

**AER Proceeding 434**

August 14, 2023

By email only

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**Bennett Jones LLP**

**Alberta Energy Regulator – Compliance and  
Liability Management Branch**

Attention: Keely Cameron  
Kelsey Meyer

Attention: Candice Ross

**Re: Regulatory Appeal 1943521  
Decision on Request for Stay of Suspension Order (issued June 5, 2023)**

Dear Counsel:

The panel of Alberta Energy Regulator (AER) hearing commissioners presiding over this proceeding (the panel), writes to provide our decision on AlphaBow Energy Ltd.'s (AlphaBow) request for a stay of the suspension order issued on June 5, 2023, by the AER's Compliance and Liability Management Branch (CLM). Following review and consideration of the submissions provided by AlphaBow and CLM, we have decided to deny AlphaBow's request to stay the suspension order for the reasons set out below.

## **BACKGROUND**

AlphaBow currently holds a number of licences granted by the AER under the *Oil and Gas Conservation Act (OGCA)* and *Pipeline Act* for physical infrastructure located throughout Alberta. This includes 3784 well licences, 277 facilities licences, and 4038 licences for pipeline segments.

On March 30, 2023, CLM issued an order directing AlphaBow to take steps to show that it is providing reasonable care and measures at its sites (RCAM order). AlphaBow and CLM have had extensive communications about the RCAM order, including AlphaBow's compliance record. On April 21, 2023, AlphaBow requested a regulatory appeal of the RCAM order.

On June 5, 2023, CLM issued the suspension order suspending all AlphaBow licences and directing suspension of all AlphaBow wells and facilities and discontinuance of all AlphaBow pipeline segments. On June 9, 2023, AlphaBow requested a regulatory appeal of the suspension order, a stay of the suspension order, and an inquiry under the *OGCA*.

On June 13, 2023, the AER granted an interim stay of the suspension order pending a decision on AlphaBow's request for an inquiry. On June 28, 2023, the AER granted AlphaBow's requests for regulatory appeals of the RCAM order and suspension order, which are covered by this proceeding. On July 5, 2023, the AER denied AlphaBow's request for an inquiry and indicated that the interim stay of the suspension order would remain in place while the panel decided the stay request as part of this proceeding.

## REASONS FOR DECISION

Under section 38(2) of the *Responsible Energy Development Act (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) of *REDA*.

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR-MacDonald*.<sup>1</sup> The onus is on the applicant for the stay to demonstrate 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 regulatory 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.<sup>2</sup>

### 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 must demonstrate that there is some basis on which to present an argument on the regulatory appeal. This is a very low threshold. The stay applicant need only show that the regulatory appeal is not frivolous or vexatious.

For this part of the test, AlphaBow submitted:

- CLM erred in issuing the suspension order, including errors in law related to the choice of enabling legislation, basing the order on noncompliance with the RCAM order in spite of pending review of

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<sup>1</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR-MacDonald*).

<sup>2</sup> *Ibid.* at 334.

that order, providing no evidence that the suspension order was needed to protect the public or the environment, and causing harm to the public and the environment by making the suspension order.

- The AER's granting of regulatory appeals of the RCAM order and suspension order was a finding that those regulatory appeals have merit.
- Proper interpretation of section 27 of the *OGCA*, under which the suspension order was issued, was necessary to provide certainty to the industry.

CLM submitted:

- AlphaBow's interpretation of how section 27 of the *OGCA* applied to the suspension order was too specific.
- There was not a serious question related to pending review of the RCAM order because AlphaBow's requests to stay that order were denied by both the AER and the Alberta Court of Appeal.
- The suspension order clearly outlined the evidence and assertions relied on for its issuance, thus there was no serious question raised by AlphaBow's submission asserting a lack of evidence to support the need to protect the public or the environment through the suspension order.
- AlphaBow's assertion that the suspension order would harm the public and the environment does not raise a serious question, as harm would arise from AlphaBow's failure to act as a responsible licensee.

Some matters discussed in AlphaBow's submissions may raise serious questions to be tried and we are satisfied that the first step of the stay test has been met. This conclusion does not make any assessment or predetermination of the issues that would be the subject of the hearing of this proceeding.

## **2. Irreparable Harm**

The second step in the test requires the stay applicant to establish it will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay applicant will be adversely affected by the conduct the stay would prevent if the applicant ultimately prevailed on the regulatory appeal.

We must consider the nature of the harm and not its magnitude. The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.<sup>3</sup> The stay applicant must provide clear and nonspeculative evidence that it will suffer irreparable harm if its application is denied.<sup>4</sup> Allegations of hypothetical or speculative harm will not suffice. The stay applicant must prove that actual harm will occur if the stay is not granted.<sup>5</sup>

AlphaBow submitted the suspension order would cause it irreparable harm because the order would result in a shutting-in of all its operations. The consequences of this would be an immediate cessation of business operations and revenue generation, inability to meet contractual and regulatory obligations, inability to conduct abandonment and reclamation work, and staff layoffs. AlphaBow submitted insolvency would result if the suspension order were not lifted.

CLM submitted that AlphaBow could avoid the anticipated effects of the suspension order, particularly cessation of revenue generating activities, by complying with the previous RCAM order. CLM indicated that AlphaBow had significantly increased its inventory of inactive sites through voluntary suspension and thus increased the risk of unfunded liability for its end-of-life obligations. CLM also stated that the suspension order was issued as a result of AlphaBow's noncompliance with AER requirements over several years.

This step of the test for a stay requires AlphaBow to prove that it will suffer actual harm if a stay is not granted. AlphaBow has made various allegations of anticipated results of the suspension order, including cessation of business and revenue generation, loss of staff and insolvency, however, it has not given us evidence that such harm *will* occur, and thus has not satisfied the second step of the test for a stay.

### **3. Balance of Convenience**

The balance of convenience involves examining which party will suffer more harm from granting or refusing the stay. We must weigh the burden the stay would impose against the benefit AlphaBow would receive from a stay. This requires consideration of significant factors and not simply a cost-benefit analysis.

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<sup>3</sup> *Ibid.* at 341.

<sup>4</sup> *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FC 815 at para. 59.

<sup>5</sup> *International Longshore and Warehouse Union, Canada v. Canada (Attorney General)*, 2008 FCA 3 (CanLII) at para. 22.

For this part of the test, AlphaBow referred to its submissions regarding irreparable harm and indicated that refusing a stay of the suspension order would require it to “divert further funds away from its operations and obligations to carry out unnecessary work that may impede the resumption of operations at a future date.” AlphaBow stated that a stay would enable it to generate revenue and better situate it to meet its regulatory obligations. It admitted to noncompliances under the RCAM order. AlphaBow restated that the suspension order would result in its insolvency and job losses, as well as consequent nonpayment to the Province of Alberta, municipalities, and landowners.

AlphaBow also submitted there would be no harm to CLM in staying the suspension order, that CLM had other enforcement tools at its disposal, and there was no immediate risk to the public or the environment. AlphaBow stated that granting the stay would not undermine the regulatory regime and would be akin to extending the timelines in the suspension order.

CLM submitted that the public interest must be considered in assessing the balance of convenience. It referred us to *RJR-MacDonald* and the Supreme Court’s statement that a public authority would establish irreparable harm to the public interest by showing that the public authority is required to protect the public interest and that the challenged activity was undertaken under that responsibility. CLM indicated the AER had the duty to protect the public interest related to public safety and the environment under the legislation which the suspension order was issued, the *OGCA* and *Pipeline Act*.

CLM stated that the AER had continued concerns about AlphaBow’s ability to provide reasonable care and measures of its sites, and that a stay would greatly hinder CLM’s ability to carry out the AER’s mandate for environmental and public safety protection. CLM further stated that AlphaBow’s financial situation raised serious concerns about its ability to manage the risk inherent in all oil and gas operations, and that AlphaBow’s noncompliance record indicated it posed a serious risk to the public. CLM stated that they were required by mandate and law to act and did so.

We note from AlphaBow’s submissions that it refuted CLM’s assertion that it was an unsafe licensee and that “there [was] no basis to support CLM’s statement that AlphaBow’s current staff cannot provide the level of reasonable care and measures required”, while also acknowledging noncompliances, including nonpayment of AER and Orphan levies. AlphaBow also explained that payment of the levies and prioritization of environmental obligations were delayed pending the outcome of its stay request and that should the stay be granted, it intended to pay the outstanding amounts. We note that AlphaBow claimed irreparable harm would result from the stay, but it also appeared to imply that it had the appropriate levels of staff and the necessary funds to address many of the outstanding noncompliances and payment of levies if the stay was granted. In our opinion, this is puzzling at best.

As with the first two steps of the test for a stay, AlphaBow bears the onus of convincing us that the balance of convenience weighs in favour of granting a stay of the suspension order. We are not convinced that the balance of convenience favours AlphaBow; AlphaBow has alleged various financial consequences that would result if a stay were not granted but has not provided clear proof supporting any of those allegations. It also has not specified the other enforcement options it alleged were available to CLM.

Given the vast number of AlphaBow's licences and the risks that could flow to the public and the environment from noncompliance or inadequate or unsafe operations, we believe that the balance of convenience favours the AER and the public interest. The public interest would be best protected if the suspension order was kept in effect. AlphaBow has not met this part of the test.

## **CONCLUSION**

We dismiss the stay request because AlphaBow has failed to meet the second and third parts of the test related to irreparable harm and balance of convenience. In light of this decision being issued, the interim stay granted by the AER is vacated and the suspension order is in effect.

Sincerely,

C.L.F. Chiasson, Hearing Commissioner (presiding)

S. F. Mackenzie, Hearing Commissioner

M.A. (Meg) Barker, Hearing Commissioner

cc: A. Huxley and A. Doebele, AER legal counsel for the panel