

Via Email

March 8, 2023

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Osler, Hoskin and Harcourt LLP

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Attention: Sander Duncanson

Attention: Keely Cameron

Dear Sir and Madam:

RE: Request for Reconsideration of Approved Transfer of Pipeline Licence No. 46189 filed by NOVA Chemicals Corporation (NOVA) AlphaBow Energy Ltd. (AlphaBow) Pipeline Licence No.: 46189 (PL46189 or Pipeline) Request for Reconsideration No.: 1941311

The Alberta Energy Regulator (AER) received a letter and written submissions from NOVA on September 9, 2022 regarding the AER's approval of a licence transfer application on December 11, 2019, that transferred PL 46189 from NOVA to AlphaBow (Decision). In the letter and submissions, NOVA requests that the AER reconsider and revoke the Decision pursuant to section 42 of the *Responsible Energy Development Act* (REDA), with the effect of NOVA being restored as the holder of PL46189.

This letter addresses NOVA's request for reconsideration.

The AER has considered NOVA's request and the submissions filed by NOVA dated September 9, 2022 and January 23, 2023. The AER has also considered a November 22, 2022 letter from NOVA to the AER with request to a separate request for reconsideration, as it was included as an attachment to NOVA's January 6, 2023 submissions. The AER has also considered the submissions filed by AlphaBow on December 23, 2022.

For the reasons that follow, the AER has determined that this is not an appropriate case for it to exercise its discretion to reconsider the Decision pursuant to section 42 of REDA, and therefore, the AER declines NOVA's reconsideration request.

Background

NOVA provided its reconsideration submission on September 9, 2022. On December 2, 2022, counsel for AlphaBow requested that it be copied on all communications with respect to NOVA's reconsideration request.

On December 6, 2022, the AER wrote to NOVA and AlphaBow and requested submissions from each of them and set timelines for these submissions. AlphaBow requested a brief one-week extension to the submission timelines. NOVA opposed this request but the AER granted it on December 8, 2022. AlphaBow provided its submissions on December 23, 2022, and NOVA provided reply submissions on January 6, 2023.

The AER's records indicate that PL46189 was originally licensed to NOVA on October 1, 2005 (Application 1415588). NOVA discontinued the Pipeline through a licence amendment on August 15, 2019 (Application 1259652) and transferred the Pipeline to AlphaBow on December 11, 2019 (Application 1925369). This is the Decision NOVA seeks to have reconsidered. AlphaBow is the current holder of PL46189 and the Pipeline is currently discontinued and has been since 2019.

Reasons for Decision

NOVA argues that AlphaBow has no legal interest in or contractual right to use or operate the Pipeline, and that it is located entirely on lands owned by NOVA, to which AlphaBow has no right of access. NOVA refers to contractual agreements it had with Glencoe, pursuant to which, among other things, NOVA states that Glencoe constructed and owned the Pipeline, but NOVA was obligated to operate, maintain, repair and replace it during the term of the agreements. NOVA states that these agreements were terminated, and as a result it ceased operating the Pipeline and applied to have it transferred to AlphaBow. NOVA states that the contractual arrangements provided NOVA with the right to purchase the Pipeline if AlphaBow failed to remove it within a specified time period, and when AlphaBow failed to do so, NOVA exercised this right and NOVA is now the owner of the Pipeline.

NOVA states that AlphaBow has refused to cooperate with NOVA in making a joint application to the AER to transfer PL46189 back to NOVA pursuant to section 18 of the *Pipeline Act* and Directive 088: *Licensee Life-Cycle Management*. NOVA argues that the Decision was premised on AlphaBow owning the Pipeline and having a right of access to allow AlphaBow to remove it from NOVA's land. NOVA submits that circumstances have changed such that AlphaBow does not own and has no ability to access the Pipeline, and the premise on which the AER approved the transfer no longer exists. In its September 9, 2022 submissions, at paragraph 26, NOVA submits that if these facts were before the AER when it made the Decision, "the AER would almost certainly have refused the transfer." NOVA's position is that this is a

material change in circumstances, and this fact, plus the fact that there are no other AER review or appeal mechanisms to address the situation, support the AER reconsidering the Decision.

AlphaBow submits that NOVA is seeking extraordinary relief from the AER, namely expropriation of an AER license and its associated benefits and obligations, which AlphaBow assumed three years ago. AlphaBow submits that it is aware of no precedent for such a request, and that the pipeline at issue is subject to ongoing litigation between the parties, “which NOVA is seeking to circumvent through this process.”¹ AlphaBow submits that NOVA’s reconsideration request should be dismissed, as this is not an appropriate situation for the exercise of the AER’s discretionary authority, and that the matters raised in the reconsideration request pertain to complex contractual legal issues that are before the Court of Kings Bench. AlphaBow states there are a number of issues in dispute relating to the assumption, performance, and termination of one or more of the agreements, and that its counterclaim explicitly deals with the issues raised in this reconsideration request, namely NOVA’s entitlement to purchase certain assets under the agreements. AlphaBow argues that there is a live issue as between the parties, regarding whether NOVA is entitled to or has purchased the Pipeline. AlphaBow submits that the existence and availability of a court process supports dismissal of NOVA’s request. AlphaBow argues that the AER’s jurisdiction in relation to contractual disputes is limited and does not extend to provide authority to the AER to determine ownership disputes.

In its reply submissions, NOVA provide more details about the court proceedings including copies of pleadings. NOVA argues that its ownership of the Pipeline is not subject to the existing litigation and that the court proceedings will not deal with the issues raised in the request for reconsideration. NOVA submits the Decision should be reconsidered because there has been a material change in circumstances where AlphaBow has no ability to access or operate the Pipeline and there is no other AER review or appeal mechanism to address this situation.

Section 42 of the *Responsible Energy Development Act* (REDA) sets out the authority for the AER to reconsider its decisions:

42 The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision. [underlining 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 used by industry or members of the public; other provisions in REDA are available for that purpose. Further, section 42 does not provide mechanism to address pipeline

¹ AlphaBow’s December 23, 2022 letter at para 2

compliance issues; other provisions in REDA and the *Pipeline Rules* are available to address and respond to pipeline compliance matters.

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. The AER considers that the reconsideration power in section 42 of REDA should be used sparingly and only in the most compelling cases where no other review power exists to address a situation that is in obvious need of remediation. The AER will reconsider a decision where 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.

NOVA has not established that this is such a case. NOVA has not established that there are exceptional and compelling grounds to justify the AER reconsidering the Decision. The Decision was made over three years ago with NOVA's consent, and without conditions.

The AER appreciates that contractual disputes have arisen between NOVA and AlphaBow, the current licensee of the Pipeline, and these contractual disputes are the subject of ongoing court litigation. NOVA has not provided the AER with a copy of the referenced contractual agreements that it relies on to support its right to purchase the Pipeline from AlphaBow, and it has not provided the AER with a purchase and sales agreement or any evidence of the purchase of the Pipeline from AlphaBow. NOVA has not provided the AER with clear and unequivocal evidence or information to demonstrate that AlphaBow is contractually required to transfer PL46189 back to NOVA. The AER does not have sufficient information at this time to determine a change in ownership or entitlement to the Pipeline has occurred.

The AER does not regulate private contractual agreements between parties, nor does it determine contractual disputes that arise between parties. The AER is not obliged to utilize its reconsideration power to address contractual issues or disputes between parties that are more appropriately resolved by the courts. The courts are the proper forum to consider the evidence and make factual findings and interpret and determine the legal impact of contractual agreements and the resulting relief that might be appropriate.

The AER notes that while it has been given the court pleadings by NOVA, neither party has advised the AER if the matter has gone to trial, or if a final court decision has been rendered. The fact that there are contractual disputes before the court between these parties is one of the reasons why the AER has decided not to exercise its extraordinary power of reconsideration in this case. The parties should engage the courts to determine the contractual disputes that exist between them and seek the appropriate relief. The AER does not agree with NOVA that there is no other available mechanism to address this situation. The court has

inherent jurisdiction to grant necessary relief to parties when they have established entitlement to it. It is open to NOVA to seek court declarations or orders to address the current situation.

AlphaBow is the current licensee of the Pipeline. It obtained the licence by way of a licence transfer, to which NOVA consented, and which was approved by the AER without conditions. There is no compelling evidence that AlphaBow does not own or is not entitled to operate the Pipeline, but even if there was, NOVA could access the AER's compliance process. Part 10 of the *Pipeline Rules* set out the AER's rules for the discontinuance, abandonment, removal or resumption of pipelines. Section 82(9)(h) of the *Pipeline Rules* provide that a licensee must abandon a pipeline if the licensee has sold or disposed of the licensee's interest in the pipeline and has not transferred it to a person who is eligible to hold a licence for the pipeline. Thus, if AlphaBow does not have an interest in PL46189, as alleged by NOVA, the AER's compliance assurance program is a mechanism that NOVA could consider using if NOVA has clear and unequivocal evidence or information to support a compliance complaint. This is another reason why the AER has decided not to exercise its discretion to reconsider the Decision. NOVA alleges that AlphaBow refuses to cooperate in transferring PL46189 to NOVA, but even if the AER assumes this is the case, this would not be a valid reason to reconsider the Decision. Compliance concerns are addressed through the AER's compliance assurance process, not through a section 42 REDA reconsideration request.

Finally, NOVA's submissions include a discussion of AlphaBow's eligibility status. The AER finds those submissions irrelevant to this reconsideration request. As noted above, it is open to NOVA to access the AER's compliance assurance program if it has concerns about AlphaBow's compliance with its regulatory obligations associated with PL46189.

Conclusion

In conclusion, NOVA has not established that there are exceptional or compelling grounds, or extraordinary circumstances to justify a reconsideration of the Decision in these circumstances. Accordingly, the AER will not exercise its discretion and reconsider the Decision under section 42 of REDA.

Sincerely,

<Original signed by>

David Hardie

Director, Liability Management

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Anita Lewis
Senior Advisor, Liability Strategy

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