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Subject: Investor's Observations on public access to January 2020 hearing video - RE: PCA Case No. 2018-54: Tennant Energy, LLC (U.S.A.) v. Government of Canada

Dear President Bull and Members of the Tribunal

As the Tribunal is aware, there was a public viewing of the open session of the January 2020 Tennant Procedural hearing. Confidential information was heard in closed session at Canada's request. Canada had the opportunity to close more portions of the session but did not do so. The open session was heard live by the public. The January 3rd direction to the parties set out the deadlines regarding publications. Under this direction, subsequently, Canada had an opportunity to raise concerns about the record by January 16th. Canada raised no objections and the public session video was posted to the internet on January 17 and was freely available to the public until January 21st.

Canada failed to make timely objections to the public portions of the meeting or event to the public posting of the video, which would have been meritless in any event because the meeting itself was public with the limited exception of the closed portion. Canada now wants to have the public video shelved until it can redact the hearing transcript. Presumably, Canada then will seek to edit the previously-public video to redact it. This is contrary to transparency and the whole purpose of a public meeting. Indeed, in the United States, where the meeting is being held, once a matter is made public, then the information cannot be made secret as an unconstitutional prior restraint. In any event, such an approach would be highly objectionable given the public interest in investor-state arbitration.

Canada claims it is in favor of transparency and public access but it really is not.

While Canada pays lip service to the laudable objectives of public access and transparency, in practice, at virtually every opportunity, this Tribunal has been confronted with Canadian attempts to keep information away from the public. The notion that this Tribunal should make private that which is already in the public sphere is untenable. There is no need for Canada to be allowed to make redactions to information that was already public.

Now Canada attempts to 'roll back the clock'. Canada seeks to enlist the Tribunal and the Investor to suppress information already made public. Canada makes an argument that this

publicly released information is now protected by institutional secrecy privilege. Whether or not this privilege applies, Canada wishes to put the genie back into the bottle. That is not right and is unacceptable.

Any material in the public session is public. It must be made available to the public and should not be hidden away at Canada's request. Canada and the United States have identified the importance of transparency in the NAFTA Process in their October 7, 2003 ministerial statements. The Investor cannot support such an attempt to keep information in a NAFTA hearing away from the public.

The information at issue has already been released to the public. There are those in the public that were present at the hearing or who have already downloaded the video have all the information. This Tribunal should not be withholding information that has already been released to the public. This is especially true when Canada failed to make a timely objection under the process set out by this Tribunal. There can be no further confidentiality associated with information that has now entered the public domain.

Accordingly, the Investor cannot agree with Canada's request and requests that the PCA minimize any disruption to transparency and public access by making the video recordings available to the public as soon as possible.

On behalf of the counsel for the Investor,

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