitude, air density, speed and prevailing wind direction on a site can be addressed by the siting of turbines and the turbine technology. Some turbines, because of their blades or motors, are more suitable for some wind sites over others. Developing a wind-energy site is not a pre-packaged formula. You cannot just un-package a set of turbines, erect them, and start generating wind power.
16. Mesa's first wind development project was the 1,000 MW Pampa wind project in Texas. This project was larger than any wind project ever developed in Ontario and at the time was the largest development wind project in the world. The project was carefully designed and planned. The Pampa project was advancing as planned and on schedule during the development stage. This included leasing rights for more than 100,000 acres of contiguous land, collecting wind data from 24 meteorological towers, initiating wind resource assessments, identifying sites for nearly 700 turbines, conducting environmental studies and initiating the selection of a contractor for construction of the project.
17. The project employed the industry's latest technologies and standards. The Master Turbine Sales Agreement (MTSA) that Mesa negotiated with GE was a deliberate decision to partner with the industry leader when it came to turbine manufacturing.
18. The global financial crisis in late 2008 significantly altered the economics of the energy market. It resulted in a steep decline in energy demand. This was a merchant market project that relied on the spot energy prices of power. Power pricing collapsed following the decline in natural gas pricing. At the same time, the ability to obtain debt financing in the market for large scale merchant projects was very difficult. Given this change of market conditions, there was a significantly reduced appetite for debt exposure to these types of projects. As a result of these market conditions, the Pampa project did not proceed.
19. Mesa also successfully developed the Goodhue project, of 78MW, in Minnesota, which was successfully sold in 2012. After Mesa sold that project regulatory issues led the subsequent purchaser of the project to decide not to operationalize that project.

## II. WORK WITH GENERAL ELECTRIC

20. We worked collaboratively with GEDSI in the American Wind Alliance (AWA). The joint work with General Electric allowed us to combine the experience, financial capabilities and technical abilities of both parent companies. Partnering with General Electric permitted Mesa to work with one of the world's most successful and storied companies. General Electric has over 130 years of success to its name and *Forbes* lists the company as the 7<sup>th</sup> most valuable brand in world and 4<sup>th</sup> in its Global 2000 list, with nearly \$150 billion in sales.<sup>1</sup> This should have provided our wind projects with the greatest chance of success. Mesa knew that General Electric was also working directly with Ontario and had signed a Memorandum of Understanding to that effect. AWA then worked with one of the most experienced Ontario wind developers, Charles Edey, who worked for Leader Wind and then Leader Resources. Mr. Edey brought knowledge and experience on the local Ontario development of wind projects. Together this highly experienced team was designed to reduce wind project and development risks.
21. We developed AWA to continue the development of wind projects in North America. This relationship also assisted us in obtaining access to key components for wind facilities. At this point in time, the supply in wind turbines was limited. We knew that working with GE, we could be assured of delivery of wind turbines, and that we would have competitive costing, and effective power generation. It was on that basis that we entered into the AWA LLC agreement with GE's subsidiary, GE Energy, LLC.
22. When Mesa explored the various wind turbine options with GE, we expressed a preference for the 2.5XL turbine, because it was the most cost effective turbine that could generate the wind power Mesa needed. The 2.5XL turbine was most suited to our Ontario wind sites as it had the characteristics of higher density and slightly lower wind speeds. I understood that it would have been 8% more efficient than the 1.6xle turbine.
23. While Mesa preferred the 2.5XL, the central challenge of the Ontario minimum domestic content requirements was that Mesa was precluded from securing equipment that was most appropriate and efficient for the particular wind site. The Ontario minimum domestic content requirements reduced Mesa's choice and impaired the economics of the project by pre-determining less efficient means to develop its wind projects. At the time we made our applications, GE could not confirm to us that the 2.5XL turbines would be able to meet the Ontario minimum documents requirement. The 1.6xle turbine could meet the Ontario minimum domestic content requirements and this was confirmed to us at that time. In the end, Mesa chose wind turbines that were guaranteed to meet the domestic content as General Electric could not guarantee

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<sup>1</sup> "General Electric" on *Forbes* "World's Most Valuable Brands" (*Investor's Schedule of Exhibits at C-0581*)

- that other turbines were compliant. The domestic-content requirements meant there was more limited choice of turbines and services available. Mesa was forced to settle for a less-efficient turbine, constantly ensure that its development plans addressed the domestic content requirements and thereby altering the availability of suppliers that would have otherwise been used, which included contractors for Engineering, Procurement and Construction (EPC).
24. The Stephens Bor-Lynn project used a smaller turbine than the 2.5XL because it was most suitable for that location, which had characteristic of a lower air density and higher wind speeds.
  25. Mesa had a preference to obtain other equipment to operate with in Ontario. Such other more efficient turbines included the 2.5XL turbine. Although we knew that the 2.5XL turbine was being manufactured by General Electric, we did not receive confirmation from General Electric that these turbines would meet the requirements of Ontario's minimum domestic content requirements.<sup>2</sup> Up to the time of making the FIT launch period applications for our wind power projects, the minimum domestic content requirements had less impact on our decision making. The Ontario minimum domestic content requirements were harmful. They had the effect of interrupting our customary business relationships as we had to find new suppliers to provide goods and services that could meet the Ontario minimum domestic content requirements. Sometimes this required us to change to use less efficient goods or more expensive goods or service providers.
  26. It was really only on August 5, 2010, when we had no confirmation for our projects at the time of our applications that we could use the 2.5XL turbine for Ontario's minimum domestic content requirement that we started to suffer loss arising from the performance requirements.
  27. We had confirmation from GE that the 1.6XLE turbines would meet the minimum domestic content requirements.
  28. Similarly, we obtained quotes from Mortenson as to construction and engineering work required to install the turbines,<sup>3</sup> but without confirmation that Mesa could appropriately use the 2.5XL turbines, Mesa could not accept the project risk that the turbines would not comply with the domestic content requirements. As a result, Mesa was required to

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<sup>2</sup> Email from Mark Ward (Mesa) to Michal Volpe (General Electric) and Andrew Goodman (General Electric), August 5, 2010 (*Investor's Schedule of Exhibits at C-0107*)

<sup>3</sup> Mortenson Open Book Summary for Twenty-Two Degrees 150.0 MW, GE 2.5XL, and Mortenson Revised Proposal for the GE 2.5MW Turbine, July 21 2010 (*Investor's Schedule of Exhibits at C-0358*); Mortenson, Open Book Summary, Arran Wind - Port Elgin, Ontario, GE 1.6xle, 85.5m Rotor 80m HH, March 26, 2010 (*Investor's Schedule of Exhibits at C-0375*)

use the less-efficient 1.6XLE turbines that we knew would meet the Ontario domestic content requirements, rather than other turbines that we would have preferred to use.

29. From our conversations with GE, I was informed that the cost of the 2.5XL turbines was [REDACTED]. Even though the 2.5XL costs more per unit, fewer would have been needed. If Mesa was able to use the 2.5XL turbines, that would have reduced the number of turbines needed by [REDACTED]. This would have translated into a capital savings of approximately [REDACTED]. As a result, Mesa suffered a loss by committing to the 1.6XLE turbines that were compliant with the domestic content requirements.

### **III. INVESTING IN ONTARIO**

30. Mesa was first approached in 2008 by Ontario wind developer, Chuck Edey, as to participating in the development of the TTD and Arran projects. However, in light of the financial circumstances created by the 2008 crisis, our discussions did not progress further at the time. When the financial conditions improved in 2009, Mesa became eager to purchase these projects.
31. Mesa made its investments in Ontario's FIT Program in the fall of 2009. There were various places for Mesa to invest, but Ontario's FIT Program with its ratepayer guaranteed FIT contract price of 13.5c/kWh was very attractive for us.
32. We also were attracted to Ontario as being a safe place to invest, where the rule of law prevailed and administrative fairness would be a principle followed by governments and courts.
33. At this time, Ontario was marketing itself as a committed consumer of renewable energy. Our understanding was confirmed in an April 2011 phone call between the Mesa team, led by Mr. Pickens, and the then-Deputy Premier of Ontario and Minister of Economic Development and Trade, Sandra Pupatello.<sup>4</sup> I was on that call with Mr. Pickens. The call confirmed to us that Ontario was eager to rely on a greater amount of clean energy. The Deputy Premier encouraged us to invest in Ontario and told us that this was a good place to do business. Neither Minister Pupatello, nor other officials, indicated to us at that time that Mesa could by-pass the requirements of the FIT Program through special arrangements, and we were not invited to engage in negotiations with the Ontario government to that effect. We were aware of the NAFTA because it provided a prudent understanding of trade relations between the United States and its neighbours. So we were aware that there were investment protections in place between Canada, the United States and Mexico. The call with the Deputy Premier

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<sup>4</sup> E-mail from Leigh-Ann Popek (Office of the Minister of Economic Development and Trade) to Monica Long, May 6, 2011 (*Investor's Schedule of Exhibits at C-0501*), and E-mail from Cole Robertson (Mesa Power) to Jay Rosser and Sally Geymuller, April 15, 2011 (*Investor's Schedule of Exhibits at C-0502*)

reinforced Mesa's belief that the FIT Program was Ontario's way of demonstrating its commitment and putting into action.

34. As Mesa was now committed to the FIT Program, the MTSA with GE was updated in [REDACTED], such that the manufacture of turbines would conform to Ontario's domestic content requirements. Though the MTSA had to be renegotiated to reflect the terms of the FIT Program, it was not a speculative agreement. The MTSA reflects that Mesa's made a conscious decision to secure a supply of wind turbines.<sup>5</sup>
35. When the joint enterprise between Mesa and GE ended on [REDACTED] it was decided that each member of the venture would take back those projects (with their associated rights and liabilities) that they contributed to the joint venture. As Mesa brought the Twenty Two Degrees and Arran projects to the joint venture, these projects returned to us.
36. Mesa continued developing the Twenty Two Degree and Arran wind projects as they were very attractive, given their unique favourable location. All of Mesa's Ontario wind sites had optimal wind velocity compared to others in Ontario and were at low altitude. In order to harness that energy as efficiently as possible, a larger turbine with higher masts was preferable.

#### **IV. THE FIT APPLICATIONS MADE BY MESA'S INVESTMENTS**

37. Development of wind projects requires extensive preparation, due diligence and research. If an investor is not properly prepared, the investment's chances of successful operation will suffer. Mesa's approach and preparation, drawing on a leadership team and model with over 60 years of experience in the energy field, significantly reduced such risks. Mesa carried out extensive wind surveys and prepared FIT applications, working in collaboration with our local partners, as soon as the FIT Program was announced.
38. To get the projects ready, we were at a very advanced stage of the Renewable Energy Approval (REA) Process.
  - a) The TTD project had completed all but one of the components,
  - b) The Arran project completed many of the components, and
  - c) The North Bruce and Summerhill projects were well on their way in the process.<sup>6</sup>Given that our approach to moving all projects through the REA stage was the

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<sup>5</sup> Amended and Restated Master Turbine Sale Agreement For The Sale Of Power Generation Equipment and Related Services between General Electric Company and Mesa Power Pampa LLC, November 17, 2009 (*Investor's Schedule of Exhibits at C-0379*)

<sup>6</sup> CER- Independent Valuator's Report of Low and Taylor of Deloitte, at ¶12.17.



same, we expected the North Bruce and Summerhill projects to reach the same advanced stage as the TTD and Arran projects.

39. All of Mesa's projects were proceeding smoothly as planned to being shovel ready for when FIT contracts were awarded. The projects did not have any financial hurdles, any REA hurdles or construction risks. Mesa was sure that it had or could raise the equity needed for each project to achieve commercial operation. Our due diligence and pre-planning had us in an ideal position.
40. Our TTD and Arran projects were adjacent to the North Bruce and Summerhill sites. This permitted us to use the same wind data for all four sites. It also meant that the North Bruce and Summerhill projects faced less future development risks due to their proximity to projects that were nearing completion of the REA process.
41. Chuck Edey was a member of the Applicant Control Group for Mesa's projects. Mr. Edey was a director of our FIT applicants, which are Twenty Two Degree Wind Project, ULC, Arran Wind Project, ULC, North Bruce Project, ULC and Summerhill Project, ULC.<sup>7</sup> Mr. Edey signed statements as a director, which were included in the FIT applications.
42. I understand that we were not awarded a ranking point for experience on the basis that Mr. Edey's considerable experience was excluded since he was a consultant. The FIT Rules do not exclude the experience of consultants, but in any event, Mr. Edey was an officer of the applicants, so his experience could never properly be excluded from consideration. Since this was such a straight-forward component of the application ranking, I was surprised that Mesa was not scored for this criterion. We were also not awarded a point under the financial capacity criteria even though we submitted GE's audited financial statement for 2008, which was submitted as a summary of its full financial statements.
43. When the FIT rankings were released on December 21, 2010 and our TTD and Arran projects were not ranked as high as their applications' merited, we knew at least a part of the ranking process had not been performed correctly. I am aware that Mr. Edey had been in contact with the OPA during the application process in January 2010 about Mesa's applications<sup>8</sup> and am surprised that there was no mention of any concerns by the OPA that Mesa might have incorrectly filed in its application.

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<sup>7</sup> Notice of Directors, Twenty Two Degree Wind Project, ULC, November 17, 2009 (*Investor's Schedule of Exhibits at C-0503*); Notice of Directors, Arran Wind Project, ULC, November 17, 2009 (*Investor's Schedule of Exhibits at C-0504*); Notice of Directors, North Bruce Project, ULC, April 5, 2010 (*Investor's Schedule of Exhibits at C-0505*); Notice of Directors, Summerhill Project, ULC, April 5, 2010 (*Investor's Schedule of Exhibits at C-0507*)

<sup>8</sup> Ontario Power Authority, FIT Application Management Extranet, FIT-FZ2K5LZ – Twenty Two Degree Energy, at pp.2-3 (*Respondent's Schedule of Exhibits at R-134*); Ontario Power Authority, FIT Application Management Extranet, FIT-FNRGE96 – Arran Wind Energy, at pp.2-3 (*Respondent's Schedule of Exhibits at R-135*)

44. On September 17, 2010 the Minister of Energy ordered the OPA to reserve 500 MW of transmission capacity in the Bruce region.<sup>9</sup> This capacity was reserved for the Korean Consortium, their joint venture partners and their Canadian subsidiaries, because of the *GEIA*. These competitors for transmission capacity in the Bruce region were being given priority over its FIT applications for that capacity.
45. As Mesa always expected to receive FIT contracts, especially throughout 2011, Mesa continued developing the projects in order ensure they were shovel ready to reduce the time until the Commercial Operation Date. By July 2011, we ensured that the REA was close to completion.

**V. VALUATION QUESTIONS RAISED BY CANADA'S WITNESS**

46. I have had the opportunity to read the valuation report prepared by Christopher Goncalves on behalf of Canada. Mr. Goncalves raised an issue about the cost of wind turbines for our projects.<sup>10</sup> He has relied upon the US Shepherds Flat and Canadian Kent Breeze projects as a basis for comparison of costs of 2.5XL turbines. I believe that this is an error as these two projects are not a proper basis for comparison. The fundamental reason why they are not appropriate is because of the location and geography of the Shepherds Flat Project and because of the reduced scale of the Kent Breeze project which is only 20MW.
47. As each project is different, turbine costs vary, depending on such factors as the terrain and costs of transportation. In contrast to these projects, we knew what the costs of the 2.5XL turbines were, as we received those costs directly from GE, and there was no speculation of the actual costs. The costs were as follows:

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<sup>9</sup> Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 (*Investor's Schedule of Exhibits at C-0119*)

<sup>10</sup> Expert Report of Christopher Goncalves (Berkeley Research Group), Attachments, at ¶171.

[REDACTED]	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
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[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

48. After the Pampa project was cancelled, Mesa worked with GE to identify new projects for development. While the initial deposit in June 2008 of \$153M related to the Pampa

wind project in Texas, that deposit was simply transferred to the Amended MTSA which was the deal specifically negotiated for the Ontario FIT Program. The MTSA and Amended MTSA were not geographically restrictive and always contemplated working on projects throughout North America.<sup>11</sup> That deal was for 333 turbines. As the Ontario projects required at total of [REDACTED], and the Amended MTSA would have more than covered the required turbines, the loss of the \$153M deposit was a direct result of not being able to fulfill the order of 333 turbines when we failed to receive a contract throughout 2011. An existing deposit might have been in place, but a fresh deal had been negotiated because of the prospect of success and the merits of the projects. When the projects did not go ahead, the deposit for that specific deal was determined to be a past, or sunk, loss.

49. After we were denied contracts on July 4, 2011 we worked with GE to renegotiate forfeiting the deposit, Mesa attempted to mitigate its losses by applying the turbines under the Amended MTSA to the Stephen Bor-Lynn project. Ultimately, however, we lost the entire amount for the 333 turbines, first \$43,785,600 in December 2011, then \$109,807,000 in December 2012.
50. Mr. Goncalves raised an issue over the warranty period and the remaining value of the projects. We revised the payment and delivery dates of turbines as best we could, by way of change orders, which were adjusted based on the actual anticipated construction dates. As we [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].
51. On June 3, 2011, when significant changes to the FIT Program were announced, Mesa appreciated the extent to which the FIT Program was not proceeding as planned. Mesa's loss was confirmed on July 4, 2011, when we were not awarded the FIT contracts that we anticipated.
52. As a result of Mesa not receiving contracts, the fact that we have not received any subsequent offers to purchase the projects, and that the FIT program ceased in 2013 for projects of Mesa's scale, there is a very limited possibility of a wind project will we be constructed on our Ontario sites, we consider that our Ontario projects have nominal value.

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<sup>11</sup> Amended and Restated Master Turbine Sale Agreement For The Sale Of Power Generation Equipment and Related Services between General Electric Company and Mesa Power Pampa LLC, [REDACTED]  
[REDACTED] (*Investor's Schedule of Exhibits at C-0379*)

**VI. FINANCING FROM THE US EXPORT – IMPORT BANK**

53. By working with GE, Mesa was able to take advantage of its unique expertise in working with US Export-Import Bank (Ex-Im Bank). Steve Howlett was the Managing Director of GE Capital Markets Corporate. The letter provided to Mr. Howlett from the Ex-Im Bank is the best indication of a lending rate that Mesa could have obtained. Mesa had done thorough research into lending rates and knew that the rate being offered by Ex-Im Bank was preferred compared to other lending rates available.
54. Mesa took advantage and relied on the expertise of General Electric with respect to dealing with the Ex-Im Bank. When it came to supplies and ensuring reliance on Ontario's domestic-content rules, GE had this expertise and we deferred to it. When we approached them for finance, Ex-Im Bank fully appreciated Ontario's domestic content requirements and provided the lending rate on that basis.
55. As part of GE's expertise as a manufacturer of turbines, it knew that Ex-Im Bank was an excellent choice to assist with financing. Our own research confirmed that relying on GE's expertise and going with Ex-Im Bank was a preferable route.
56. It was very early days in our project when Mesa and GE sought the letter from Ex-Im Bank on financing for the Twenty Two Degrees project. Our cost projections were very conservative with respect to capital costs as it was early in the planning stage.

**VII. OBSERVATIONS ON THE ONTARIO PROCESS**

57. Overall, the FIT Program and our investments in Canada did not unfold the way Mesa expected them to:
- a) We follow the rules. Our FIT applications were based on the rules. We expected the administrators of this government program to apply the rules to everyone in the same fair manner. While we diligently set out to follow the proscribed process in the FIT Rules, we were unaware of the fact that political undertones and backroom deals were unfolding in the Premier's Office and the Ministry of Energy. At the time, Mesa was unaware that other FIT applicants were working behind the scenes to modify the FIT Program to suit their interests.
  - b) At the early stages of the FIT process, while Mesa prepared and, then through its investments, submitted its first applications, it did not know that Ontario was working to provide, and then provided, the Korean Consortium preferential access to the same transmission capacity that Mesa was competing for.

- c) During the FIT process Mesa did not know that meetings were taking place between NextEra and the Premier's Office to benefit NextEra's investments in the FIT Program.
  - d) During the FIT process, Mesa did not know that processes such as the Economic Connection Test (ECT), that were required by the FIT Rules, could be abandoned by the OPA notwithstanding the fact that FIT applicants reasonably relied on the fact that they would be conducted when preparing their applications. Mesa received a letter on April 8, 2010 stating that the ECT would take place in August 2010.<sup>12</sup> We relied on that letter and planned as follows:
    - i) If an ECT was carried out as we were told, Mesa expected FIT contracts for the TTD and Arran wind projects.
    - ii) Up until the June 2011 rule change, when NextEra's projects moved into the Bruce region, the TTD and Arran projects should have passed the ECT and been awarded FIT contracts. When the rules were changed to benefit NextEra's projects, transmission capacity that Mesa expected through the ECT was no longer available to it, displacing our projects.
  - e) From April 2010 onwards Mesa was not provided with an explanation for why the ECT was not being run as planned. I now know that the ECT was delayed because the Ministry of Energy and the OPA waited for the Korean Consortium to select connection points.
  - f) During the FIT process Mesa did not know that its position to receive contracts would be subsumed by other proponents in a completely different transmission region.
  - g) During the FIT process, when selecting connection points, Mesa did not know that FIT applicants were choosing to select a connection to a dormant reserve line that existed to ensure the safety and reliability of Ontario's nuclear power system; Mesa focused its connection points on publicly known and available connection points.
58. Mesa did not receive those contracts it expected in July 2011 and, until it received documents throughout this process, it did not understand the basis of not receiving contracts.
59. We wrote to the Energy Minister about our concern with respect to what appeared to us to be obvious errors with the ranking we received. The OPA's response to our inquiry

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<sup>12</sup> Letter from JoAnne Butler (Ontario Power Authority) to Charles Edey, April 8, 2010 (*Investor's Schedule of Exhibits at C-0182*)

of May 20, 2011 as to our ranking position did not provide a real indication either. I also note that this explanatory letter was held off for a month until June 17, 2011, shortly before the July 2011 contract awards were publically released.

60. The changes to the FIT Program and level of secrecy over the course of Mesa's investment made the program unpredictable. Had Mesa known when it invested in 2009 that the FIT Rules would be changed on a whim to benefit other select proponents, we would not have made the sizeable investment and commitment needed for such projects.

#### **VIII. THE GREEN ENERGY INVESTMENT AGREEMENT**

61. The Premier of Ontario and the Ontario Minister of Energy signed the Green Energy Investment Agreement (GEIA) on January 25, 2010. We saw a copy of the press stories about this deal and I later saw a copy of the press backgrounder issued the day of the announcement.
62. We did not see the actual terms of the GEIA until well-after this arbitration had commenced. The terms of this deal were completely secret.
63. I assumed that the press statement sent out by the Premier and the Minister of Energy was truthful and accurate. As a result, I believed that the GEIA required the Korean Consortium to make very substantial investments and that the large amount of reserved transmission access was related to this obligation.
64. I now know that the GEIA did not require the members of the Korean Consortium (or their joint venture partners) to create jobs or to invest. I was surprised by the looseness of the obligations upon the members of the Korean Consortium and the clear generosity of its terms from Ontario towards Samsung, KEPCO and their joint venture partners.
65. The better treatment provided to the Korean Consortium under the GEIA resulted in significant lowering of the operational risk for wind projects. Risk of REA approval, aboriginal consultation, access to Transmission and regular and preferred access to government decision makers all reduced the completion risk of projects under the GEIA over other projects. In addition, there were other terms such as the economic development adder and the ability to scale projects up or down 10% without government approval that were also very helpful to those who could qualify under the GEIA.
66. Had Mesa known that Ontario was prepared to enter into a *GEIA*-like agreement it would have entered into negotiations for one. Given our size, resources, and past experience, Mesa would have undertaken the same obligations to adhere to the FIT minimum Ontario domestic content rules as the Korean Consortium.

67. Upon reviewing the *GEIA*, I have not been able to find any terms that imposed a requirement on the Korean Consortium that went above and beyond what Mesa was required to do in order to get its projects to commercial operation. Operating under a *GEIA*-like agreement would have permitted Mesa to take advantage of the same economic adder provided to the Korean Consortium.
68. If Mesa had received the treatment in obtaining 2500 MW of reserved transmission access, Mesa would have also used the 10% capacity expansion option that was available to the Korean Consortium through the *GEIA* with respect to the four wind facilities in the Bruce Region.
69. In the event that Mesa obtained the opportunity of having reserved transmission capacity, like that provided to the Korean Consortium under the *GEIA*, reserved for it, we would have first connected those projects that had a lower chance of being awarded contracts in a competition. This is also the approach taken by Samsung and Pattern when offering to purchase our lower ranked projects.
70. As someone involved with developing and financing Mesa's investments and their FIT projects, it was a disappointment to see Ontario's FIT Program and its rules become subject to political manoeuvring and influence. I was surprised to observe that Ontario's government would become subject to controversies, like the gas-plant controversy, leading up to the Ontario election of 2011. Mesa was not aware that Ontario was susceptible to business interests meddling in politics. As applicants in a provincial regulatory competition, Mesa did not think it appropriate to make political donations in the lead up to provincial elections. Had Mesa known that such politics would have had a detrimental impact on its investments in the Ontario FIT Program it would not have made the investment in 2009.

**IX. ATTEMPTS FROM THE KOREAN CONSORTIUM MEMBERS TO PURCHASE PROJECTS FROM MESA**

71. In 2010, Zohrab Mawani from Samsung and Colin Edwards from Pattern<sup>13</sup> made verbal offers to purchase Mesa's Twenty Two Degrees and the Arran projects. However, as we expected a high degree of likelihood that contracts for these projects would be immediately forthcoming, negotiations did not progress and as a result no term sheets were exchanged.

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<sup>13</sup> Mr. Edwards is a resident of the Province of Ontario, Canada. I note from Mr. Edwards' declaration, which was produced throughout the Section 1782 proceedings in the United States, that he works in Toronto, Ontario, for Pattern's subsidiary, Pattern Renewable Holdings Canada, ULC in Ontario. Declaration of Colin Edwards, at ¶12 (*Investor's Schedule of Exhibits at C-0184 – CONFIDENTIAL*). I am aware that Mr. Mawani is also a resident of the Province of Ontario, Canada.



72. Samsung and Patterns did make written offers to buy North Bruce and Summerhill. Those offers for the North Bruce project were made on September 22, 2010 and January 12, 2011.<sup>14</sup> In the end, Mesa chose not to sell the projects because of the low offer made, and because we expected the FIT Program to continue as planned and were confident in that process.
73. In its letter of proposal to purchase the North Bruce project, Pattern confirmed that the project was in the [REDACTED] and that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>15</sup>

**X. THE LACK OF RESPONSIVE DOCUMENT PRODUCTION FROM CANADA**

74. The lack of documentation production from the Government of Canada from the Government of Ontario in this arbitration has been surprising, and disappointing. The gas plant controversy has confirmed many details about the deletion of emails and destruction of documents in connection with the Ontario Government and the offices of the Premier and the Minister of Energy. In this context, Mesa is not confident that it has been provided with the full array of evidence that supports its claims.
75. I make this statement in support of the Investor's Reply Memorial and for no other purpose.

Dated: April 28, 2014



LEE ALLISON (COLE) ROBERTSON III

<sup>14</sup> Letter from Pattern Renewable Holdings Canada, ULC to Mark Ward (Mesa Power Group), September 22, 2010 (***Investor's Schedule of Exhibits at C-0424 - CONFIDENTIAL***); Letter from Pattern Renewable Holdings Canada, ULC to Mark Ward (Mesa Power Group), January 12, 2011 (***Investor's Schedule of Exhibits at C-0425 - CONFIDENTIAL***)

<sup>15</sup> Letter from Pattern Renewable Holdings Canada, ULC to Mark Ward (Mesa Power Group), September 22, 2010 (***Investor's Schedule of Exhibits at C-0424 - CONFIDENTIAL***)