

October 13, 2023

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Via email only

ATCO Energy Solutions Ltd.
5302 Forand St SW
Calgary AB, T3E 8B4
Attention: Jennifer Rumas

www.aer.ca

Dear Ms. Rumas:

Re: Request for confidentiality and extension of previously granted confidentiality (Request) pursuant to section 49 of the *Alberta Energy Regulator Rules of Practice (Rules)* Cavern Storage Scheme Application (Storage Application) by ATCO Energy Solutions Ltd. (ATCO) under section 39 of the *Oil and Gas Conservation Act (OGCA)* for Hydrogen Salt Cavern Development Program (Program)

Introduction

The Alberta Energy Regulator (**AER**) has considered ATCO's Request dated February 10, 2023, for confidentiality under section 49 of the *Rules*. On May 31, 2023, ATCO confirmed its intention to seek confidentiality under section 49 of the *Rules* rather than seeking to obtain confidentiality by applying to classify the Program as an experimental scheme under the *OGCA*.

As ATCO noted in its May 31 letter, the Request was held in abeyance while AER staff and ATCO engaged in discussions regarding the potential classification of the Program as an experimental scheme to streamline regulatory processes. ATCO had hoped that an experimental scheme classification could have streamlined the process for the Program. However, in ATCO's view, this classification under the *OGCA* may actually move ATCO further away from resolution of its concerns regarding confidentiality. As a result, ATCO elected not to request experimental scheme classification for the Program and instead elected to pursue confidentiality under section 49 of the *Rules*.¹

ATCO supplemented the February 10 and May 31, 2023 emails with further information received by the AER on February 10, February 17, March 13, May 31, September 8, and September 29, 2023. The AER was also assisted in its review of ATCO's Request by meeting with ATCO on March 6 and May 5, 2023, and discussing with counsel for ATCO, notably by phone call on September 22, 2023 (collectively, the **Submissions**).

In a decision issued on November 2, 2022, the AER previously granted confidentiality to ATCO for certain documents submitted in support of ATCO's cavern solution mining scheme application for the Program,

¹ Letter from ATCO to AER (31 May 2023), "Re: ATCO Pilot Program – Update and Supplemental Information in Support of Previous Requests for Decisions".

AER Application 1939412 (the **Mining Application** and **Mining Application Confidentiality Decision**, respectively).² In ATCO’s submission, the present Request relates to information that was previously granted confidentiality in the Mining Application Confidentiality Decision and that has been “updated, consistent with the progression of the [Program].”

ATCO also requests that the AER extend the confidentiality term previously granted in the Mining Application Confidentiality Decision because of delays in processing the present Request. ATCO requests a minimum one-year extension to the terms of confidentiality granted by the AER in the Mining Application Confidentiality Decision.

Based on the Submissions, the AER understands that ATCO seeks to maintain the confidentiality of certain appendices which ATCO intends to submit to the AER in support of the Storage Application, the details and terms of which request are outlined in the table below (the **Requested Confidential Information**).

	All / Part	Requested Duration
Appendix F – Geomechanical Study	All	5 years
Appendix L – Nitrogen Mechanical Integrity Test and Hydrogen Mechanical Integrity Test	All	3 years
Appendix N – Subsurface Risk Assessment	All	3 years, with option to renew

In addition, ATCO’s Request initially contained a request for confidentiality for Appendix E (Mechanical Properties Testing). However, in its September 29, 2023 submission, ATCO confirmed that it was withdrawing its request for confidentiality over this appendix.

ATCO submits that the Requested Confidential Information consists of “proprietary and commercially sensitive information” developed in support of the Program, which looks at the feasibility of hydrogen storage in bedded-salt cavern formations. ATCO indicated that the Program is the first of its kind in Canada and developed at significant cost to ATCO.

ATCO submits that disclosure of the Requested Confidential Information would result in significant harm to ATCO’s competitive commercial position as the first mover in this space, cause ATCO undue financial loss and cause undue financial gain to its competitors. ATCO states that disclosure of the Requested

² Letter Decision re ATCO Energy Solutions Ltd., Hydrogen Salt Cavern Development Program Application No. 1939412, November 2, 2022.

Confidential Information would eliminate the commercial advantages in which it has invested significant time and capital; provide express, prescriptive guidance to competitors to replicate hydrogen cavern storage facilities without incurring the technical and commercial risk that ATCO has incurred as a first mover; and enable competitors to draw conclusions regarding the characteristics of ATCO’s specific subsurface assets, thereby impacting its commercial position. ATCO states that based upon its experience to date, the AER’s existing regulatory framework does not easily apply to innovative and non-traditional energy development activities, nor does it necessarily foster outcomes supportive of energy transition initiatives such as its Program.

ATCO refers to an agreement it has entered into with the United States Department of Energy (USDOE). ATCO submits that without the USDOE’s consent, the release of the identified pages of Appendix N would be a breach of ATCO’s confidentiality agreement with the USDOE (the **USDOE Confidentiality Agreement**).

Summary of decision

The AER has considered ATCO’s Submissions, and for the reasons below grants ATCO’s Request in part. A summary of the AER’s disposition in respect of ATCO’s Request is outlined in the table below.

Disposition Notes

Disposition Notes		
Appendix F – Geomechanical Study	Denied	
Appendix L – Nitrogen Mechanical Integrity Test and Hydrogen Mechanical Integrity Test	Granted in part	Three-year term for sections that provide prescriptive guidance on testing procedures.
Appendix N – Subsurface Risk Assessment	Granted in part	Information that is subject to the USDOE Confidentiality Agreement, term of three years. ATCO can apply under s. 49 of the <i>Rules</i> for an extension prior to expiration.
Mining Application Appendix B – Subsurface Risk Assessment of Underground Hydrogen Storage in a Bedded Salt Cavern	Extension granted	Term extended to match confidentiality granted to Storage Application Appendix N.

Mining Application Appendix I – Mechanical Properties Testing of Salt and Nonsalt Core from ATCO Utility Redwater Wells 9-28-55-21 and 11-27-55-21 Alberta, Canada	Extension denied	
Mining Application Appendix N – Testing Reporting ATCO Utility S Redwater 11-27-55-21 Pilot – Cavern Well Project	Extension granted	Term extended to match confidentiality granted to Storage Application Appendix L.

Confidentiality generally

It is AER policy and a requirement under section 49 of the *Rules* that information filed in respect of a proceeding including an application and any statements of concern are available on the public record. Section 12.150 of the *Oil and Gas Conservation Rules (OGCR)* also provides that records, reports, and information submitted to or acquired by the AER are available to the public on request. In the absence of very compelling reasons, **all** materials filed in connection with an application are publicly available.

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 who participate in its process. Making the information used by decision makers available 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.

The AER also recognizes the legitimate need, when established, of a party to protect confidential or sensitive information where disclosure of that information is likely to result in harm to the party’s competitive, financial, or personal interest, and such harm outweighs the benefit to the public interest of disclosure. Exceptions to disclosure may be granted in clear and compelling cases and should be limited to those situations where the party requesting confidentiality has positively and demonstrably met the criteria established under subsection 49(4) of the *Rules*. A confidentiality ruling is highly fact and situation specific. Where confidentiality has been granted in the past, the AER has where possible limited confidentiality to portions of the document as opposed to the entire document.

Subsection 49(1) of the *Rules* is premised on the fact that it is in the public interest that all information and documents filed with the AER should be made publicly available unless there are very compelling reasons to do otherwise. Accordingly, there is generally a presumption against granting confidentiality of any document filed with the AER.

The AER requires ATCO to submit the Requested Confidentiality Information to perform the AER’s regulatory function and to assess ATCO’s Storage Application. The Requested Confidential Information

is commercial, financial, scientific or technical in nature, so the applicable provisions are contained in paragraph 49(4)(b) of the *Rules*. To grant ATCO's Request, these provisions require ATCO to demonstrate a reasonable expectation that disclosure of the Requested Confidential Information would result in undue financial loss or gain to a person or organization or cause significant harm to ATCO's competitive position.

Considering the nature of the Requested Confidential Information and the Submissions provided, the AER finds that ATCO has established that portions of the Requested Confidential Information meet the criteria in paragraph 49(4)(b) of the *Rules*. Therefore, the AER grants ATCO's Request in part as explained in more detail below.

Furthermore, the AER acknowledges that the expiry of the current terms of confidentiality granted in the Mining Application Confidentiality Decision may undermine the confidentiality now granted in respect of the Storage Application. Therefore, the AER has elected to grant ATCO's extension request in part as explained in more detail below.

Novelty of the Program

As stated in the Mining Application Confidentiality Decision, the AER appreciates that ATCO has invested a significant amount of time and capital into the Program. The AER also appreciates ATCO's submission that the Requested Confidential Information relates to its proprietary business plans to advance the first hydrogen salt cavern storage project in Canada utilizing proprietary designs.

Notwithstanding ATCO's submissions about the novelty of the Program as a basis for confidentiality, the AER must base its decision on the criteria set out in section 49(4)(b) of the *Rules*. In this regard, ATCO's submissions must positively and demonstrably indicate that the release of the Requested Confidential Information would meet these criteria.

The AER appreciates and understands that all applicants have likely dedicated a significant amount of time and money to the materials submitted in support of an application. Further, many applicants will understandably want to protect the knowledge gained through such an investment from exploitation by their competitors. However, this desire to maintain confidentiality of such information is not enough, on its own, to meet the criteria in section 49(4)(b) of the *Rules*.

Characterization of ATCO's assets

Similar analysis applies to claims in ATCO's submissions about the potential for competitors to draw conclusions about its assets from application material submitted to the AER. The AER cannot grant confidentiality based on the mere assertion that competitors or customers would be able to draw conclusions about ATCO's specific storage assets. To establish a basis for confidentiality, ATCO's submissions must positively and demonstrably indicate that the release of the Requested Confidential Information meets the criteria in section 49(4)(b).

Based on the Submissions, ATCO has not established that the ability of competitors or customers to draw conclusions about ATCO's specific storage assets could reasonably be expected to cause significant harm to ATCO's competitive position or to result in undue financial loss or gain.

In previous decisions, the AER has denied requests for confidentiality in respect of geophysical information and proprietary data relating to an anomaly map and net pay map,³ as well as a reserve report and internal financial model and business plan.⁴ In the AER's view, these situations are analogous to the present Request.

Appendix F – Geomechanical study

ATCO requests a five-year term of confidentiality for Appendix F to the Storage Application, which contains a geomechanical study in support of the Program. The AER did not grant confidentiality to the equivalent appendix in the Mining Application Confidentiality Decision.

ATCO submits that Appendix F can be distinguished from the equivalent appendix to the Mining Application because Appendix F contains actual cavern design based on the completed washing activities and actual core analysis from wells drilled as part of the Program. ATCO further submits that releasing this information publicly would:

- release information regarding the Program prematurely;
- inform potential competitors or customers of characteristics of ATCO's specific storage assets, thereby impacting its commercial position and bargaining power; and
- eliminate commercial advantages that ATCO has obtained as a first mover in the space.

In previous decisions, when data is open to different interpretations, the AER has not granted confidentiality over the submitted interpretation.⁵ As was the case with the equivalent appendix in the Mining Application, the AER finds that ATCO has not provided adequate reasons in the present circumstances to distinguish the Requested Confidential Information in Appendix F from information the AER routinely collects and makes public in the context of its proceedings.

Based on ATCO's Submissions, the AER is of the view that the geomechanical study is interpretative or speculative in nature, similar to geotechnical information, relying upon the author's professional analysis of underlying geophysical and geological data to draw conclusions which others may not agree with.

³ Letter Decision re Kelt Exploration Ltd., Directive 065 Pool Delineation Application No. 1846297, Location 04-09-054-24W5, Confidentiality Application, January 26, 2016.

⁴ Letter Decision re Midstream Canada Limited Confidentiality Request – Section 49 of the AER Rules of Practice, November 30, 2018.

⁵ Letter Decision re Shell Canada Limited, Off Target Application No. 1841340, January 26, 2016.

The AER finds ATCO has not established that disclosure of the geomechanical study could reasonably be expected to cause significant harm to ATCO's competitive position or undue financial loss or gain. Therefore, the AER denies ATCO's request for confidentiality with respect to Appendix F.

Appendix L – Mechanical integrity testing with nitrogen and hydrogen

ATCO requests a three-year term of confidentiality for Appendix L to the Storage Application, which contains the details of mechanical integrity tests first using pure nitrogen, followed by pure hydrogen. ATCO explains that other than the composition of the test gases, this testing and the associated reports will be substantially the same as those provided in Appendix N in the Mining Application Confidentiality Decision.

In the Mining Application Confidentiality Decision, the AER granted confidentiality to Appendix N for a three-year term on the basis that ATCO represented Appendix N “would provide prescriptive guidance to anyone seeking to copy the Program.”

In relation to Appendix L, the AER asked ATCO to identify whether testing results could be provided separately from the prescriptive technical description of the testing process. In response, ATCO submits that the information in the mechanical testing reports would provide information to competitors regarding ATCO's storage assets. Further, ATCO claims that it would not be feasible to separate testing details from results as “they form the basis of ATCO's position that hydrogen storage is feasible and are required by the AER Oil & Gas Subsurface Applications branch in review of the cavern storage application to confirm ATCO's assessment.”

As noted above, ATCO's assertion that disclosing testing results would provide information to competitors about ATCO's storage assets is not a sufficient basis upon which to establish confidentiality.

In the AER's view, ATCO has not established that the release of testing results could reasonably be expected to cause significant harm to ATCO's competitive position or to result in undue financial loss or gain. However, as noted in the Mining Application Confidentiality Decision, portions of Appendix L describing testing design are granted confidentiality on the basis that their release would provide prescriptive guidance regarding testing methodology that may otherwise be unavailable publicly. Such prescriptive guidance could reasonably be expected to constitute an undue financial gain to a party seeking to copy ATCO's Program. ATCO has not demonstrated the same for the other portions of Appendix L, including testing results. For this reason, the facts in the present Request justify granting narrower confidentiality to Storage Application Appendix L than was granted to Mining Application Appendix N. Accordingly, the AER grants a three-year term of confidentiality for those sections of Appendix L describing well configuration, testing plan, design conditions, and test methodology. The three-year term starts from the date of this decision. The AER will not grant confidentiality for those sections of Appendix L that do not provide prescriptive guidance that would otherwise be unavailable to anyone seeking to copy the Program, including fluids used, criteria considered, QA/QC results, and test results.

Appendix N – Subsurface Risk Assessment

ATCO requests a three-year term of confidentiality for Appendix N to the Storage Application, which contains a subsurface risk assessment in support of the Program. In the Mining Application Confidentiality Decision, the AER granted the equivalent appendix a three-year term of confidentiality with the potential to apply to extend the term of confidentiality under section 49 of the *Rules*.

ATCO submits that Appendix N refers to details of proprietary technical design and advancements in the Program including completion of certain laboratory testing and modelling, governed by the USDOE Confidentiality Agreement. In the Mining Application Confidentiality Decision, the AER found that ATCO had not established that the release of the equivalent appendix could be reasonably expected to significantly harm ATCO's competitive position. However, the AER found that the disclosure of the information that is subject to the USDOE Confidentiality Agreement could reasonably be expected to cause undue financial loss to ATCO, the USDOE, or others. The AER therefore granted ATCO's request for confidentiality only in respect of those sections of the appendix that are subject to the USDOE Confidentiality Agreement.

For the purposes of the present Request, the AER is of the view that the same confidentiality should apply for Appendix N to the Storage Application as was applied to Appendix B to the Mining Application, based on the reasons described in the Mining Application Confidentiality Decision.

ATCO specifies that pages 2-13 and 17-99 of Appendix N contain information that is subject to the USDOE Confidentiality Agreement. Therefore, these pages of Appendix N will be granted a three-year term of confidentiality. The three-year term starts as of the date of this decision.

ATCO may request that that AER extend the term of confidentiality applied to Appendix N by making a request in writing to the AER prior to the expiration of the initial three-year term, which request must comply with section 49 of the *Rules*.

Extension request – Mining Application Confidentiality Decision

ATCO requests that the AER extend the terms of confidentiality provided in the Mining Application Confidentiality Decision. Specifically, ATCO requests a minimum one-year extension due to what it alleges to be delays in processing the Request.

In the Mining Application Confidentiality Decision, the AER explained its approach to assessing the terms of confidentiality granted based on the submissions provided by ATCO in support of its request for confidentiality. For the purpose of the present Request, the AER is satisfied that the three-year terms of confidentiality sought by ATCO are justified in relation to the information in the Storage Application over which confidentiality has been granted in this decision.

The AER notes that the release of information contained in Mining Application Appendices B & N would undermine the confidentiality now granted in relation to Storage Application Appendices N & L, respectively. Therefore, in the interest of giving effect to the confidentiality granted in this decision, it is

appropriate to extend the terms of confidentiality granted in the Mining Application Confidentiality Decision as follows:

- Confidentiality of Mining Application Appendix B (Subsurface risk assessment) is extended to match that of Storage Application Appendix N (Subsurface risk assessment), being three years from the date of this decision, with the potential to apply to extend confidentiality further pursuant to section 49 of the *Rules*.
- Confidentiality of Mining Application Appendix N (Testing Reporting) is extended to match that of the relevant sections of Storage Application Appendix L (Mechanical Integrity Tests), being three years from the date of this decision.

ATCO's extension request is worded broadly enough to include Mining Application Appendix I (Mechanical Properties Testing), which is equivalent to Storage Application Appendix E. ATCO withdrew its request for confidentiality over Storage Application Appendix E as the mechanical properties test results are already available to the public due to the operation of section 12.150 of the *OGCR*.

As ATCO notes in its September 29, 2023 submission, its request for confidentiality for Appendix E (Mechanical Properties Testing) has been rendered moot by the release of this information pursuant to the operation of the *OGCR*. As this information has now been released publicly, there is no basis on which to extend to the confidentiality provided to Appendix I in the Mining Application Confidentiality Decision.

Given the nature of the AER's disposition in relation to ATCO's Request, AER staff will be in touch with ATCO to facilitate how to handle the submission and review of the appendices over which confidentiality has been granted.

Sincerely,

<Original signed by>

Stephanie Latimer
Vice President, Law and Associate General Counsel

cc: James Powell, ATCO
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