

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA  
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

**MESA POWER GROUP, LLC**

Claimant

and

**GOVERNMENT OF CANADA**

Respondent

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**PROCEDURAL ORDER NO. 8**

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**ARBITRAL TRIBUNAL**

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

**Secretary of the Tribunal**

Rahul Donde

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## **I. PROCEDURAL BACKGROUND**

1. In its communication of 28 April 2014, the Respondent raised several complaints in respect of the Claimant's compliance with the Tribunal's rulings on confidentiality. It submitted the table provided in Procedural Order No. 6 in which it challenged the Claimant's confidentiality designations, explaining why each of the designations was inappropriate. In its communication of 5 May 2014, the Claimant commented on the Respondent's complaints. It responded to each of the Respondent's challenges in the same table. This Order deals with various issues arising out of the Parties' submissions.

## **II. THE REQUESTS**

### **A. DESIGNATIONS IN THE CLAIMANT'S AMENDED MEMORIAL**

#### **1. The Respondent's position**

2. The Respondent submits that on 16 December 2013, the Tribunal had struck each of the Claimant's Restricted Access designations that appeared in a 23-page section of the Claimant's Memorial. Despite this, in its amended Memorial, the Claimant maintained 18 Restricted Access designations. Accordingly, the Respondent informed the Tribunal that it had proceeded on the basis that the information in question was not Restricted Access vis-à-vis the Respondent, but was Restricted Access vis-à-vis the Claimant.

#### **2. The Claimant's position**

3. In its response, the Claimant opposes the Respondent's position on the basis that the Respondent had never specifically challenged the designations in question. According to the Claimant, this was "the first time that Canada has ever identified these 23 pages and the first time that Canada articulated challenges in a form consistent with [the tabular form it used later]." The Claimant emphasizes that it has always complied with the Tribunal's directions, and that the Respondent's claims to the contrary are misleading and incorrect.

### 3. Analysis

4. The Tribunal recalls that in its letter of 25 November 2013, the Respondent had challenged the Restricted Access designations made by the Claimant in a 23-page section of the Claimant's Memorial.<sup>1</sup> In its ruling on the challenges, the Tribunal found:

“the Respondent clearly challenged all Restricted Access designations in the identified 23-page section of the Claimant's Memorial. It was then obviously incumbent upon the Claimant to justify these designations. According to the Tribunal, the Claimant has not done so. In fact, in some cases, the Claimant has not provided any explanation at all for its Restricted Access designations. [...] In these circumstances, *the Tribunal cannot uphold the Claimant's designations*, especially when the Claimant who was well aware of the challenges chose not to address them.”
5. As a result, the Tribunal denied the Claimant's Restricted Access designations. However, it observed that if the Claimant wished to designate the information in question as Confidential, it could do so by 23 December 2013. Alternatively, the Claimant was given leave to withdraw that information from the record. In its communication of 23 December 2013, the Claimant did not precisely designate any such Restricted Access information as Confidential.<sup>2</sup> Thus, the Tribunal understands that the Claimant did not intend to make any Confidential designations in the 23-page section of its Memorial. On this basis, the Tribunal would be entitled to reject all the Restricted Access designations claimed by the Claimant in its amended Memorial.
6. However, the Tribunal finds that this approach would be unnecessarily formalistic. Not all the designations presently challenged by the Respondent were specifically challenged earlier in its 25 November 2013 letter. Further, the Respondent has itself agreed that some designations in the 23-page section of the Memorial should remain Restricted Access. Of the 14 designations at issue now, only eight appear to be contested. Therefore, rather than denying the designations summarily, the Tribunal has proceeded to examine each challenge. The Tribunal's determination in respect of each designation is contained in Annex A hereto, which forms an integral part of the present Procedural Order.

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<sup>1</sup> While the letter did not precisely designate the relevant 23 pages, the pages could be identified on reading the letter in context.

<sup>2</sup> The Claimant's communication of 23 December 2013 considered only 11 "Restricted Access" designations made by the Respondent in its communication of 25 November 2013 ("Further to the Tribunal's letter of December 16, 2013, we write in regards to eleven "Restricted Access" designations challenged in Canada's letter of November 25.")

## **B. DESIGNATIONS IN THE CLAIMANT'S AMENDED EXHIBITS AND EXPERT REPORT**

### **1. The Respondent's position**

7. Here, the Respondent contends that when filing its amended exhibits, the Claimant disregarded the Tribunal's earlier orders by continuing to apply blanket Restricted Access designations to over 50 exhibits (the "Samsung and Pattern documents"). It argues that the Tribunal had amended the schedule on several occasions to allow the Claimant to comply with the Confidentiality Order. As the Claimant has not complied, "[t]he Tribunal should deem the Claimant's refusal [...] to be a decision by the Claimant to withdraw this information, and any reference to it, from the record in this arbitration."

### **2. The Claimant's position**

8. In its reply, the Claimant reiterates that it has always followed the process established by the Tribunal. It submits that the U.S. court orders governing the Samsung and Pattern documents required that the existing confidentiality designations be maintained until "a ruling from the Tribunal [...] address[ed] the confidentiality of these documents." The Respondent had not specifically challenged any designations in the Samsung and Pattern documents. As a result, the Tribunal had not ruled on their confidentiality. In the absence of a ruling, the Claimant was bound to retain the confidentiality designations imposed in the relevant U.S. court proceedings. Finally, it submits that "Canada's approach to [the documents in question] is not only inefficient, but creates obstacles in the use of such relevant evidence, rather than promoting transparency." The documents were relevant and material, and should not be struck from the record.

### **3. Analysis**

9. The Claimant submits that because the Tribunal has not ruled on the confidentiality of the Samsung and Pattern documents, the existing U.S. court orders prevent it from altering the existing confidentiality designations of those documents. The Tribunal finds this position difficult to follow. In Procedural Order No. 6, the Tribunal directed the Claimant to file an amended Memorial and supporting documents "*complying with the Tribunal's decisions...*" Thus, the Tribunal ruled that the amended exhibits to be filed by the Claimant (which would include the Samsung and Pattern documents) should comply with the Tribunal's decisions (i.e. the designations made in those documents should not simply reflect the designations made by third parties to the arbitration, but should satisfy the requirements of the Confidentiality Order). According to the Tribunal,

this ruling should have been sufficient to meet the Claimant's concerns about compliance with the U.S. court orders.

10. Nevertheless, it is true that in Procedural Order No. 6 the Tribunal made a general order on the Claimant's Memorial and accompanying documents. It did not *specifically* rule on the confidentiality of the Samsung and Pattern documents. If the Claimant had altered the designations of the Samsung and Pattern documents on the basis of the Tribunal's general order, it might have been argued that it was not acting in conformity with the U.S. court orders. In the circumstances, the Tribunal believes that it is more appropriate for it to review the Respondent's challenges to determine whether the Claimant's confidentiality designations should be upheld, rather than denying the designations on the basis of its previous orders.
11. The Tribunal's decision in respect of the Respondent's challenges is contained in Annex A hereto. In deciding these challenges, the Tribunal has kept in mind the Claimant's submission that the Tribunal has the authority to decide the confidentiality of the Samsung and Pattern documents. The Tribunal has also kept in mind that in several instances the Claimant has not disputed the designations sought to be placed on these documents by the Respondent.

## **C. SOURCE OF DESIGNATION**

### **1. The Respondent's position**

12. In its communication of 28 April 2014, the Respondent notes that, contrary to the Tribunal's direction on 16 December 2013, the Claimant has not indicated the source of its Restricted Access designations in its submissions (i.e. whether the designation has been made by the Claimant or by the Respondent). It points out that the Claimant's failure to follow the Tribunal's directions "would lead to confusion and disorder in preparing for and at the hearing."

### **2. The Claimant's position**

13. The Claimant replies that the Tribunal's direction only applied to "future submissions". The Memorial was filed prior to the Tribunal's direction, and hence the direction was inapplicable. The direction was prospective, not retrospective. In any event, according to the Claimant, the documents which were relied upon in the Memorial and which

contained information designated as Restricted Access by the Respondent could be identified easily.

### 3. Analysis

14. For the reasons mentioned below, the Claimant is to file a revised Memorial and accompanying submissions. The Claimant has itself stated that it will comply with the Tribunal's 16 December 2013 direction in this revised filing.<sup>3</sup> Hence, this matter requires no decision.

### D. NEXT STEPS

15. As mentioned above, the Tribunal's decisions on the challenges made by the Respondent are contained in Annex A hereto. The Claimant will have to modify the existing confidentiality designations in its submissions in accordance with the Tribunal's decisions. In the circumstances, the Tribunal believes that it would benefit from receiving revised submissions from the Claimant that comply with all of the Tribunal decisions. The Claimant too has recognized that such revised submissions will be needed.<sup>4</sup>
16. On this basis, the Tribunal revises the existing calendar as follows:
  - a. 13 May 2014 – Claimant to retain/withdraw the additional designations it requested on 8 May 2014 in respect of the Counter-Memorial and supporting documents;
  - b. 15 May 2014 – Claimant to produce its amended Memorial and supporting documents;
  - c. 16 May 2014 – Respondent to comment on the additional designations requested by the Claimant at item (a) above (if any);
  - d. 20 May – Claimant to produce public versions of its amended Memorial and supporting documents;
  - e. 21 May – Tribunal's decision (if any) on the additional designations in the Respondent's re-designated Counter-Memorial and supporting documents;
  - f. 28 May – Respondent to produce its amended Counter-Memorial and supporting documents (if required);
  - g. 2 June – Respondent to produce public version of its re-designated Counter-Memorial and supporting documents; and,
  - h. 6 June 2014 – Notification to third parties.

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<sup>3</sup> Claimant's communication of 5 May 2014 (“[...] the Investor can identify information designated by Canada as Restricted Access in the version of the Memorial that will be amended to reflect the forthcoming decisions of the Tribunal on Canada's supplemental confidentiality designation challenges.”)

<sup>4</sup> Ibid.

17. On the basis of the decisions in this Order, the Claimant shall make the necessary modifications in its Memorial, exhibits, and expert report. The Tribunal would appreciate receiving copies of the documents so modified in accordance with the rules prescribed in Procedural Order No. 1. Unless it hears from the Claimant to contrary by **20 May 2014**, the Tribunal will replace the Memorial, exhibits, and expert report presently with the Tribunal with the modified versions of these documents to be filed by the Claimant on 15 May 2014. If required, the same process will be followed for the amended Counter-Memorial and supporting documents.

### III. DECISION

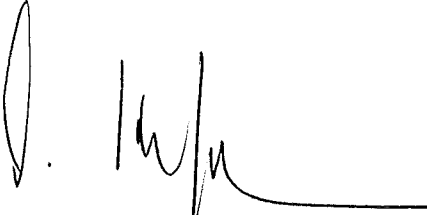
18. For the reasons set out above, the Tribunal:
- i. decides requests (A) and (B) in connection with the Claimant's designation of information in its Memorial, exhibits, and expert report as stated in Annex A, which forms an integral part of this Order;
  - ii. amends the calendar as follows:
    - a. 13 May 2014 – Claimant to retain/withdraw the additional designations it requested on 8 May 2014 in respect of the Counter-Memorial and supporting documents;
    - b. 15 May 2014 – Claimant to produce its amended Memorial and supporting documents;
    - c. 16 May 2014 – Respondent to comment on the additional designations requested by the Claimant at item (a) above (if any);
    - d. 20 May – Claimant to produce public versions of its amended Memorial and supporting documents;
    - e. 21 May – Tribunal's decision (if any) on the additional designations in the Respondent's re-designated Counter-Memorial and supporting documents;
    - f. 28 May – Respondent to produce its amended Counter-Memorial and supporting documents (if required);
    - g. 2 June – Respondent to produce public version of its re-designated Counter-Memorial and supporting documents; and,
    - h. 6 June 2014 – Notification to third parties.
  - iii. reserves all questions of costs for subsequent determination.



Seat of arbitration: Miami, Florida, U.S.A

Date: 9 May 2014

**For the Arbitral Tribunal:**



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Prof. Gabrielle Kaufmann-Kohler  
President of the Arbitral Tribunal