

By e-mail only

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May 10, 2023

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Bennett Jones LLP

Alberta Energy Regulator – Compliance
and Liability Management

**Attention: Keely Cameron
Laura Glover
Thomas Machell**

Attention: Candice Ross

Dear Sir and Mesdames:

RE: Stay Request by AlphaBow Energy Ltd. (AlphaBow)
Alberta Energy Regulator – Compliance and Liability Management Branch (CLM)
Alberta Energy Regulator’s decision to issue an order to AlphaBow, pursuant to sections 26.2 of the *Oil and Gas Conservation Act* (OGCA), sections 1.100 and 12.152 of the *Oil and Gas Conservation Rules* (OGCR) and section 22.1 of the *Pipeline Act* on March 30, 2023
Location: Various
Request for Regulatory Appeal No.: 1942793

The Alberta Energy Regulator (**AER**) has considered the request of AlphaBow, under section 39(2) of the *Responsible Energy Development Act* (**REDA**) for a stay of the AER’s decision to issue a reasonable care and measures order (**Order**) to AlphaBow pursuant to section 26.2 of the OGCA, sections 1.100 and 12.152 of the OGCR, and section 22.1 of the *Pipeline Act* on March 30, 2023 (**Decision**). The Decision is the subject of the above-noted request for regulatory appeal, filed by AlphaBow on April 21, 2023.

For the reasons that follow, the AER denies AlphaBow’s request for a stay of the Decision.

REASONS FOR DECISION

Under section 38(2) of REDA, the filing of a request for regulatory appeal does not operate to stay an appealable decision. The AER may, however, grant a stay on the request of a party to the regulatory appeal under section 39(2).

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.¹ The onus is on the applicant for the stay to demonstrate that they meet each of the following criteria:

1. Serious question to be tried – Based on a preliminary assessment of the merits of the case, they have an arguable issue to be decided at the requested appeal.
2. Irreparable harm – They will suffer irreparable harm if the stay is not granted.
3. Balance of convenience – The balance of convenience favours granting a stay.²

1. Serious Question

The first step in the test requires the stay applicant to establish that there is a serious issue to be tried. The applicant has to demonstrate that there is some basis on which to present an argument on the requested appeal. This is a very low threshold. The stay applicant need only show that the requested appeal is not frivolous or vexatious.

For this part of the test, AlphaBow asserted that the decision was procedurally unfair, the decision maker was biased, and the decision itself was unreasonable.

CLM submitted there was no arguable question of fact or law to be considered in the RRA and the stay should therefore not be granted.

We find that these appear to be arguable issues and, given the low threshold that must be met for this test, we find that AlphaBow has met the test.

2. Irreparable Harm

The second step in the test requires the applicant for the stay to establish that they will suffer irreparable harm if the stay is not granted. It is the nature of the harm and not its magnitude that is considered. The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.³ As noted by the Alberta Court of Appeal, irreparable harm is “of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the [stay] would be a denial of justice.”⁴

¹ *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*).

² *Ibid* at 334.

³ *Ibid* at 341.

⁴ *Ominayak v Norcen Energy Resources Ltd*, 1985 ABCA 12 at para 31, citing *High on The Law of Injunction*, 4th ed, vol 1 at 36.

The Federal Court of Canada has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied.

That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*.⁵

For this part of the test, AlphaBow stated that if a stay was not granted, it would suffer various harms, including but not limited to risk of contravening the Order, risk of defaulting on its obligations, risk of insolvency, risk of prosecution by the AER for breach of the Order or issuance of a further order to cease operations, risk of assets going to the OWA, and further harm to its reputation and relationship with stakeholders. AlphaBow stated it would have no effective redress for the harms. It did not provide financial or other evidence to substantiate these claims.

CLM argued that all of the harms raised by AlphaBow are speculative, not certain.

We find that AlphaBow has raised potential, not inevitable, outcomes. The risks alleged by AlphaBow are potential consequences of failure to comply with AER requirements. Further, AlphaBow has not provided any documentation to support its allegations that its potential losses would be irreparable. No additional information has been provided by AlphaBow which demonstrates that compliance with the Order including payment of security will result in irreparable harm.

We also find that regulatory appeal stay decision 1932652 cited by AlphaBow in support of its stay request is factually distinguishable. In that case, the licensee had submitted the action plan required by the AER Suspension Order but then failed to implement it. This resulted in the AER issuing a subsequent Abandonment Order under the *Oil and Gas Conservation Act* (OGCA) and the *Pipeline Act*. The Abandonment Order required the licensee in that case to submit and implement an abandonment plan in relation to all wells, pipelines and facilities described in the Order. It also required the Orphan Well Association (OWA) to immediately suspend the Licensee's wells and discontinue its pipelines. Some of the Mojek wells were to be immediately 'shut in, sealed, locked and chained in a manner acceptable to the AER'. The Licensee took issue with the significant impact this would have on its operations, and argued that:

⁵ *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted] [emphasis in the original].

‘if the Abandonment Order is not stayed, it will lose its assets and business. It states that, since it has no revenue due to the Suspension Order, it needs third-party funding to implement its action plan and comply with its regulatory requirements’.

Regulatory appeal stay decision 1932652 considered the significant impacts of the Abandonment Order which required the immediate abandonment or suspension of substantially all of the licensee’s assets. The decision found that the resulting loss of assets and revenue from production operations, and the possibility of resulting business failure, would leave the licensee with no effective redress for the harm it would suffer. The AER found irreparable harm in that case in respect of the required abandonment pursuant to the abandonment plans, and granted a temporary and partial injunction of only those provisions in the Order.

Those circumstances are wholly different in nature than the ones arising out of the Order against AlphaBow. The Order requires AlphaBow to submit plans to demonstrate that AlphaBow is providing reasonable care and measures at the sites. The Order does not require third parties such as the OWA to take care and custody, and immediately suspend and discontinue AlphaBow’s wells, facilities and pipelines, as was the case in regulatory appeal stay decision 1932652. The Order only requires abandonment plans to abandon ‘all mineral lease expired wells’, which AlphaBow is not legally permitted to produce in any event.

Therefore, we find that AlphaBow has failed to substantiate that they *will* suffer harms of a nature to satisfy this part of the test as a result of the stay not being granted. Accordingly, AlphaBow has not satisfied the second branch of the stay test and the request for a stay is denied.

3. Balance of Convenience

As explained above, an applicant for a stay must satisfy each element of the three-part test for the stay to be granted. The balance of convenience involves examining which party will suffer more harm from granting or refusing the stay. In applying this branch of the test, the AER must weigh the burden the stay would impose on CLM against the burden on AlphaBow if the stay does not issue.

AlphaBow asserted that there will be no harm in staying the decision, whereas AlphaBow would be required to expend significant resources if it is not stayed. It argued that the balance is clearly in its favour.

CLM asserted that the Order evidences the AER’s concerns about AlphaBow’s ability to provide reasonable care and measures with respect to its properties and that granting a stay would seriously and significantly hinder CLM’s ability to carry out its mandate and duties in ensuring protection of the environment and public safety.

CLM cites the following quote from *RJR MacDonald*:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a public applicant... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.

Here the Court was considering the balance of convenience test, but referring to the irreparable harm test, given that there is interplay between the two, as noted by AlphaBow in its submission. The AER is charged with the authority of protecting the public interest in the environment and safety of the public. If, as AlphaBow suggests, a reasonable care and measures order should be stayed due to financial related harms, and harms possibly arising from additional non-compliance and enforcement, the AER's ability to enforce compliance any time a licensee was financially distressed would be unreasonably curtailed. This would frustrate the purpose of such orders and increase risks to the public and the environment that exist when a licensee is not providing reasonable care and measures.

Given the nature of Order, and the mandate of the AER, we find that the balance of convenience favours protecting the public interest by maintaining the order in force. AlphaBow has not established that there is a greater public interest served by suspending compliance with the Order until the regulatory appeal is determined, which could be a significant time period should this matter proceed to a hearing. Consequently, the AER finds, in addition to failing to demonstrate irreparable harm, AlphaBow has not established that the balance of convenience favours the AER granting the stay.

CONCLUSION

The stay request is dismissed because AlphaBow has failed to demonstrate irreparable harm and that the balance of convenience favours granting the stay.

The AER will provide its decision on the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Sean Sexton
Executive Vice President, Law and General
Counsel

<Original signed by>

Afshin Honarvar
Principal, Economist

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Paul Ferensowicz
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