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16 October 2020

RE: PCA CASE N° 2018-54 – TENNANT ENERGY, LLC V. GOVERNMENT OF CANADA

Dear Mesdames, dear Sirs,

I write on behalf of the Tribunal, with reference to the Respondent's letter, and the Claimant's e-mail communication, of 8 October 2020.

In its 8 October 2020 letter, the Respondent requests the Tribunal to clarify the operation of paragraph 16 of the Confidentiality Order dated 24 June 2019 ("CO"), and the timing for its confidentiality designations to the following submissions:

- Claimant's Memorial, dated 7 August 2020;
- Witness Statement of Mr. John C. Pennie, dated 7 August 2020;
- Claimant's Response to Canada's Motion of August 10, dated 18 August 2020;
- Witness Statement of Ms. Parthenya Taiyanides, dated 18 August 2020;
- Claimant's Rejoinder Response to Canada's Motion of August 10, dated 2 September 2020; and
- Witness Statement of Mr. Justin Giovanneti, dated 2 September 2020.

In particular, given that the Claimant did not label these submissions as confidential at the time of filing in accordance with paragraph 15 of the CO, the Respondent seeks the Tribunal's clarification on whether the Respondent's proposed confidentiality designations would be due (i) 21 days after the submissions were first filed; or (ii) 21 days after the expiry of a period of 21 days after the Claimant filed those submissions.

The Claimant, in response, contends that the Respondent must first submit a request to the Tribunal, pursuant to paragraph 50 of Procedural Order No. 7 dated 21 September 2020 (“PO7”), before it can propose any confidentiality designations to these submissions. Separately, the Claimant also asserts that because the Respondent failed to label as confidential its Motion dated 10 August 2020, as well as its corresponding Reply dated 26 August 2020 (together, the “Motion Materials”), it cannot now seek to make any confidentiality designations to those submissions.

The Tribunal does not consider paragraph 50 of PO7 to mean that the Respondent has to first file a formal request before it can proceed to designate information as confidential in accordance with the CO. Instead, the Respondent may proceed to designate information as confidential in accordance with the procedure set out in the CO.

In the event that the Claimant disagrees with the Respondent’s confidentiality designations regarding any information contained in the *Mesa Power* Videos which is subject to the confidentiality order issued by the *Mesa Power* tribunal, and the issue comes before the Tribunal for determination, the Tribunal will be prepared to order that any such confidential information be redacted from the publicly available versions of the Parties’ submissions, and any directions, orders or award, in accordance with paragraph 50 of PO7.

In particular, the Tribunal reiterates paragraph 50 of PO7 which provides that “the Tribunal notes that the Confidentiality Order in this arbitration defines ‘Confidential Information’ to include information ‘that is not publicly available and is designated by a Party as confidential on the grounds that it is...information subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings’.”

Accordingly, the Respondent’s proposed confidentiality designations to the Claimant’s submissions listed above would be due 21 days after the expiry of a period of 21 days after the Claimant filed those submissions in accordance with the CO. Having regard to the Tribunal’s previous order, by consent, that all confidentiality order filing deadlines under the CO be stayed from 10 August 2020 until the issuance of PO7, and unless otherwise agreed between the Parties, the Respondent is to provide the Claimant with its proposed designations by 30 October 2020 (for the Claimant’s Memorial and Mr Pennie’s witness statement) and 2 November 2020 (for the remaining four documents set out in the Respondent’s 8 October 2020 letter).

As for the Motion Materials, which the Claimant claims the Respondent failed to label as confidential in accordance with paragraph 15 the CO, the Respondent has not stated that it intends to propose any confidentiality designations therein. The Tribunal therefore does not regard this issue as having been put before it for its determination.

Should you have any questions regarding this letter, please do not hesitate to contact me at the details set forth above.

Yours sincerely,



Christel Y. Tham
Legal Counsel

cc: Mr Cavinder Bull SC (by e-mail: cavinder.bull@drewnapier.com)
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Sir Daniel Bethlehem QC (by e-mail: dbethlehem@twentyessex.com)