

**Proceeding 397**

October 05, 2020

By email only

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ISH Energy Ltd.

Canadian Natural Resources Limited

Attention: Laura-Marie Berg

Attention: JoAnn P. Jamieson

**RE: Regulatory Appeal 1927181**  
**Confidentiality and In Camera**

Dear Counsel:

I am writing on behalf of the Alberta Energy Regulator (AER) panel of hearing commissioners (the panel) assigned to this proceeding. The panel has considered the parties' correspondence dated October 1, 2020, in response to the panel's September 30, 2020, request for comments on holding a single *in camera* session, what an *in camera* session would look like, and the estimated time each party anticipated needing to question on the Confidential Information in an *in camera* session.

Canadian Natural Resources Limited (Canadian Natural) requests that the confidential session be scheduled at the beginning of the hearing, because the confidential information filed by Canadian Natural is all geological and geophysical data that relates to the first hearing issue regarding effective containment as well as the issue of whether or not there are faults and fractures in the area. Canadian Natural further requests that the hearing panel scope the *in camera* session to include direct evidence on the first hearing issue plus the issue of faults/fracturing. Canadian Natural submits that its technical submissions on the first hearing issue and the faults/fracturing issue are all underpinned by its confidential data and addressed in its direct evidence. Canadian Natural anticipates needing two hours to question ISH on its submission regarding the Confidential Information and one hour to present its direct evidence on the first hearing issue plus faults and fractures.

ISH Energy Ltd. (ISH) submits that it currently anticipates that much of its cross-examination will be focused on the Confidential Information. ISH also submits that all Canadian Natural questions to ISH

regarding geology and seismic would need to proceed *in camera*, because it is difficult to conceive of how ISH witnesses could respond to such questions without making some reference to the Confidential Information. Finally, ISH concludes that the management of the Confidential Information will require that most of the hearing be held *in camera*.

The panel is of the view that its confidentiality decision dated August 10, 2020 (Confidentiality Decision), does not extend beyond access to or receipt of the Confidential Information, described in the decision as:

- ISH-CNRL-001 – access to the cores and / or digital copies of the analyses done on the core for the wells highlighted in Tab 7 – Cored Wells Evaluated of the Canadian Natural hearing submission;
- ISH-CNRL-002 – copies of GCMS data relied on by Canadian Natural;
- ISH-CNRL-003 – copies of image logs for the 20 wells referenced in paragraph 125 of Canadian Natural’s submission; and
- ISH-CNRL-004 – access to Canadian Natural’s propriety 3D seismic data as referenced in paragraph 111 of Canadian Natural’s submission (including acquisition parameters and processing details).

The confidentiality decision was issued under section 49(4) of the *Alberta Energy Regulator Rules of Practice (Rules)*. There is nothing in section 49 that suggests references in subsequent submissions or the hearing to the information over which confidentiality is granted are also to be treated confidentially.

AER hearings are presumptively open to the public under section 25(1) of the *Rules*. This accords with the AER’s role as an administrative decision maker and its public mandate.

Section 25(2) sets out the limited circumstances in which a hearing or part of it will be conducted in private:

**Hearings in absence of the public**

**25(1)** Subject to subsections (2) and (3), all oral hearings and electronic hearings are open to the public.

**(2)** If the Regulator considers it necessary to prevent the disclosure of sensitive personal, financial or commercial matters or other matters because, in the circumstances, the need to protect the confidentiality of those matters outweighs the desirability of an open hearing, the Regulator shall conduct all or part of the hearing in private.

(3) If all or any part of an oral hearing or electronic hearing is to be held in private, no party may attend the hearing unless the party files an undertaking stating that the party will hold in confidence any evidence heard in private.

In determining whether, in the circumstances, the need to protect the confidentiality of the information outweighs the desirability of an open hearing, the panel has regard for the requirements under section 49(4)(b) of the *Rules*. That is, would disclosure of the information reasonably be expected to cause significant harm to Canadian Natural's competitive position or result in undue financial loss to Canadian Natural or gain to a competitor.

While the panel is still of the view that access to the *entire* set of data that is currently subject to the Confidentiality Decision could reasonably be expected to result in significant harm to Canadian Natural, it is not persuaded that references in oral testimony to specific and limited elements of that data would be equally prejudicial. This is particularly the case as the panel is of the understanding that the wells that are the subject of the Confidential Information are beyond the one-year confidentiality period for geological information, pursuant to section 12.150 of the *Oil and Gas Conservation Rules*. Furthermore, it appears that most of the seismic images provided, with the exception of one section (C-C'), was submitted by Canadian Natural in its non-confidential hearing submission.

The panel has determined it does not have sufficient evidence before it to conclude that the specific and limited references to the Confidential Information that it anticipates will be made at the hearing could reasonably be expected to cause significant harm to Canadian Natural's competitive position or result in undue financial loss to it or gain to a competitor, let alone sufficient evidence to determine that the need to protect the confidentiality of those specific and limited references outweighs the desirability of an open hearing.

To be clear, subject to being persuaded to the contrary, the panel does not plan to hold any of this hearing in private.

The panel remains open however, to having a single *in camera* session, if evidence is presented which satisfies the test enumerated above.

Regards,  
*Tammy Turner*  
Hearing Coordinator, Hearing Services

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cc: Karen Lilly, AER Regulatory Applications

Alana Hall and Scott Poitras, AER counsel for the panel