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VIA EMAIL

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Dear Members of the Tribunal:

RE: Investor's Request for Adjustment to Procedural Calendar to Allow for a Document Production Phase Prior to the Filing of its Counter-Memorial on Jurisdiction

We are in receipt of the PCA's communication dated November 19, 2020 regarding the potential logistics surrounding the jurisdictional hearing. In this communication, the Tribunal has suggested that a jurisdictional hearing could take place over a three-day period on September 20-22, 2021.

The Investor, Tennant Energy, is not amenable to the Tribunal's proposal - both in respect to its unavailability for the dates proposed and in the number of days it has allotted for the hearing. Tennant Energy also raises significant substantive issues regarding the jurisdictional phase.

The Tribunal's consideration of the Investor's jurisdictional standing is predicated on whether Tennant Energy had standing to bring a claim at the time of the breach. There is no question that Tennant Energy, LLC is an American juridical national. The question of standing is entirely dependent on the Tribunal's determination of whether Tennant Energy owned the protected investments on the date of the breach.

Canada does not dispute the fact that this Tribunal would have jurisdiction with respect to the registered control and shareholding of Tennant Energy in Skyway 127 if the date of the breach were to be the 2015 breach dates asserted by Tennant Energy. That matter is not in dispute. The Tribunal would have rights to consider all measures first arising after June 1, 2014.

In paragraph 44 of *Procedural Order No. 8,* this Tribunal concluded that while it was prepared to address the Respondent's objection that the Investor was not a protected "investor of a Party" in a bifurcated manner, it reserved ruling on whether the Respondent's objection that the Investor's claim was not filed prior to the expiry of the three-year period articulated in Article 1116(2) of the NAFTA should be bifurcated until "after it has had sight of the Claimant's Counter-Memorial on Jurisdiction". That Counter-Memorial on Jurisdiction is now due on January 11, 2021.

The Investor has difficulty in seeing how it could possibly have the opportunity of having its case heard on the matter of the date of the measure in the absence of necessary documentary production from Canada and extensive witness examination in advance of the filing of its Counter-Memorial on Jurisdiction, and a jurisdictional hearing on that issue.

From the Investor's perspective, the Tribunal cannot possibly determine whether Tennant Energy has standing to assert a claim on the earlier dates asserted by Canada without first coming to a determination about the actual date of breach. That determination necessitates heavy factual determinations to be made by the Tribunal. It was for that reason that Tennant Energy opposed the bifurcation as it, by necessity, requires a substantive hearing.

That substantive jurisdictional hearing will require the production of evidence first from the disputing parties.

In particular, and as more fully briefed in the Investor's October 13, 2020 filing in response to Canada's Renewed Request for Bifurcation, there are significant issues related to the date upon which Tennant Energy knew, or should have known, about the effects of the massive spoliation of government documents upon its FIT Application.[1]

There is also a very significant general issue regarding the extent and effect of the admitted conspiracy arising from the now public admission at the *Mesa Power* NAFTA hearing that there was a previously undisclosed covert body of senior government officials, known as the Breakfast Club, secretly manipulating the FIT rules and other governmental practices to reward government friends and allies."[2]

Indeed, depending on what is produced from Canada in document production, Tennant Energy may be seeking permission from the Tribunal to obtain assistance from US Courts to obtain further documentary production or depositions. This material would be required to address the issues raised in *Procedural Order No. 8* before the filing of the jurisdictional Counter-Memorial.

The reference to the "Breakfast Club" includes reference to the evidence provided at the *Mesa Power* NAFTA hearing by Assistant Ontario Deputy Energy Minister Susan Lo about the

[1] *See* Investor's *Response to Canada's Third Bifurcation Motions*, pp. 70-74; 85-87.

[2] Transcript, Tennant Energy v Canada Procedural Hearing on Bifurcation and Preliminary Motions, Transcript Day 1 (Public Version), 14 January 2010, at page 64, line 2; *see also* Investor's *Response to Canada's Third Bifurcation Motions*, ¶66.

existence of a previously unknown body of the most senior public civil service official and political officials who "fixed" issues for the government to ensure that local friends and political cronies obtained favorable outcomes. The result of these actions was to change the FIT Rules and to artificially reduce the amount of available transmission capacity to FIT Proponents to a level where Skyway 127 could not obtain a FIT Contract. These actions also enabled other FIT proponents, who were otherwise unable to be considered for FIT Contracts at that time, to obtain FIT Contracts in preference to those waiting for their first consideration as FIT launch period Proponents.

This information about the existence and role of the "Breakfast Club" and its extraordinary assistance to local favourite, International Power Canada, and possibly others, was kept hidden from the public. It only became known though the 2015 release of the post hearing submissions in the *Mesa Power* NAFTA case.

The Investor seeks guidance from the Tribunal as there could be no way in which a claim focused on this Breakfast Club disclosure, first arising at the October 2014 *Mesa Power* NAFTA Hearing, could have been known by Tennant Energy, or anyone else, before June 1, 2014. The admission of the conspiracy was not even made by the Assistant Deputy Energy Minister before the June 1, 2014 deadline date.

Thus, the Tribunal would have jurisdiction to hear such claims related to the role of the "Breakfast Club" and the Post-*Mesa Power* October 2014 NAFTA hearing disclosures such as the special treatment to International Power Canada in any event as Canada does not challenge Tennant Energy's standing to initiate a claim after January 15, 2015.

However, as noted by Tennant Energy in its response to Canada's request for bifurcation, it will require document production and witness examination to determine the timing of the spoliation and other conspiracy claims that it has alleged.[3]

Thus, fairness and due process require that a document production process precede the jurisdictional hearing. Indeed, is only after document production is finished that the Investor will be able to identify documents that should be available but for their destruction through spoliation. As such, requiring the Investor to file its Counter-Memorial on Jurisdiction, and potentially participate in a jurisdictional hearing on the timing of its claim - without the benefit of document production - would impair the Investor's ability to present its case and violate the due process guarantees provided for in Article 1115 of the NAFTA and Article 15 of the (1976) UNCITRAL Arbitration Rules.

The document production phase requested by the Investor would need to cover all the issues in the case (both on the merits and on the Investor's standing) – because of the necessary breadth and applicability of the spoliation and conspiracy issues. Thus, the Investor respectfully suggests that it would be best if Canada produced its regularly scheduled Counter-Memorial *before* the document production process.

Canada has refused to file a full Statement of Defense in this case. For any efficient document production phase to take place, the Investor must know Canada's defenses – which

[3] *See* Investor's *Response to Canada's Third Bifurcation Motions*, pp. 70-74; 85-87.

have not yet been filed – and which presumably will be included in Canada's Counter-Memorial. Thus, the Investor believes that Canada should file its Counter-Memorial (with its defenses), followed by a bilateral document production phase. The Investor's Counter-Memorial on jurisdiction would then follow. This would narrow the number of documents necessary to produce, and possibly have the beneficial effect of narrowing the issues in dispute.

In addition, at this time, it is not possible to determine the number of witnesses that will need to be heard at the eventual hearing. That would require the document production first. Without question, it seems unlikely that three days will be sufficient. We believe that it will be necessary to cross-examine several government witnesses to determine the date of the breach at issue. A full week hearing would be the minimum period needed.

Finally, the Investor notes that one of its two lead counsel is unavailable in September 2021. He is already committed to two other hearings / trials in that month. Mr. Mullins has another investor-state final hearing through the beginning of September (as does Mr. Appleton), and a jury trial starting on to commence at the beginning of October. Thus, the current proposed dates do not work for the Investor for that additional reason.

Thank you for your consideration.

Respectfully submitted,

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