

- proprietary seismic interpretations of the Leduc Formation;
- proprietary interpretations and quantitative analysis of well logs;
- a proprietary geological model of the Leduc Formation;
- a proprietary reservoir model of the Leduc Formation;
- proprietary geological mapping of the Leduc Formation and other relevant intervals; and
- a proprietary geomechanical analysis of the Leduc Formation.

Obsidian submits that the Information is scientific and technical in nature, has been consistently treated as confidential, and pertains to the quality and geological makeup of certain underground formations and the ability of those formations to receive and absorb water injections. By extension, the Information pertains to the capability and value of Obsidian's current and potential future wastewater injection operations in the geographical area addressed in the Information.

Obsidian claims that public disclosure of the Information could reasonably be expected to cause significant harm to its competitive position and to result in undue financial loss to it because of the cost to obtain and develop the Information. Further, it could result in undue financial gain to its competitors. Obsidian stated that should the Information be made public, other operators in the Peace River area will have access to and financially benefit from Obsidian's valuable and proprietary work. This puts Obsidian at a competitive disadvantage for having incurred costs that its competitors did not, and for allowing its competitors and commercial disposal scheme operators access to the Information. This could result in undue financial gain to other operators in the Peace River area.

Submissions from the Parties

CLM

On June 24, 2024, CLM filed a response to the Motion and submitted the following:

- Consideration of Obsidian's confidentiality request motion is governed by the framework of relevant statutory and regulatory provisions, which establish a presumption for the type of documents at issue on Obsidian's confidentiality request motion to be on the public record.
- Consistent with section 49 of the *Rules*, documents and/or information submitted to the AER in a regulatory appeal are presumptively on the public record unless a party can establish that disclosure to the public could reasonably be expected to cause significant harm to the competitive position of a party, or to result in undue financial loss or gain to any person or organization. It is not sufficient for a party requesting confidentiality to merely establish that some harm to its competitive position

or some financial loss could reasonably be expected to be caused by the disclosure of the information.

- Consideration should be given to subsection 49(7) of the *Rules*, which provides that section 49 does not apply in respect of information and documents referred to in section 35 of the *Environmental Protection and Enhancement Act (EPEA)*. Information required to be provided to the AER under section 35(1)(a)(iv) of *EPEA*, must be made available to the public. Further, Ministerial Order 02/2010, Designation of Public Information Under the *Environmental Protection and Enhancement Act* (the Ministerial Order) requires that scientific and/or technical information, studies, reports, records submitted to the AER concerning the environmental condition of a site or other information submitted in accordance with an approval, authorization, notice or direction must be made available to the public. Although the Ministerial Order does not apply to information or records that relate to a matter that is the subject of an open or ongoing investigation, insofar as confidentiality may be granted for the course of the proceeding it would lapse following conclusion of the proceeding as there would no longer be an open or ongoing investigation or proceeding. CLM acknowledged that Obsidian is neither an approval holder nor a registration holder for the purposes of *EPEA*.
- Guidance for consideration of Obsidian's confidentiality request motion is also provided in case law as to the open court principle, and the application of that principle to quasi-judicial proceedings.
- Granting the confidentiality request would tie the AER's hands from using the documents subject to confidentiality, for purposes outside of this regulatory appeal, including where the documents provide information that some party other than Obsidian caused seismic events. CLM argued that this would impede the ability of the AER to carry out its statutory mandate to provide for the efficient, safe, orderly, and environmentally responsible development of energy resources and mineral resources in Alberta through the Regulator's regulatory activities.
- Precedent responses by the AER to confidentiality requests are consistent, that absent very compelling reasons, all material filed in connection with a proceeding will be placed on the public file and be made publicly available on request.
- Obsidian has not met the heavy burden to establish the documents in issue should be confidential.

Accordingly, CLM submitted that Obsidian's confidentiality request motion should be denied.

Obsidian

On June 28, 2024, Obsidian filed a reply to CLM's response and submitted the following:

- The Motion is not impeding the AER from meeting its statutory mandate.
- The AER is currently proposing amendments to *Directive 065: Resources Applications for Oil and Gas Reservoirs (D065)*, which include the need to complete “seismic hazard assessments”. Obsidian believes that the Information could be used to meet the proposed amended requirements for new and amended disposal wells and schemes in the Peace River area. In commissioning the development of the Information for the purposes of this proceeding, Obsidian has incurred approximately \$545,000 in costs as of June 27, 2024. Should the Information be made available publicly, any other operator in the Peace River area who is planning or has an existing disposal scheme will have ready access to and financially benefit unduly from the Information, without investing the time or costs incurred by Obsidian.
- The Motion seeks to only have the Information marked as confidential and redacted. Any conclusions set out in any of the evidence that Obsidian files will not be confidential, and those conclusions do not form part of the Information.
- The AER is equipped and experienced in applying the *Rules* to maintain the open court principle. It has done so in the past and it can do so in this proceeding.
- The correct framework for the analysis of the Motion lies wholly within section 49(4)(b) of the *Rules*. Raising the *EPEA* and the Ministerial Order, as CLM has done, is a distraction. Obsidian noted that it is neither an approval holder nor a registration holder for the purposes of *EPEA*.
- Regarding precedent responses by the AER to confidentiality requests, the AER’s May 1, 2020, Ridgeback Resources Inc./Westbrick Energy Ltd. decision¹, the March 26, 2020, Cenovus Energy Inc. decision², and the August 10, 2020, Canadian Natural Resources Limited decision³, all deal with protecting similar technical information to that making up the Information. In each case, the AER concluded that the confidential information did not need to be made public to preserve the open court principle while operating within the *Rules*.

¹ T. Wheaton, 2020, Westbrick and Ridgeback Request for Confidentiality

² T. Wheaton, 2020, Panel Decision on Cenovus Request for Confidentiality

³ T. Turner, 2020, Canadian Natural Resources Limited (Canadian Natural) – Request for Confidential Filing

- CLM does not appear to have undertaken the requisite technical work required to properly assess the causes of the November 2022 and March 2023 seismic events. It is wholly inappropriate for CLM to submit that the Information should not be treated as confidential on the basis that to do so would prevent it from using it for any purpose other than participating in the proceeding. If CLM believes it requires any of the Information to conduct work outside of the proceeding, it should invest, as Obsidian has, in developing such information and should not seek to financially gain at the expense of Obsidian. The panel's sole focus in considering the Motion should be the requirements set out in section 49(4)(b) of the *Rules*.

CLM

On July 3, 2024, CLM requested permission to make a very brief submission, in response to new subject-matter raised for the first time by Obsidian in its June 28, 2024, reply submission. CLM submitted that regarding the proposed amendments to *D065*, the plans and other information submitted pursuant to those new *D065* requirements will be on the public record, similar to how monitoring, measurement, and verification plans for carbon sequestration are currently on the public record.

Confidentiality Generally

It is a requirement under section 49(1) of the *Rules* that information filed for a proceeding is available on the public record, unless confidentiality is granted under section 49 of the *Rules* or is already confidential by the operation of other legislation. Section 49(1) of the *Rules* is premised on the principle that it is in the public interest that all information and documents filed with the AER should be made publicly available unless there are compelling reasons to do otherwise.

This approach to disclosure is consistent with the AER's role as an administrative tribunal and its obligation to be transparent and to provide procedural fairness to all parties participating in its process. Disclosing information used by decision makers assists the public in understanding the AER's decisions. In other words, transparency and disclosure of relevant information are fundamental to be procedurally fair, efficient, and to promote credible decision making.

However, section 49(4)(b) of *the Rules* recognizes that a party may have a legitimate need to protect confidential information where disclosure could reasonably be expected to cause significant harm to the party's competitive position, or to result in undue financial loss or gain to any party. In such cases, the harm may outweigh the benefit of public disclosure.

Panel Decision

The decision to grant a request for confidentiality is highly fact and situation specific.

Section 49(4)(b) of the *Rules* provides the following:

(4) The regulator may, with or without a hearing, grant a request for confidentiality on any terms it considers appropriate

(b) if the information is commercial, financial, scientific or technical in nature and the Regulator is of the opinion that disclosure of the information on the public record of the proceeding could reasonably be expected

(i) to cause significant harm to the competitive position of a party, or

(ii) to result in undue financial loss or gain to any person or organization.

With respect to the submissions made by both parties regarding the relevant legislative provisions to be applied to Obsidian's confidentiality request, we find that section 35 of *EPEA* and the Ministerial Order are not applicable. Obsidian is not a holder of an approval or authorization under *EPEA*, and the enforcement order being appealed is the subject of an active proceeding. Section 49 of the *Rules* applies in this case.

To grant confidentiality over the Information, section 49(4)(b) of the *Rules* requires that it be commercial, financial, scientific, or technical in nature and that we are of the opinion that its disclosure could reasonably be expected to cause significant harm to the competitive position of a party or result in undue financial loss or gain to any person or organization.

We are satisfied that the information for which confidentiality is sought is of a scientific, technical, and commercial nature and that this information has historically been treated as confidential by Obsidian.

We accept that information of this type is typically considered proprietary by industry operators and kept confidential, and that comparable data is not publicly available. Therefore, release of the Information could present an opportunity for Obsidian's competitors to exploit the data to develop their own resources without incurring the significant time and expense of obtaining it themselves, resulting in an undue financial gain for third parties. Release of the Information could also result in significant harm to Obsidian's competitive position in the area, by allowing Obsidian's competitors to pursue previously unrecognized opportunities that Obsidian intended to pursue.

With regards to CLM's argument that a confidentiality order over the Information will prevent it from using the Information for other matters or proceedings outside of this one, we are of the view that there are other tools that are available to the AER, such as its regulatory instruments and audit and verification

processes, through which it is reasonably expected that CLM will be able to obtain information from Obsidian or other operators that may be able to be used in other proceedings.

Regarding the proposed amendments to *D065* involving fluid disposal induced seismicity requirements, we note that these requirements have not been made to the current directive and are not in effect at this time.

In summary, we find that the Information is commercially sensitive and technical in nature and on the balance of probabilities, its disclosure may cause significant harm to Obsidian's competitive position. Further, we are of the view that refusing confidentiality for the Information would be inconsistent with the principles of fairness as it may prejudice Obsidian by preventing it from fully presenting its case. As the Information meets the tests for granting confidentiality set out in section 49 of *the Rules*, we grant Obsidian's requested motion for confidentiality.

We understand that geological interpretation and modelling are not static, and models generally change over time as more data becomes available. After weighing Obsidian's need for confidentiality and the public's interest in the Information, we have decided it is appropriate to grant confidentiality over the Information for a term of 3 years from the date of this decision.

Direction

Pursuant to subsection 49(5) of the *Rules*, a party may receive a copy of the Information only when the party files an undertaking stating that it will hold the Information in confidence and use it only for the purposes of the proceeding. Any undertakings made related to the confidentiality of the information in this proceeding does not preclude CLM from requesting the same information in the future for a purpose outside of this proceeding.

We direct that Obsidian and CLM finalize the form of an undertaking acceptable to both that complies with subsection 49(5) of the *Rules*. The undertakings shall be valid for a period of three years from the date of this decision.

We will provide further direction in due course about how the confidential information will be handled in the context of the hearing. In the meantime, a separate SharePoint file will be set up for the confidential information. Only the AER and Obsidian will have access until CLM's confidentiality undertaking, in a form acceptable to both parties, has been filed with the AER. At that time, the Hearing Coordinator will give CLM access to the SharePoint file as well.

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Yours truly,

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Brian Zaitlin, Panel Member

Tracey Stock, Panel Member

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