

Annex: Canada's Proposed Designations to *Mesa Power* Hearing Video Exhibits

S/N	Exhibit	Time Frame to be Designated (HH:MM to HH:MM)	Objections to Designation		Reply to Objections	Tribunal's Decision
			Reasons	Designation		
1.	C-201	00:24:53 – 00:34:39  00:35:28 – 00:44:28  00:46:15 – 00:49:42	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portions of this exhibit display or make reference to information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, these portions meet the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.</p> <p>Canada has not waived confidentiality over the identified time frame portions of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit. Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the <i>Mesa Power</i> Videos at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portions meet the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	<p>The Tribunal allows the Respondent's proposed Confidential Information designations. The Tribunal hereby sets out its reasons below.</p> <p>The Claimant submits that it is not enough that the material was once covered by a confidentiality order by another tribunal, but that the information must continue to meet the definition of confidential information in the current arbitration. According to the Claimant, the client representative of Mesa Power Group, Mr. Cole Robertson, issued a notification on 14 May 2021 stating that Mesa Power Group "had no objection to the continued publication of the full Mesa Power NAFTA hearing videos". Additionally, the <i>Mesa Power</i> hearing videos were publicly on the internet for over five years. Given that one of the two disputing parties to <i>Mesa Power</i> has indicated that the <i>Mesa Power</i> hearing videos are no longer confidential, it is "no longer possible to consider the <i>Mesa Power</i> Hearing Videos as confidential information between the disputing parties".</p> <p>In response, the Respondent submits that the identified time frame portions of the exhibit display or make reference to information deemed confidential pursuant to the confidentiality order issued in <i>Mesa Power</i>. The Respondent did not waive confidentiality over the identified time frame portions of the exhibit, nor the information contained therein, and this was accepted by the Tribunal in Procedural Order No. 7. Should the Tribunal disagree that the information contained in the identified time frame portions meet the criteria set out in Confidentiality Order paragraph 1(1)(b)(v), the Respondent maintains that the information should in any event be designated</p>

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						<p>as confidential under paragraph 1(1)(b) of the Confidentiality Order.</p> <p>The starting point of the Tribunal's analysis is paragraph 1(1)(b) of the Confidentiality Order, which provides that "<i>Confidential Information</i>" means "<i>information that is not publicly available</i>" and is designated by a Party as confidential on the grounds that it is <i>inter alia</i> "<i>information subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings</i>".</p> <p>While the <i>Mesa Power</i> hearing videos were publicly available on the internet for over five years, these videos have since been removed from the public domain. They are thus no longer publicly available. The issue then is whether the Respondent can be said to have waived confidentiality over the <i>Mesa Power</i> hearing videos. The Tribunal has decided this issue in the negative in Procedural Order No. 7, and the Tribunal sees no reason to revisit its decision.</p> <p>Insofar as the Claimant argues that the Respondent's "proposed redactions in a number of places purport to redact information that could never have been confidential", it is not clear from the Claimant's letter dated 6 August 2021 why this is so.</p> <p>Insofar as Mesa Power Group has waived confidentiality over the <i>Mesa Power</i> hearing videos, the Tribunal is unable to accept the Claimant's argument that this must <i>ipso facto</i> mean that the <i>Mesa Power</i> hearing videos have lost their confidentiality.</p> <p>In this regard, the Tribunal notes that the Respondent has withdrawn its confidentiality objections for information provided by the Mesa Power Group in light of the 14 May 2021 notification from Mr. Cole Robertson, but</p>

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						<p>has maintained its objections over parts of the <i>Mesa Power</i> hearing videos containing information which did not arise from the Mesa Power Group: see Claimant's email to the Tribunal dated 16 August 2021.</p> <p>In other words, the Respondent is merely maintaining confidentiality over information which did <i>not</i> arise from the Mesa Power Group, and which is subject to the confidentiality order in <i>Mesa Power</i>. Since the information did not arise from the Mesa Power Group, the confidentiality of such information cannot be waived by the Mesa Power Group. Accordingly, the criteria set out in paragraph paragraph 1(1)(b) of the Confidentiality Order is met, and the Tribunal rejects the Claimant's objections to the Respondent's proposed Confidentiality Information designations.</p>
2.	C-204	1:24:54 – 1:26:22	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portion of this exhibit displays or makes reference to information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, this portion meets the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.</p> <p>Canada has not waived confidentiality over the identified time frame portion of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit. Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information</p>	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-204 for the same reasons as set out above at S/N 1.

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					<p>contained in the <i>Mesa Power Videos</i> at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portion meets the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frame be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	
3.	C-205	00:08:15 – 00:25:40 00:26:53 – 00:29:44 00:40:43 – 44:32	The Claimant's objections to Canada's Proposed designations contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portions of this exhibit display or make reference to Information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, these portions meet the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings. Canada has not waived confidentiality over the identified time frame portions of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit.</p> <p>Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the <i>Mesa Power Videos</i> at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portions meet the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-205 for the same reasons as set out above at S/N 1.

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4.	C-206	1:09:45 – 1:20:00	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>Canada withdraws its confidential designations with respect to C-206 1:12:07 – 1:20:00 in consideration of the email of Mr. Cole Robertson May 14, 2021 as contained in the Claimant's objections set out in Annex A.</p> <p>However, Canada maintains its designation with respect to C-206 1:09:45 – 1:12:06, as this portion of the exhibit Displays and/or makes reference to information which was subject to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, this portion meets the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as 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.</p> <p>Canada has not waived confidentiality over the identified time frame portion of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit. Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the <i>Mesa Power</i> Videos at para. 38 of Procedural Order 7.</p> <p>Should the Tribunal disagree that C-206 1:09:45 – 1:12:06 meets the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the identified time frame portion be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	<p>The Tribunal notes the Respondent's withdrawal of its confidential designations with respect to C-206 1:12:07 – 1:20:00 in consideration of Mr. Cole Robertson's notification dated 14 May 2021. Consequently, no ruling is required by the Tribunal with respect to C-206 1:12:07 – 1:20:00.</p> <p>The Tribunal allows the Respondent's proposed Confidential Information designations with respect to C-206 1:09:45 – 1:12:06 for the same reasons as set out above at S/N 1.</p>

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5.	C-208	00:43:03 – 00:53:16  1:30:25 – 1:50:56 (i.e., end of video)	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portions of this exhibit display or make reference to information which was subject to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, these portions meet the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as 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.</p> <p>Canada has not waived confidentiality over the identified time frame portions of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit.</p> <p>Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the <i>Mesa Power</i> Videos at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portions meet the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-208 for the same reasons as set out above at S/N 1.
6.	C-226	1:02:01 – 1:07:41  1:14:25 – 1:16:04	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		Canada withdraws its confidential Designations with respect to C-226 1:02:01 – 1:07:41 and 1:15:17 – 1:16:04 in consideration of the email of Mr. Cole Robertson May 14, 2021 as contained in the Claimant's objections set out in Annex A.	The Tribunal notes the Respondent's withdrawal of its confidential designations with respect to C-226 1:02:01 – 1:07:41 and 1:15:17 – 1:16:04 in consideration of Mr. Cole Robertson's notification dated 14 May 2021. Consequently, no ruling is required by the

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					<p>However, Canada maintains its designation with respect to C-226 1:14:25 – 1:15:16, as this portion of the exhibit displays and/or makes reference to information which was subject to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, this portion meets the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as 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.</p> <p>Canada has not waived confidentiality over the identified time frame portion of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit.</p> <p>Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the <i>Mesa Power</i> Videos at para. 38 of Procedural Order 7.</p> <p>Should the Tribunal disagree C-226 1:14:25 – 1:15:16, meets the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the Identified time frame portion be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	<p>Tribunal with respect to C-226 1:02:01 – 1:07:41 and 1:15:17 – 1:16:04.</p> <p>The Tribunal allows the Respondent's proposed Confidential Information designations with respect to C-226 1:14:25 – 1:15:16 for the same reasons as set out above at S/N 1.</p>
7.	C-231	00:16:35 – 00:24:30  1:28:34 – 1:30:13	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021		The identified time frame portions of this exhibit display or make reference to information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012.	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-231 for the same reasons as set out above at S/N 1.

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					<p>As such, these portions meet the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.</p> <p>Canada has not waived confidentiality over the identified time frame portions of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit. Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the Mesa Power Videos at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portions meet the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	
8.	C-232	0:57:12 – 1:03:39	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portion of this exhibit displays or makes reference to information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, this portion meets the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.</p> <p>Canada has not waived confidentiality over the identified time frame portion of this</p>	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-232 for the same reasons as set out above at S/N 1.

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					<p>exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit.</p> <p>Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the Mesa Power Videos at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portion meets the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	
9.	C-237	00:03:06 – 00:09:08	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portion of this exhibit displays or makes reference to information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, this portion meets the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.</p> <p>Canada has not waived confidentiality over the identified time frame portion of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit.</p> <p>Further, the Tribunal has already accepted Canada's position that it did not waive</p>	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-237 for the same reasons as set out above at S/N 1.

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					<p>confidentiality of the information contained in the <i>Mesa Power</i> Videos at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time frame portion meets the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).</p>	
10.	C-239 <sup>1</sup>	00:24:36 – 00:25:13	The Claimant's objections to Canada's proposed designations are contained in its letter of July 23, 2021 to the Respondent, found at Annex A to Canada's letter of August 6, 2021.		<p>The identified time frame portion of this exhibit displays or makes reference to information which was deemed confidential pursuant to the Confidentiality Order of <i>Mesa Power v. Canada</i> dated 21 November 2012. As such, this portion meets the criteria set out in Procedural Order No. 7 at para. 50 and the Confidentiality Order para. 1(1)(b)(v) as information that is subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.</p> <p>Canada has not waived confidentiality over the identified time frame portion of this exhibit, nor the information contained therein. As Canada has previously indicated to the Tribunal, including in Canada's Motion of August 10, 2020 and Canada's Reply of August 26, 2020 there has been no waiver by Canada of the information contained in this exhibit.</p> <p>Further, the Tribunal has already accepted Canada's position that it did not waive confidentiality of the information contained in the <i>Mesa Power</i> Videos at para. 38 of Procedural Order 7.</p> <p>Finally, should the Tribunal disagree that the information contained in the identified time</p>	The Tribunal allows the Respondent's proposed Confidential Information designations to exhibit C-239 for the same reasons as set out above at S/N 1.

<sup>1</sup> Canada has only proposed designations up until the 00:29:50 time stamp, as the exhibit as no sound or picture appears on the video beyond this point. Should the Claimant choose to file a fully functioning version of this exhibit, Canada reserves its right to propose designations to the remainder of the video. Canada notes that the Claimant has not responded to Canada on this point as of the time this submission has been made to the Tribunal.

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					frame portion meets the criteria set out in Confidentiality Order para. 1(1)(b)(v), Canada maintains that the information in the identified time frames be designated as confidential as provided in Confidentiality Order para. 1(1)(b).	