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23 December 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 concerning the issues related to the bifurcated hearing raised in the Claimant's letter dated 30 November 2020, and the Respondent's response, as set out in its letter dated 15 December 2020.

***Procedural Calendar in the Preliminary Phase of Proceedings***

By its letter dated 30 November 2020, the Claimant submitted that "fairness and due process require" that there be document production in the preliminary phase of the proceedings. The Claimant further submitted that it should file its Counter-Memorial on Jurisdiction only after the Respondent has filed its Counter-Memorial on merits and damages, and the proposed document production phase has occurred. According to the Claimant, these procedural steps are necessary regardless of whether the Tribunal bifurcates one or two jurisdictional issues in the preliminary phase of the proceedings. The Respondent objected to the Claimant's submissions in their entirety and requested that the Tribunal award the associated costs incurred in its favour.

Having carefully considered the Parties' respective submissions on these issues, the Tribunal rejects the Claimant's submissions and maintains the procedural calendar as set out in Procedural Order No. 1 ("PO1") and Procedural Order No. 8 ("PO8").

The Tribunal recalls that, after having directly considered whether document production should occur in the preliminary phase should the proceedings be bifurcated, it had already decided against this in PO1. The Tribunal further recalls that in PO8, it granted the Respondent's renewed request to bifurcate in respect of the first of two jurisdictional objections, namely that the Claimant was not a protected "investor of a Party" when the alleged breach occurred, and therefore has not met the requirements of Article 1116(1) of the NAFTA (the "**First Objection**"). As to the second jurisdictional objection, namely that the Claimant's claim was not filed prior to the expiry of the 3-year limitation period articulated in Article 1116(2) of the NAFTA (the "**Second Objection**"), the Tribunal held that it would decide on the question of bifurcation "after it has had sight of the Claimant's Counter-Memorial on Jurisdiction." The Tribunal then set 11 January 2021 as the deadline for the Claimant's Counter-Memorial on Jurisdiction.

The Tribunal presently sees no reason to revisit its decisions in PO1 and PO8 or adjust the procedural calendar, as the Claimant proposes.

To the extent that the Claimant seeks documents relating to the merits because it takes the view that such documents are to be produced before the Tribunal may resolve the Respondent's First Objection, such a request is, in the Tribunal's view, effectively an attempt to re-litigate the issues decided in PO1 and PO8 and should not be countenanced.

As to the Second Objection, the Tribunal is not convinced by the Claimant's argument. The Claimant alleges that the issue in the Second Objection is whether "the date upon which Tennant Energy knew or should have known about the effects of [the Respondent's] alleged breaches" occurred more than three years prior to the filing of the Notice of Arbitration. If this is the case, then the Claimant would have to show, in its Counter-Memorial on Jurisdiction, what it knew or did not know at the material time, or whether it should have reasonably known about the alleged breaches and losses based on documents in its possession and/or public records. The Tribunal finds it difficult to see why document production from the Respondent is necessary for this submission.

If, after having had sight of the evidence which the Claimant intends to adduce, the Tribunal decides that the Respondent's Second Objection is too intertwined with the merits, the solution is not to allow for document production at this stage or for the Respondent to file its Counter-Memorial on the merits and damages. Rather, the Tribunal considers that the appropriate solution would be to proceed in accordance with what the Tribunal has already decided in PO8, namely to have a bifurcated hearing addressing only the Respondent's First Objection.

Accordingly, the Tribunal confirms that, in accordance with PO1 and PO8, the Claimant's Counter-Memorial on Jurisdiction shall be due on 11 January 2021. Thereafter, after determining whether the Second Objection will be addressed in the preliminary phase of the proceedings, the Tribunal shall fix the deadlines for the remaining procedural steps in accordance with the procedural calendar set out in Annex 1 of PO1. The issue of costs is reserved to a further order, decision, or award.

### ***Length and Date of the Bifurcated Hearing***

In its 30 November letter, the Claimant submits that while it is currently "not possible to determine the number of witnesses that will need to be heard" at the bifurcated hearing, in its view, "it seems unlikely that three days will be sufficient" and that a "full week hearing would be the minimum period needed." In the Respondent's view, a three-day hearing as proposed by the Tribunal, is sufficient. The Tribunal further understands, based on the Claimant's email of 9 December 2020, that the Parties are

available in the period between 8 and 19 November 2021, with the Claimant having a preference for the period between 15 and 19 November 2021.

Given the current uncertainty concerning the number of witnesses that the Claimant intends to put forward with its Counter-Memorial on Jurisdiction, the Tribunal considers it prudent for all parties to reserve at least five days for the bifurcated hearing for the moment. After it has decided on the scope of the bifurcated hearing, the Tribunal shall then confirm the length of the bifurcated hearing as well.

The Tribunal accordingly requests both Parties to reserve 15 to 19 November 2021 as potential dates for the bifurcated hearing.

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

Yours sincerely,



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