

Via Email

February 12, 2021

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[www.aer.ca](http://www.aer.ca)

Third Eye Capital Corp. and,  
Conifer Energy Inc.  
c/o Bennett Jones LLP

Regent Equipment Leasing Ltd.  
c/o Miller Thomson LLP

**Attention: Keely Cameron, Counsel**

**Attention: Steven T. Robertson, Counsel**

Predator Oil BC Ltd.

**Attention: Ryan Tobber**

Dear Madam and Sirs:

**RE: Request from Third Eye Capital Corporation for Reconsideration or Confidentiality  
Request for Reconsideration No. 1931964**

The Alberta Energy Regulator (AER) has considered the request from Third Eye Capital Corporation (TECC), under section 42 of the *Responsible Energy Development Act (REDA)*, that the AER reconsider its decision dated January 13, 2021, to make statement of concern (SOC) 31845, filed by Regent Equipment Leasing Ltd. (Regent), and SOC 31844, filed by Predator Oil BC Ltd. (Predator) (collectively, the SOCs), part of its public record (the Decision). The AER has also considered TECC's request that, in the alternative, the AER grant confidentiality over the SOCs pursuant to section 49 of the *AER Rules of Practice (Rules)*.

The AER has reviewed TECC's submissions, dated January 15, 2021, and January 26, 2021, as well as submissions from each of Predator and Regent in response, both dated January 22, 2021.

For the reasons that follow, the AER has determined that this is not an appropriate case in which to exercise its discretion under section 42 of *REDA* to reconsider the Decision. The AER has also decided to deny TECC's request for confidentiality.

### **Background**

On January 6, 2021, TECC and Conifer Energy Corp. sent a letter to the AER requesting that it "rescind the registration of the [SOCs] on the basis that they are frivolous and vexatious and contain defamatory content which if placed on the public record would result in significant harm to TECC."

On January 13, 2021, the AER responded to TECC and Conifer to advise that, pursuant to section 49(1) of the *Rules*, the AER is required to place all documents filed in respect of a proceeding, including any SOC's filed prior to the commencement of the proceeding, on the public record. The AER has no discretion to exclude filed documents from the public record, except in the narrow circumstances set out in section 49(4) of the *Rules*, which did not appear to apply here. The AER further advised that section 6 of the *Rules* should be interpreted liberally as setting a low threshold for filing an SOC with the AER, given the AER's discretion to dismiss an SOC under section 6.2 of the *Rules* for, among other reasons, the SOC filer's failure to demonstrate that they may be directly and adversely affected by the application.

The AER informed TECC and Conifer that the determination of whether a person has demonstrated that they may be directly and adversely affected by an application is a substantive one to be made after an SOC is accepted and registered by the AER. Further, even if the SOC's were not filed in accordance with the SOC filing requirements in the *Rules*, they remain 'documents filed in respect of a proceeding', and must be placed on the public record as per section 49(1). Finally, the AER advised that the SOC's and the corresponding decision would be made public as per the AER's usual practice with all SOC's and other documents relating to an application or other proceeding.

On January 15, 2021, TECC submitted a request for reconsideration of the AER's decision to place the SOC's on the public record. Alternatively, TECC requested that the AER grant confidentiality over the SOC's pursuant to section 49 of the *Rules*.

## Reasons for Decision

### a) Request for Reconsideration

TECC submits that the decision erred when it held that the AER has no discretion to exclude filed documents from the public record except under the narrow circumstances set out in section 49(4) of the *Rules*, because the AER may dispense with, vary or supplement all or any part of the *Rules* pursuant to section 42 of the *Rules*.

TECC submits that "[w]hile section 49 of the *Rules* refers to a person providing the information requesting that the information not be placed on the public record, the *Rules* did not envision this type of scenario and therefore should be interpreted broadly." TECC argues that, "[g]iven the AER's ability to vary or supplement its *Rules*, it should do so in this circumstance as section 49 of the *Rules* was clearly intended to enable the AER to keep information off of the public record in circumstances where significant harm would result, irrespective of the provider of such information."

The AER has authority to reconsider its decisions pursuant to section 42 of *REDA*. That section states:

The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision. [emphasis added]

As indicated by section 42, the AER has the sole discretion to reconsider a decision made by it. Section 42 does not provide an appeal mechanism to be utilized by industry or members of the public; other provisions of *REDA* are available for that purpose. The AER will only exercise its discretion to reconsider a decision

under the most extraordinary circumstances, where it is satisfied that there are exceptional and compelling grounds to do so. Essentially, the AER will reconsider a decision when there is new information or where there is an error in the decision that is so profound that to not reconsider the decision would make it without any value or merit, such that it would be absurd not to reconsider it.

TECC has not established that there are exceptional and compelling grounds to justify the AER reconsidering the decision. TECC does not appear to take issue with the AER's decision to not rescind its registration of the SOCs; rather TECC specifically asks that the AER reconsider its decision to make the SOCs part of the public record. TECC has not provided any additional information or identified any error in the AER's decision. Even if section 49(4) of the *Rules* should be interpreted broadly, as TECC suggests, TECC did not submit a request for confidentiality until after the decision had been made. Its January 6, 2021, letter requesting that the AER rescind the registration of the SOCs did not refer to section 49 at all. Pursuant to section 49(1), the AER must place all SOCs on the public record, unless it receives a request for confidentiality under section 49(3) and grants the request under section 49(4).

It is not clear whether TECC is suggesting that the AER should exercise its discretion under section 42 of the *Rules* to dispense with or vary the requirement in section 49(1) that SOCs be placed on the public record; however, to do so would be inappropriate, given the *Rules* set out a clear process for requesting confidentiality and outline the circumstances in which the AER may grant such a request. The AER will generally only exercise its discretion under section 42 where it would be impractical or patently unfair to strictly apply the *Rules*. TECC has not demonstrated that is the case here.

In conclusion, the AER is not satisfied that there are exceptional or compelling grounds to justify a reconsideration in these circumstances. Accordingly, the AER will not reconsider its decision under section 42 of *REDA*.

#### **b) Request for Confidentiality**

Pursuant to section 49 of the *Rules*, the AER may grant confidentiality in certain defined circumstances. Section 49 provides as follows:

**49(1)** Subject to this section, all documents filed in respect of a proceeding, including any statements of concern or other documents filed prior to the commencement of the proceeding, must be placed on the public record.

**(2)** If a party wishes to keep confidential any information in a document, the party may, before filing the document, file a request for confidentiality and serve a copy of the request on the other parties.

**(3)** A request for confidentiality must

(a) be in writing,

(b) briefly describe

(i) the nature of the information in the document that is the subject of the request, and

- (ii) the reasons for the request, including the specific harm that might result if the document were placed on the public record.
- (4) The Regulator may, with or without a hearing, grant a request for confidentiality on any terms it considers appropriate
- (a) if
    - (i) disclosure of the information could reasonably be expected to reveal personal information that has consistently been treated as confidential by the person the information is about, and
    - (ii) the Regulator considers that the person's interest in confidentiality outweighs the public interest in disclosing the information on the public record of the proceeding,
  - or
  - (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.

It is a fundamental premise of the AER's decision making process, and a requirement under section 49(1) of the *Rules*, that all documents filed in respect of a proceeding – including an application – be placed on the public record. Public disclosure in the name of procedural fairness and transparency is the overriding general principle reinforced in subsection 49(1). Accordingly, the test for confidentiality under section 49(4) creates a high threshold that must be met before confidentiality will be granted.

The AER 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 will only be granted in the clearest and most compelling cases, and will be limited to those situations where the party requesting confidentiality has positively and demonstrably met the criteria established under subsection 49(4).

Section 49(2) does indicate that only the person submitting the information may request confidentiality of the information. This is likely for good reason. SOCs, requests for regulatory appeal, and other submissions from people who object to applications before the AER or approvals issued by the AER often contain statements that the applicant or approval holder likely finds prejudicial. This is especially true where licence eligibility or a licence transfer is in issue, as it is here. It would create an undue administrative burden if the AER were to accept requests from applicants and approval holders that objectors' submissions be kept confidential.

Further, there is a strong public interest in the disclosure of SOCs, as they inform the AER's decision on an application and whether to hold a hearing. Making the information used by decision makers public

assists in understanding the AER's decisions. Keeping the SOC's confidential could inhibit the AER's ability to articulate reasons for its decisions, which could in turn limit the justification, intelligibility, and transparency administrative decisions are required to exhibit.<sup>1</sup>

Moreover, even if the AER were to accept TECC's confidentiality request, the request does not meet the criteria in section 49(4). Section 49(4)(b) is most applicable in the circumstances, but the information contained in the SOC's is not clearly "commercial, financial, scientific or technical in nature," nor has TECC demonstrated that public disclosure of the SOC's could reasonably be expected to cause significant harm to its competitive position or result in undue financial loss to it, as that section requires.

TECC states that public disclosure of the SOC's would cause TECC to suffer reputational and economic loss, and that the harm would be irreparable. TECC does not provide any details of any specific undue financial loss that it expects to suffer, nor does it elaborate on how the harm would be irreparable.

Even on the public record, SOC's are not available on the AER's website or through the AER's Integrated Application Registry. The public can only obtain the SOC's by submitting an information request to the AER.<sup>2</sup> As a result, only someone who is aware of an SOC's existence can obtain it through the AER. Without further information from TECC, it is hard to see how the SOC's being on the public record could reasonably be expected to cause TECC significant harm or undue financial loss given the limited extent of their actual distribution.

Finally, TECC (through Conifer) has had an opportunity to respond to the SOC's and refute the claims therein. Its response to the SOC's is on the public record, as is TECC's request for reconsideration and confidentiality, with its claim that the statements in the SOC's are false and defamatory.

In conclusion, the AER denies the request for confidentiality because section 49(2) of the *Rules* does not allow for someone other than the person submitting the information to request confidentiality over it, and there are no compelling circumstances for the AER to exercise its discretion under section 42 of the *Rules* to vary section 49(2) as suggested by TECC. Moreover, the information is not clearly commercial, financial, scientific or technical in nature, and TECC has not demonstrated that disclosure of the SOC's would cause significant harm to its competitive position or result in undue financial loss to it.

## Conclusion

The AER will not exercise its discretion under section 42 of *REDA* to reconsider the decision to place the SOC's on the public record, and TECC's request for confidentiality of the SOC's is denied.

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<sup>1</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, cited by the Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 86.

<sup>2</sup> The January 13, 2021, decision incorrectly stated that the SOC's would be available through the AER's Integrated Application Registry.

Sincerely,

*<Original signed by>*

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Jeff Moore  
Associate General Counsel

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Blair Reilly  
Director, Enforcement & Emergency Management

*<Original signed by>*

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Paul Ferensowicz  
Principal Regulatory Advisor

cc: Megan Legue, AER  
Melanie Bridgeman, AER