Alberta Energy Regulator

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Via Email

June 11, 2021

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Attention: Jeremy Barretto, Counsel

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Attention: Alan Harvie, Counsel

RE: Request for Regulatory Appeal by Canadian Natural Resources Limited (Canadian Natural)
Gain Energy Ltd. (Gain Energy)
i3 Energy Canada Ltd. (i3 Canada)
Approved Licence Transfer Application Nos.: 1929555, 1929556, 1929557, 1929558, 1929559, 1929560, 1929561 and 1929702 (Licence Transfers)
Request for Regulatory Appeal No.: 1932015

The Alberta Energy Regulator (AER) has considered Canadian Natural's request under section 38 of the *Responsible Energy Development Act* (*REDA*) for a regulatory appeal of the AER's decision to approve the Licence Transfers. The AER has reviewed Canadian Natural's submissions and the submissions made by Gain Energy and i3 Canada.

For the reasons that follow, the AER has decided that Canadian Natural has not demonstrated that it is directly and adversely affected by the Licence Transfers. As a result, Canadian Natural is not eligible to request a regulatory appeal and the request is dismissed.

Legislation

Section 38 of *REDA* governs requests for regulatory appeal. It states that:

> 38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

There are three components to section 38(1) of *REDA*:

1. The decision must be an appealable decision,
2. The requester must be an eligible person, and
3. The request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice* (*Rules*).

The term "eligible person" is defined in section 36(b)(ii) of *REDA* to include:

> a person who is directly and adversely affected by a decision [made under an energy resource enactment]…

The term "appealable decision" is defined in section 36(a)(iv) of *REDA* to include:

> a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing…

Reasons for Decision

1. The Licence Transfers are Appealable Decisions

The Licence Transfers are appealable decisions under section 36(a)(iv) of *REDA*, as they were approved under section 24 of the *Oil and Gas Conservation Act* (*OGCA*), an energy resource enactment, without a hearing.

2. Canadian Natural is Not an Eligible Person

For Canadian Natural to be eligible for a regulatory appeal, it must demonstrate that it is directly and adversely affected by the AER's decision to approve the Licence Transfers. We have determined that Canadian Natural has failed to do this.

(a) Submissions

Canadian Natural says it is directly and adversely affected by the Licence Transfers because:

1) it has a working interest in more than 80 of the transferred licences;

2) it has wells, facilities, and pipelines in the area affected by the licences; and

3) it is the largest contributor to the Orphan Fund.

Canadian Natural notes that i3 Canada's 2019 year-end auditor's report raised doubt that i3 Canada would be able to continue as a going concern due to its inability to generate revenue and report a profit. Canadian Natural submits that it believes i3 Canada does not have the financial wherewithal to address its liabilities, and as a result, there is a risk the Licence Transfers will increase the OWA's existing inventory

of orphaned sites. In short, Canadian Natural says it would be directly impacted by i3 Canada's inability to meet its end of life obligations.

Canadian Natural submits that the economic failure of i3 Canada would adversely impact Canadian Natural's ability to work with "local surface rights holders" to the extent they would not be paid their surface rentals.[1] Further, the Licence Transfers may result in an increased orphan levy if i3 Canada becomes insolvent and the licenced sites are orphaned to the OWA. Finally, the sites may come to the OWA in worse shape than they are now if i3 Canada is unable to maintain them.

i3 Canada submits that the information provided by Canadian Natural is general in nature and fails to identify a direct and adverse impact. i3 Canada states Canadian Natural's concerns are speculative, as they are premised on i3 Canada's failure to meet its future regulatory obligations and the potential harm to Canadian Natural that would result. i3 Canada further states that Canadian Natural relies on outdated and irrelevant information to ground its argument that i3 Canada is a risky licensee.

Gain Energy submits that it faced bankruptcy, due to significantly reduced revenue and cash flow (resulting from a drop in oil and natural gas liquid prices, the Russia-OPEC feud, and the COVID-19 pandemic) and limited access to credit or other financial support. As a result, Gain Energy sold all its assets and is proceeding with winding-up and discontinuing operations. In fact, on March 8, 2021, Gain Energy filed a proposal under the *Bankruptcy and Insolvency Act* (*BIA*) to allow it to restructure its debt before winding-up. KPMG Inc. was named trustee under the *BIA*. The proposal was approved by the Court of Queen's Bench on April 27, 2021.

Conversely, Gain Energy and i3 Canada submit that i3 Canada raised approximately $52 million through equity financing to close the $35 million acquisition of Gain Energy's Alberta and British Columbia assets. Gain Energy states that i3 Canada operates with lower debt, and is therefore in a better financial position than Gain Energy was prior to the sale of its assets to i3 Canada.

Canadian Natural responds that it is not required to prove beyond a shadow of a doubt that i3 Canada would become bankrupt and fail to meet its regulatory obligations, and cites a number of decisions from the AER's predecessors under the former *Energy Resources Conservation Act* (*ERCA*), as well as a more recent decision of the AER that says "what is required is reliable information in the regulatory appeal request that demonstrates a reasonable potential or probability that the person asserting the impact will be affected."[2] Canadian Natural states that its concerns are not general in nature, and reiterates its view that it has interests that may be directly and adversely affected by the Licence Transfers (its working interest in more than 80 of the transferred licences, its other assets in the area affected by the licences, and its status

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[1] By "local surface rights holders," we understand Canadian Natural to mean landowners and occupants.
[2] *AER Decision on Request for Regulatory Appeal Numbers 1913250 and 1913252* (December 20, 2018) at p. 3.

as the largest contributor to the Orphan Fund). Canadian Natural further submits that it could be held liable under the *Builder's Lien Act* for i3 Canada's operations in respect of their joint assets, which would amount to a direct and adverse impact.

With respect to Gain Energy's and i3 Canada's submissions about Gain Energy's dire financial situation before the transfer, Canadian Natural submits that Gain Energy is the result of an amalgamation of 4227417 OMERS ENERGY INC. and 10335371 Superman Resources Inc. Canadian Natural says it understands that Gain Energy is fully owned and controlled by the Ontario Municipal Employees Retirement System Administration Corporation (OMERS), a $109 billion pension fund.[3] Canadian Natural cites several statements from OMERS about its good governance and commitment to sustainable investing,[4] which lead Canadian Natural to conclude that it is unlikely OMERS would have allowed Gain Energy (a 100% subsidiary) to default on its end of life liabilities.

Meanwhile, Canadian Natural states it is of the opinion that i3 Canada and its parent company are shell companies with little revenue, significant costs and risks, and inadequate disclosure of financial information. Canadian Natural refers to reports from June 2020 and August 2020 from i3 Canada's parent company that i3 Canada retained losses and had negative earnings.[5]

Gain Energy disputes this information. It states that OMERS is only an indirect shareholder in Gain Energy along with another shareholder, and there is no factual or legal basis for Canadian Natural's assumption that OMERS will provide Gain Energy with any further funds.

In response, Canadian Natural says OSI Penco Corporation (OSI), which Canadian Natural understands to be an investment vehicle for OMERS, has been the majority shareholder holding 75% of the voting shares in Gain Energy since 2017; therefore, according to the *Canada Business Corporations Act*, under which it is incorporated, Gain Energy is a subsidiary of OSI.

(b) Decision

The impacts Canadian Natural says it may experience because of the transfers are contingent on i3 Canada becoming insolvent, failing to pay its surface rents, and the transferred wells, facilities, and pipelines being orphaned to the OWA. Based on the information before us, we have determined that these impacts are too speculative and remote to be considered direct.

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[3] Canadian Natural's Reply Submission (February 24, 2021) at para 41.
[4] *Ibid*.
[5] *Ibid* at para 48.

In *Court v Alberta (Environmental Appeals Board)*,[6] a judicial review of a decision of the Environmental Appeals Board (EAB) to dismiss a notice of appeal, the Court of Queen's Bench examined the interpretation of the phrase "is directly affected" as it is used in section 95 of the *Environmental Enhancement and Protection Act* (*EPEA*). Subsection 95(5)(a)(ii) of *EPEA* allows the EAB to dismiss a notice of appeal submitted under certain provisions of the Act if the EAB is of the opinion the person submitting the notice of appeal is not directly affected by the decision.

The reviewing judge found that, in order to establish eligibility for appeal, "an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project."[7]

More recently, the Alberta Court of Appeal explained the meaning of "directly" in that context as follows:

> The adverb, "directly" also restricts or limits the effects which can give rise to standing. The *Concise Oxford Dictionary* defines "directly" as meaning "in a direct manner". It defines "direct" as "straight, not crooked or roundabout, following an uninterrupted chain of causes and effect". There also appears to be a temporal aspect to "direct" and "directly". "Direct" is defined as "immediate". And "directly" is defined as "at once, without delay." It is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be.[8]

In *Kelly v Alberta (Energy Resources Conservation Board)*,[9] the Alberta Court of Appeal found that "adverse effect is a matter of degree" and the question is whether "the magnitude of risk is such that the applicant has become 'directly and adversely affected'."[10]

In short, to establish that it is an "eligible person", Canadian Natural must demonstrate that the magnitude of risk is such that there is a potential or reasonable probability that it may be directly harmed by the Licence Transfers. We have determined Canadian Natural has failed to do this.

First, Canadian Natural has not provided sufficient evidence to demonstrate, on a *prima facie* basis, that there is a real potential or probability that i3 Canada will become insolvent. Canadian Natural asserts that i3 Canada and its parent company "are shell companies with little revenue, significant costs and risks, and inadequate disclosure of financial information,"[11] but does not provide any clear evidence to back up its assertion.

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[6] 2003 ABQB 456.
[7] *Ibid* at para 75.
[8] *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at para 81.
[9] 2011 ABCA 325.
[10] *Ibid* at para 26. The Court was interpreting the meaning of the phrase "directly and adversely affect" in s 26(2) of *ERCA* (replaced by *REDA*), but the interpretation still applies to s 36(b)(ii) of *REDA*.
[11] Canadian Natural's Reply Submission (February 24, 2021) at para 9.

The only information Canadian Natural provides predates the sale of the licenced assets on July 3, 2020, and approval of the Licence Transfers on December 16, 2020. In approving the transfers, the AER relied on the most recent and comprehensive financial information available to it. The AER determined the Licence Transfer satisfied all applicable regulatory requirements, including those in *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, the purpose of which is to "prevent the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline in the LLR Program from being borne by the public of Alberta should a licensee become defunct, and minimize the risk to the Orphan Fund posed by the unfunded liability of licences in the program."[12]

Gain Energy states that had the assets remained with it, the outcomes Canadian Natural is concerned about (licensee insolvency and orphaning of the wells, facilities, and pipelines) were certain to occur. It is clear Gain Energy itself was in significant financial trouble before the sale and transfer. While the exact nature of the relationship between OMERS and Gain Energy is not entirely clear from the parties' submissions, Gain Energy states that its shareholders are under no obligation to provide it with further funds, and Canadian Natural does not credibly challenge that assertion. As a result, not only is it speculative that i3 Canada will become insolvent and all the transferred wells, facilities, and pipelines will end up orphaned to the OWA, it is speculative that the same thing would not have occurred had the transfer not been approved. In short, Canadian Natural has failed to demonstrate a reasonable probability of an adverse effect.

Moreover, even if i3 Canada became insolvent, it is not certain that all the transferred wells, facilities, and pipelines would be orphaned. In fact, it is possible that none of them would be. Many, if not most, of the licences have other working interest participants, and i3 Canada could transfer the licences to another licensee or the assets could be sold during an insolvency process and the AER could direct a transfer of the licenses to the buyers. Accordingly, it is difficult to determine what, if any, specific impact the Licence Transfers would have on the Orphan Fund and Canadian Natural's Orphan Fund Levy if i3 Canada were to become insolvent. The possibility that Canadian Natural may have to pay an increased Orphan Fund Levy because of the Licence Transfers is too remote and too speculative to form the basis of a finding that Canadian Natural is directly affected. If this were the case, all AER licensees who are required to pay into the Orphan Fund could be said to be directly affected by the transfer, which would not be a reasonable conclusion.

Canadian Natural cites the Alberta Court of Appeal's decision in *Orphan Well Association v Grant Thornton Limited* (*Redwater*),[13] as authority for the proposition that contributions to the Orphan Fund by

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[12] (February 2016) at p. 2.
[13] 2016 ABCA 238.

members of the Canadian Association of Petroleum Producers (CAPP) are interests that can be directly and adversely affected by decisions of the Regulator. The Court of Appeal in *Redwater* granted CAPP intervenor status on the basis that, as the primary source of funding for both the Orphan Fund and the AER, the members of CAPP were directly affected by the outcome of that appeal.[14] The Court's determination in *Redwater*, however, was specific to the context of that appeal and cannot be taken to mean Canadian Natural – as a member of CAPP and contributor to the Orphan Fund – is directly affected here. *Redwater* dealt with broader considerations of the applicable law related to the oil and gas assets of a bankrupt company, and whether a receiver could disclaim non-producing wells, which would then be orphaned to the OWA, before selling producing wells and distributing the proceeds to the bankrupt's estate. The Court's decision clearly directly affected industry, represented in *Redwater* by CAPP, as well as the Orphan Fund. This case is clearly distinguishable: the Licence Transfers do not directly affect the Orphan Fund.

Canadian Natural also states that its working interest in the transferred wells, facilities, and pipelines may be directly and adversely affected by the decision because i3 Canada's economic failure would adversely impact Canadian Natural's ability to work with local surface rights holders to the extent that they would not be paid their surface rentals. Canadian Natural does not provide any further details on how, specifically, its ability to work with landowners and occupants would be affected. Canadian Natural has not provided any evidence to support its claim, even on a *prima facie* basis. Moreover, any impact on its relations with landowners and occupants would be caused by the non-payment of surface rents, not the Licence Transfers. Accordingly, this is an indirect impact. Further, as Canadian Natural states, it has several wells, pipelines, and facilities in the area of the transferred assets and is one of the largest oil and gas producers in the province. Presumably its relationship with local landowners and occupants is impacted by more than the actions of one licencee in the area.

In conclusion, based on the information before us, we are not persuaded that Canadian Natural is directly and adversely affected by the Licence Transfers.

(c) Remaining Matters

Canadian Natural's request for regulatory appeal was not filed in accordance with section 30(5)(a) of the *Rules*, as it was not served on the registered owners of the land on which the transferred assets are located. Canadian Natural states that compliance with this requirement would require it to obtain a list of registered landowners from Gain Energy (or i3 Canada) and serve each landowner by courier, which would not be practicable. Accordingly, Canadian Natural asks that the AER dispense with the requirement in section 30(5)(a) pursuant to section 42 of the *Rules*, which allows the AER to dispense

[14] *Ibid* at para 20.

with, vary or supplement all or any part of the *Rules* if it satisfied the circumstances of a proceeding require it.

As we have decided to dismiss the request for regulatory appeal because Canadian Natural has not demonstrated that it is an eligible person, it is unnecessary for us to consider Canadian Natural's request that we dispense with the service requirement.

Similarly, it is unnecessary for us to consider Gain Energy and i3 Canada's arguments that the request for regulatory appeal should be dismissed because it is frivolous, vexatious, and without merit.

Sincerely,

< Original signed by>

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