

Proceeding 397
November 12, 2020

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By email only

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ISH Energy Ltd.

Attention: Laura-Marie Berg

RE: Regulatory Appeal 1927181
Motion to Reopen the Hearing

Dear Counsel:

I am writing on behalf of the Alberta Energy Regulator (AER) panel of hearing commissioners (the panel) assigned to this proceeding.

On November 6, 2020, ISH Energy Ltd. (ISH) filed a motion pursuant to section 44 of the *Alberta Energy Regulator Rules of Practice* seeking leave to submit a written legal argument clarifying its position on the following three legal issues (the Motion):

- a. The Proceeding being in the nature of a hearing *de novo*;
- b. Application of the reasonableness test, if applicable; and
- c. Discharge of the relevant onus.

The panel has reviewed the Motion, Canadian Natural Resources Limited's (Canadian Natural) response filed November 9, 2020, and ISH's reply filed November 10, 2020.

The panel has decided to deny the Motion, for the reasons that follow.

Background of Regulatory Proceeding 397

This proceeding is a regulatory appeal commenced by ISH when it filed a request for regulatory appeal in February 21, 2019. Both parties had the opportunity to file extensive written submissions in the course of that process.

The panel identified the issues for this appeal by way of a letter dated April 30, 2020, after soliciting comments from the parties on the issues. Both parties agreed with the panel's description of the issues. The panel established a process that included submissions from both parties and reply submissions from ISH. It also included a formal information request and response process.

Eventually, an electronic hearing was scheduled to be held from October 13 – 16, 2020. Each party was given the opportunity to file a written summary of its direct evidence, orally present its direct evidence, and question the other party's witnesses. ISH also provided rebuttal evidence.

In a letter dated October 6, 2020, the panel set out the schedule for the oral portion of the hearing. It advised the parties that “[t]he panel would like the parties to be prepared for final argument upon finishing the evidentiary portion of the hearing.” (emphasis added)

In remarks at the opening of the oral hearing, the panel chair advised the parties that:

We'll decide the mode and timing for final argument at the conclusion of the evidentiary portion of the hearing, but we plan to give counsel for the parties an opportunity to share their views on mode and timing for final argument at the opening of the first afternoon session tomorrow...

I can tell you that I think our -- our preference all things being equal would actually be to have online oral argument at the end of the week. (emphasis added)

The panel did solicit the parties' views on the mode and timing for final argument on the second day of the oral hearing. ISH expressed a preference for written argument on what it described as an expedited basis – about one week after the close of the evidentiary portion of the hearing. It referred to the “heavily visual” nature of the hearing as the basis for saying written argument would be more appropriate. Canadian Natural said it was prepared to proceed with oral argument at the close of the evidentiary portion of the hearing.

Before the commencement of proceedings on the third day of the hearing, the parties were advised in written correspondence by the panel's counsel that the panel had decided to proceed with oral argument on the last scheduled day of the hearing. The parties were advised that if they wished to refer to diagrams, charts or other visual hearing submissions in the course of their oral argument, they were welcome to ask to have those documents displayed electronically for the parties and the panel to see.

The evidentiary portion of the hearing concluded on Thursday, October 15, 2020. Closing arguments commenced Friday, October 16, 2020, shortly after 9 am. ISH also took the opportunity to present an argument in reply to Canadian Natural's closing argument. The record of the proceeding was closed on the afternoon of October 16, 2020.

Background of the Motion

On November 5, 2020, the panel was notified by its counsel that they had received a letter from ISH, where ISH conveyed a desire to make additional submissions on three topics: the nature of the proceeding, the standard of review, and the onus.

On November 6, 2020, the panel's counsel notified the parties, on behalf of the panel, that, as the hearing was closed (for both evidence and argument), ISH would need to bring a motion for the panel's leave to file additional submissions.

Motion Submissions

On November 6, 2020, ISH filed the Motion, asking for the panel to accept further written legal argument clarifying ISH's position about the law on the three issues cited above. ISH's grounds for the Motion were that, upon review of the transcript, it was evident that certain legal issues required clarification. ISH submitted that, as the proceeding was in the nature of a hearing *de novo*, a standard of review did not apply. It followed that the parties' submissions on the application of a reasonableness test in the context of the proceeding required clarification. Finally, on the issue of onus, the submissions were not clear as to whether the onus is only on the appellant, or whether it shifts back to the project proponent.

On November 9, 2020, Canadian Natural filed its response to the Motion. Canadian Natural objected to the Motion on the basis that procedural fairness had already been served in the proceeding. Canadian

Natural noted that, on October 6, 2020, the hearing panel issued the schedule for the hearing which indicated that both parties would be provided with the opportunity to present oral closing arguments (one hour each) on Friday, October 16, 2020. ISH was also afforded the opportunity – which it took – to make a 30-minute reply argument. Canadian Natural submitted that both parties had the same opportunity to raise and address what they believed to be the relevant legal issues, including the issues ISH wants to provide further argument on. Canadian Natural submitted that it strongly disagreed with the rationale ISH provided to support its motion, and that ISH should not be allowed to revisit its closing argument merely because it wishes that it had made different or clearer submissions in the first instance. Finally, Canadian Natural stated that it would be prejudiced if the Motion was granted and the panel’s decision on the regulatory appeal was delayed.

On November 10, 2020, ISH responded to Canadian Natural’s argument by submitting that Canadian Natural neglected to address ISH’s primary concern that the arguments from both parties were unclear regarding the implications of what a hearing *de novo* means for the standard of review, and the relevant law on the shifting of onus in AER proceedings, and when that would occur - a point which ISH raised briefly, and Canadian Natural did not address. ISH submitted that the panel would benefit from brief clarification submissions from both parties.

Analysis

The Motion’s grounds are that a review of the transcript shows that “it is evident that certain legal issues require clarification.” However, neither party referred to any legal authority on which the panel could refer to when deciding whether to grant the Motion. Accordingly, the panel must decide the Motion on the principles of fairness.

The panel is of the view that ISH was provided with ample notice that the closing arguments would be made orally, and would occur on Friday, October 16, 2020. This was a hearing attended by two experienced counsel, supported by full teams from their sophisticated, industry clients. After the submission of written materials, the completion of multiple information requests, and a full hearing, the grounds for re-opening a hearing to clarify legal submissions is, and should be, a high bar. Only under exceptional circumstances should a party be able to clear this hurdle.

ISH did not provide any substantive arguments to suggest that its situation was exceptional, or reasons why it could not adequately address in the hearing the legal issues it now seeks to clarify through further submissions. Onus, standard of review, and hearings de novo are well tread areas of law, and as the panel has noted, there was ample opportunity for the parties to specifically raise and address any one or all of them and to make submissions accordingly in their final argument. This is not a case where new legislation or case law became available, which would not have been available to the parties at the time of the hearing.

In the absence of compelling reasons from ISH, and in light of the potential prejudice to Canadian Natural and the AER's interest in promoting finality in its proceedings, the panel has decided to deny the Motion.

Regards,

Tammy Turner

Hearing Coordinator, Hearing Services

cc: JoAnn P. Jamieson, Canadian Natural Resources Limited
Karen Lilly, AER Regulatory Applications
Alana Hall and Scott Poitras, AER counsel for the panel