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**Subject:** Re: PCA Case No 2018-54 Tennant Energy LLC v. Government of Canada  
**Date:** 17 August 2021 00:23:41

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Dear Mr. President and members of the Tribunal:

Tennant Energy writes further to the Tribunal's direction of August 12<sup>th</sup> concerning its position on the treatment in the *Tennant Energy* case of the *Mesa Power* hearing videos. This letter supplements the Investor's letter to Canada of July 23, 2021, which was set out as Annex A in Canada's August 6<sup>th</sup> letter to the Tribunal.

As the Tribunal is aware, Canada has withdrawn its confidentiality objections for information provided by Mesa Power Group considering the May 14<sup>th</sup> notification provided by Cole Robertson, the client representative for Mesa Power. In this action, Canada recognized that information that previously had been considered confidential in the *Mesa Power* claim could no longer meet the definition of confidential information in the *Tennant Energy* Claim because of the expressed position of Mesa Power Group that the information was no longer confidential.

Canada has maintained its objections over other parts of the *Mesa Power* Hearing videos containing information that did not arise from Mesa Power Group. These are set out in Annex B of Canada's August 6<sup>th</sup> letter.

The first part of Mr. Robertson's May 14<sup>th</sup> letter addressed the instructions given to Mesa Power's counsel to have access to non-confidential information. The letter stated:

[Mesa Power Group authorized disseminating non-confidential information that was filed or assembled by Mesa Power Group in its NAFTA dispute to the public. I communicated these instructions to our lawyers Barry Appleton and Ed Mullins in the winter of 2016.](#)

[I authorize the release of the handwritten notes of Mr. Appleton's telephone communication with Mr. Pickens of March 14, 2016.](#)

While Canada paid attention to the first part of the May 14, 2021 notification, it ignored the second part of this notification:

[Furthermore, I understand that the videos of the Mesa Power hearings were subsequently published on the internet for over five years. Mesa Power Group was not consulted by the Permanent Court of Arbitration when the PCA made the decision to remove these videos from the internet in 2020 upon the unilateral request of the Government of Canada. In my view, all of these videos are in the public domain. Had we been asked, we would have maintained our policy of public access to information about this NAFTA arbitration claim. We had no objection to the continued publication of the full Mesa Power NAFTA hearing videos.](#)

Mesa Power Group indicated that there is no confidentiality over the *Mesa Power* Hearing videos. This declaration is equivalent to a waiver of confidentiality.

As one of the two disputing parties to the *Mesa Power* claim, Mesa Power has indicated directly that the *Mesa Power* hearing videos are no longer confidential and that it had no objection to the "continued publication of the full Mesa Power NAFTA hearing videos."

With this confirmation, it is no longer possible to consider the *Mesa Power* Hearing videos as confidential information between the disputing parties in that earlier NAFTA claim.

It is a fact that the Mesa Power Group NAFTA hearing videos have been available to the public for more than five years on the internet. Now we have direction from the other disputing party to that dispute that Mesa Power considers the contents of the hearing video not to constitute confidential information. This information requires that the Tribunal reconsider its earlier determination, made without having this information from Mesa Power Group.

In such circumstances, it is simply not possible to credibly designate the remaining portions of the hearing video as confidential. With the pro-public access position of Mesa Power Group known and the fact of the widespread publication of the video a non-disputed fact, it is simply not possible to consider the remaining portions of the *Mesa Power* Hearing as confidential.

Accordingly, the Investor opposes all of Canada's remaining confidentiality designations to the *Mesa Power* Hearing videos. The foundation of Canada's objections is based all upon the incorrect assertion that the

*Mesa Power* Hearing videos remain confidential.

To confer confidentiality on these public documents would result in a manifestly absurd interpretation of the term “confidential” in the *Confidentiality Order* to protect information in the Tennant Energy arbitration that was once confidential but is no longer confidential. We also note that Canada’s actions to hide this evidence from the public risk rendering inutile the formally expressed commitment made by the majority of the NAFTA Parties to transparency in the NAFTA investor-state process.

Transparency is one of the three interpretative principles of the NAFTA set out in Article 102 of the treaty. The Investor remains in favor of transparency in this investor-state process and asks that the Tribunal consider this in coming to its conclusion on this matter.

Yours very truly,

Nabeela Latif