

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 13

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

I. PROCEDURAL BACKGROUND

1. In Procedural Order No. 7 of 10 April 2014 ("PO 7"), the Tribunal rejected the Claimant's application for document production because it could derail the calendar of the arbitration and because the document production phase had already passed. However, the Parties were given an option to make document requests after the completion of the second round of submissions in accordance with the following calendar:
 - a. 23 July 2014 – Simultaneous Requests to produce documents;
 - b. 6 August 2014 – Simultaneous Production of Evidence or Reasoned Objections (Redfern Schedules);
 - c. 20 August 2014 – Simultaneous Reply to objections (Redfern Schedules);
 - d. 3 September 2014 – Tribunal's decision;
 - e. 17 September 2014 – Production of evidence as ordered;
2. On 23 July 2014, the Claimant submitted its Request to Produce Documents to the Respondents. The Respondent objected to all the requests in the Redfern Schedule attached as Appendix A to Procedural Order No. 1 ("PO 1"). On 20 August 2014, the Claimant replied to the Respondent's objections. The matter now falls for the Tribunal's decision.

II. ANALYSIS

3. The Tribunal's decision with respect to each document production request is stated in the completed version of the Redfern Schedule that is attached as Annex A hereto. This Annex forms an integral part of the present Procedural Order. The documents must be produced by 17 September 2014 as provided in PO 7.
4. In reaching its decisions, the Tribunal has kept the following points in mind:
 - i. *Applicable Rules*

The rules applicable to document production have been set out by the Tribunal in its earlier rulings (in particular in PO 1 and PO 4).
 - ii. *Requirements*

While allowing the Parties to initiate a new production phase after the completion of the second round of submissions, the Tribunal laid down certain additional requirements:

“if necessary, the Tribunal will entertain document requests after the completion of the second round of submissions. *These requests should be limited to new issues raised in the Reply and Rejoinder, and the requesting Party would have to establish why the requests could not be made earlier.*”¹

Accordingly, in addition to meeting the usual criteria for a document production requests set forth in PO 1 and PO 4, to be successful, such request must satisfy the following criteria: (a) the request must be limited to new issues raised in the Reply or the Rejoinder; (b) the requesting Party (here, the Claimant) must establish that the request could not be made earlier. These requirements are cumulative; failure to satisfy one of them leads to the denial of the request.

iii. *Earlier Document Production Requests*

The Respondent has objected to a number of requests made by the Claimant on the basis that the Claimant “re-issue[s] requests that have already been made, or narrow[s] or amend[s] requests which were previously denied.” As mentioned above, in order for a document request to be successful, it must be limited to “new issues” raised in the Reply or in the Rejoinder. It is possible that some documents, whose production was denied earlier, are relevant and/or material to such new issues. If this is the case, then, notwithstanding the earlier denial, they ought to be produced (provided they meet all other requirements).

iv. *Definition of Terms*

The Respondent has not objected to the definitions proposed by the Claimant for the terms used in the Redfern Schedule. Therefore, the Tribunal has proceeded on the basis that these definitions are accepted by both Parties.

v. *Possession, custody or control of third parties*

The Tribunal has already determined the rules applicable when documents are in the possession, custody or control of third parties in its earlier rulings (PO 4 etc.). For instance, in PO 4 the Tribunal observed:

“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,

¹ §21, PO 7.

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."

III. DECISION

5. For the reasons mentioned above, the Tribunal:
 - i. Decides each document production request as stated in the last column of the completed version of the Redfern Schedule that is attached as Annex A hereto. This Annex forms an integral part of the present Procedural Order;
 - ii. In accordance with PO 7, the Respondent shall produce all the documents ordered to be produced on or before **17 September 2014**. These documents shall be communicated to counsel; they shall not be communicated to the Tribunal at this stage;
 - iii. The Respondent shall provide an index of the documents produced with a reference to the respective document production request. It shall state whether (i) it has produced all responsive documents in its possession, custody or control, (ii) whether responsive documents had previously been produced, or (iii) whether no such documents exist;
 - iv. The documents produced shall not be considered part of the record, unless and until one of the Parties submits them as exhibits at the hearing, or in their post-hearing briefs (if any); and,
 - v. Reserves costs for subsequent determination.

Seat of arbitration: Miami, Florida, U.S.A

Date: 4 September 2014

For the Arbitral Tribunal:



Prof. Gabrielle Kaufmann-Kohler
President of the Arbitral Tribunal