

August 9, 2023

## **An Incredibly Ill-Advised and Unnecessary Decision**

**By:** Nigel Bankes and Martin Olszynski

**Decision Commented On:** Generation Approvals Pause Regulation, [OIC 172/2023, August 2, 2023](#)

On August 3, 2023 the Government of Alberta [announced](#) that the Alberta Utilities Commission (AUC) will pause approvals of new renewable electricity generation projects over one megawatt until February 29, 2024. As further set out below, this “pause” is entirely unnecessary to achieve the government’s stated goals; it is also astoundingly hypocritical and undermines confidence in the stability of Alberta’s regulatory framework insofar as it singles out renewable energy projects for special treatment.

### **How Was the Decision Made?**

Since Ministers of the Crown don’t get to change the law on their own, and since the AUC has a legal duty to process renewable power applications under the terms of the *Hydro and Electric Energy Act*, [RSA 2000, c H-13](#), (*HEEA*) the first question for a law blog must be the legal authority for the “pause”. The answer is a new regulation, the *Generation Approvals Pause Regulation*, [OIC 172/2023, August 2, 2023](#) (the *Pause Regulation*). The authority for the *Pause Regulation* is apparently s 75(1)(a) of the *Alberta Utilities Commission Act*, [SA 2007, A-37.2, \(AUCA\)](#). This provision is a type of Henry VIII clause (for an explanation of such clauses see our [post](#) on the first version of the *Sovereignty Act*), authorizing the Lieutenant Governor in Council (i.e. Cabinet) to make regulations “adding to, clarifying, limiting or restricting any of the Commission’s powers, duties and functions, or regulating how they are to be exercised ...”. Section 2 of the *Pause Regulation* provides that:

Despite anything to the contrary in the Act or any rule made under section 76 of the Act, during the period in which this Regulation is in force the Commission shall not grant an approval referred to in section 9 or 11 of the *Hydro and Electric Energy Act* in respect of a hydro development or power plant that produces renewable electricity.

While it is clear enough that the AUC cannot issue a new approval for the listed projects, it is not entirely clear – even to the AUC – what the implications are for its ongoing consideration of power applications short of issuing a new approval. The AUC, in an [announcement](#) issued on the same day as the press release, identified three possible options:

- Complete abeyance: The AUC does not accept new applications during the pause period and all existing excluded applications will be placed in abeyance during the pause period with the AUC taking no further steps to complete their record or issue decisions.

- Partial abeyance: The AUC does not accept new applications during the pause period. For all existing applications with an incomplete record, the AUC process will proceed to the point where the written evidence is complete, applications will then be placed in abeyance until the pause period expires. The AUC will not hold any public hearings for these applications during the pause period. Existing applications with a complete record will be placed in abeyance until the pause period expires.
- Approval hold only: The AUC continues to fully process new and existing excluded applications without issuing any approvals until after the pause period.

The AUC is seeking comments from stakeholders on these options by August 18, 2023.

The moratorium will not apply to stand-alone storage projects (e.g. [AUC Decision 25691-D01-2020](#), TERIC Power Ltd., eReserve2 Battery Energy Storage Power Plant Project, August 21, 2020) but many storage projects are linked to renewable projects to allow for time-shifting of generation. See, for example, [AUC Decision 27205-D01-2022](#), Georgetown Solar Inc., Georgetown Solar + Energy Storage Project, November 2, 2022, involving a solar power plant with a capacity of up to 230-megawatt (MW) and a battery energy storage system with capacity of up to 200-megawatt-hour (MWh). These generation-plus-storage projects are valuable additions to the grid and can provide important ancillary services. These too will be put on hold for the next seven months.

### **Why Now?**

The press release tells us that the pause was put in place as a “direct response to a letter received from the AUC and concerns raised from municipalities and landowners related to responsible land use and the rapid pace of renewables development.” The AUC’s letter to the Minister (dated July 21, 2023) attached to the press release (under the misleading heading “[AUC letter requesting government initiate a pause](#)”) notes that the AUC “is currently processing a historically high volume of new renewable (wind and solar) and thermal power plant applications.” For the AUC, this raised two important public interest considerations: (1) the development of power plants on high value agricultural lands, and (2) the lack of mandatory reclamation security requirements for power plants. The letter went on to say that these issues engaged a number of government departments as well as municipalities and landowners and that it was difficult for the AUC to address them on a case-by-case basis. The letter therefore suggested a dedicated period of engagement with stakeholders. In our view, this was effectively a call for an inquiry.

It is important to emphasise three matters. First, the AUC’s letter refers to power plants in general and not just renewable power projects. Second, at no point does the letter call for a pause or a moratorium on the AUC’s consideration of renewable power projects. Third, there is no suggestion in the letter that the AUC has any concerns with respect to the reliability of Alberta’s electricity supply.

Nevertheless, in addition to the pause, the Government has asked the AUC to conduct an inquiry “into the ongoing economic, orderly and efficient development of electricity generation in Alberta” and has issued [terms of reference](#) (ToR) to that effect. The ToR are not confined to the two issues identified in the AUC’s letter but range more broadly to include such disparate issues as grid reliability, the use of Crown lands for renewable projects, and a concern for “pristine viewsapes”.

The full ToR require the AUC to gather and provide information on the following:

- a. Considerations on development of power plants on specific types or classes of agricultural or environmental land;
- b. Considerations of the impact of power plant development on Alberta's pristine viewscales;
- c. Considerations of implementing mandatory reclamation security requirements for power plants;
- d. Considerations for development of power plants on lands held by the Crown in Right of Alberta;
- e. Considerations of the impact the increasing growth of renewables has to both generation supply mix and electricity system reliability.

There is no reference in the ToR to climate change considerations, net-zero targets or interprovincial grid connections.

The report is due on March 29, 2024 a month *after* the expiry of the moratorium. This suggests that the moratorium will be over well before we see any changes to the regulatory framework, especially if such changes require new legislation.

Reference to item (e) prompts consideration of a [second letter](#) attached to the Minister's press release. This is a letter to the Minister from Michael Law, President and Chief Executive Officer of the Alberta Electric System Operator (AESO) also dated, like the AUC's letter, July 21, 2023. Its two short paragraphs are worth quoting.

Thank you for advising us that the Government of Alberta will be requesting the Alberta Utilities Commission (AUC) to hold an inquiry into land use and reclamation issues, and that the AUC intends to review its hearing process with respect to these issues, necessitating a one-time, six-month (*sic*) temporary pause on the AUC accepting new Power Plant Applications.

As the province's independent system operator, the AESO will support the AUC in its implementation of a government directed six-month (*sic*) temporary pause on new Power Plant Applications for purposes of providing clarity to industry on land use and reclamation issues.

Several things stand out. First, the letter confirms the suspicion that the government did not consult broadly on its plans. Instead, the letter suggests that the AESO was simply told what would be happening. Second, the letter, like the AUC's, mentions only two matters: land use and reclamation issues. There is no reference to the issue of grid reliability, which is of specific concern to the AESO. The AESO also has an important stake in maintaining Alberta's reputation as an attractive jurisdiction in which to make investments in the renewable sector. And third, the AESO's statement of support is couched very carefully. It is not a statement of support for the Minister's decision to impose a moratorium, it is simply a statement that the AESO will stand by the AUC as it works through the implications of the government directed moratorium.

## Why is the Pause so Ill-Advised and Unnecessary?

Let's be clear. The two concerns raised in the AUC's letter – land-use and security for reclamation – are legitimate public interest concerns. While some may take the view that a private owner should be able to determine land use, for others there is a social interest in protecting high quality agricultural lands. Indeed, some provincial governments have severely restricted the conversion of agricultural lands: see, for example, British Columbia's *Agricultural Land Commission Act*, [SBC 2002, c 36](#). The tension between these two views is already reflected in previous AUC decisions. For example, in a 2020 decision on a solar project application the Commission reasoned that “the choice to take agricultural land out of production should remain with the landowner and should not be upset by the Commission”, yet at the same time the Commission indicated that it may intervene where “it is clearly demonstrated that the public interest” requires its intervention ([AUC Decision 24266-D01-2020](#), East Strathmore Solar Project Inc. September 25, 2020, at para 49). In sum, while it is surprising and ironic to see a government so committed to private property rights and individual freedoms affording this particular concern such prominence, there is room for debate as to how to balance private and social interests within our conceptualization of property. This is also a concern that might be better addressed through the regional planning process of the *Alberta Land Stewardship Act*, [SA 2009, c 26.8](#). But, as [we have noted elsewhere](#), government indifference has effectively undermined the *ALSA* planning process.

Similarly, there should be consideration of the steps that need to be taken to ensure that there are adequate funds available to the regulator to ensure that abandonment and remediation activities can be undertaken at no cost to the public purse. As we and others have said numerous times in relation to the oil and gas sector's [estimated \\$260 billion in unfunded remediation](#) and reclamation costs, these are private costs that should be assumed by project proponents and they should not be socialized. But this is a rule that should be applied to *all energy projects* in the province whether those projects are regulated by the Alberta Utilities Commission or by the Alberta Energy Regulator.

The AUC has dealt with similar concerns in the past by adding terms and conditions to its approvals. For example, at one point in time, the Commission routinely addressed concerns with respect to abandonment and remediation obligations for solar projects (including security for those obligations) as follows:

Until recently, the definition of “activity” under the Environmental Protection and Enhancement Act did not include solar power generation projects, therefore, the duty to reclaim did not apply to the operators of such projects. However, on March 31, 2017 the Renewable Electricity Act came into force and amended the Environmental Protection and Enhancement Act by adding “the generating of solar electric power” to its Schedule of Activities.

It is the Commission's view that as a result of this amendment, solar power generation projects now fall within the definition of an “activity” in the Environmental Protection and Enhancement Act and that the operators of such projects located on specified land are now required to obtain reclamation certificates from Alberta Environment and Parks.

At present, there is no statutory requirement for the owners of solar power generation facilities to post security for the reclamation of those facilities. However, it is the Commission's view that the Minister of Environment and Parks has the authority to issue a Ministerial Order requiring security for solar power generation projects pursuant to Section 135(1) of the *Environmental Protection and Enhancement Act* and Section 17(2) of the *Conservation and Reclamation Regulation*. Should the Minister of the Environment determine that reclamation security should be required for solar power generation projects, including the project at hand, the Commission expects that the Minister will issue a Ministerial Order to that effect.

The Commission expects that the applicant will comply with all applicable requirements for conservation and reclamation of the project site under the *Environmental Protection and Enhancement Act* at the end of the project's life, including the requirement to obtain a reclamation certificate. However, if for any reason at the time of decommissioning, there are no statutory reclamation requirements in place for solar electric power generating facilities, the applicant will be required to submit a reclamation plan to the Commission for its review and approval. Accordingly, should the Commission approve the project, it would be subject to the following condition:

The applicant shall comply with current applicable reclamation standards at the time of decommissioning. If no legislative requirements pertaining to reclamation are in place at the time of decommissioning, the applicant will submit a reclamation plan to the Commission for approval.

(See [AUC Decision 22296-D01-2017](#), C&B Alberta Solar Development ULC Hays Solar Power Plant June 7, 2017 at paras 29 – 32, and widely cited in subsequent solar power plant decisions).

In other words, consideration of these two ideas by the AUC is not new and there was no need for a general pause in relation to all renewable power projects – however that pause is interpreted. For example, take the question of security for abandonment and reclamation activities. Let us suppose that the government decides, following receipt of the Commission's Inquiry Report, to clearly legislate that security will be required for all power projects in the province. Presumably, the government will want to apply that legislation not just to new projects, and not just to projects that have been processed in the last few months, but to all power projects, renewable or non-renewable. It would be incredible to think that older projects should be exempt from such a requirement and even more incredible to think that security requirements should only apply to renewable power projects. So yes, this may require new legislation but that is not a good reason to impose a moratorium on a sub-category of power projects.

It is even more bizarre to see such a moratorium imposed on renewable energy projects for this reason when it is widely accepted that the Alberta Energy Regulator (AER)'s security rules for both conventional and oil sands operations are completely inadequate to cover the potential liability. For more on security for oilsands projects see [here](#), noting that the Alberta government has been reviewing the defective system for oilsands security since May 2021, has not made a

decision to replace it yet, and has made changes to reduce the security collected in the interim. And for adequacy of security for conventional projects see [here](#), and note that Alberta's defective system for conventional oil and gas liabilities has been under review since at least 2016, and that the [Auditor General noted](#) that the "AER has not defined how much security needs to be collected, when it will be collected or how security collection will be enforced under the new framework" (at 31). At the risk of repetition, the AER's own internal estimates from 2018 suggest that these liabilities likely exceed \$260 billion.

It is evidently more difficult to deal retrospectively with the loss of high-quality agricultural land, but the government could still have taken a more targeted approach to this issue than a general pause. For example, if Cabinet can rely on s 75(1)(a) of the *AUCA* to impose a moratorium, it could surely rely on the same power to direct the AUC to take concerns with respect to the loss of agricultural lands into account (to the extent that it is not already doing so) as part of its general public interest consideration under s 17 of the *AUCA*.

Which brings us to consider the negative implications of a targeted moratorium, such as that which has been imposed on new renewable energy projects in Alberta. The press release is titled "Creating *certainty* for renewable projects" (emphasis added) but the general reaction to the announcement is that it will have absolutely the opposite effect. Here is a sampling:

- Vittoria Bellissimo, president and CEO of the Canadian Renewable Energy Association (CanREA) said: "I'm worried about investor confidence in our electricity market. I'm worried about affordability for customers. I'm worried that we took something that was going very well in Alberta, and we had an advantage, and we're giving up our advantage" (via [CBC, Janet French](#)). And "It was a done deal before we had a chance to convince the minister that the industry doesn't need a moratorium" (via [Canadian Press](#)).
- University of Calgary economics and public policy associate professor Blake Shaffer said it's "a mix of hypocrisy and ideology that the finger was pointed solely at renewables," while the government contemplates publicly subsidizing more cleanup of abandoned oil wells (via [CBC, Janet French](#)).
- Greengate Power CEO Dan Balaban, whose company developed the country's largest solar project in Vulcan County, noted all forms of energy have various issues associated with their development. Yet, a moratorium is only being imposed on renewables. "It's like taking a jackhammer to deal with a nail," said Balaban, adding he was surprised by the decision (via [Chris Varcoe, Calgary Herald](#)).
- "With green energy halt, UCP declares a moratorium on Alberta's reputation" ([Don Braid, Calgary Herald](#)).
- "The government's sudden announcement of an unprecedented moratorium on the lowest-cost new electricity available in Alberta puts 91 projects and \$25 billion of investments and associated jobs for Albertans and revenues for municipalities at risk. It creates uncertainty around future investments while adding unnecessary red tape to these projects" ([Binnu Jeyakumar, Pembina Institute](#)).

To be fair, others have spoken in support. For example, *Paul McLauchlin, president of the Rural Municipalities of Alberta (RMA) was quoted in the press release and subsequently by many news*

*outlets as supporting the need for a review (although once again there is nothing in his comments that speaks to the need for a pause).*

RMA is pleased by this decision to develop a province wide plan for how the industry can grow strategically and responsibly. Rural municipalities cover roughly 85 per cent of Alberta's land and their voices must be included in the approval process for all renewable energy projects. We look forward to working with the Government of Alberta to create an approval process that balances provincial and local perspectives and positions Alberta as a leader in responsible renewable energy development.

## Conclusions

The AUC has the responsibility for approving all new power projects under the *HEEA* and the *AUCA*. Applicants for an approval must also comply with the AUC's [Rule 007](#): Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments, and Gas Utility Pipelines. The AUC keeps this Rule under review, and effects changes from time to time based on consultations with stakeholders to address gaps and concerns with respect to new types of developments such as [bitcoin mining projects](#). Significant new issues, such as the use of [hydrogen](#) within the utility system, [smart grids](#), or the development of new [hydro](#) resources may also merit a formal AUC inquiry. But to impose a moratorium on the approval of a specific class of generators is highly unusual and we think unprecedented in Alberta's market-based electricity sector.

Which leads to the question of why the pause, because the pause or moratorium seems to be a totally disproportionate response to the ills that have been identified. It is also wildly inconsistent with the province's dismissive approach to the massive unfunded liabilities created by the oil and gas industry (as another example, consider the government and regulator's [very gentle](#) response to the [unpaid rural municipal tax problem](#)). And while the protection of pristine viewsapes seem to loom large in relation to the development of renewables in rural Alberta, this hardly seems to figure when it comes to oil sands projects and huge landscape level impacts in the more remote parts of the province that fall within [Treaty 8 territory](#) (and see the [post](#) by one of us on the implications of the *Yahey* decision).

This leads to the suspicion that the particular remedy of a pause was motivated by political reasons rather than technical reasons. For example, Carrie Tait of the Globe and Mail has noted on [social media](#) that there is significant overlap between the membership of "Take Back Alberta" and Albertans who dislike wind and solar projects. Respected economist [Aidan Hollis](#) has speculated that the moratorium might have been a response to a [recent decision of the AUC on a solar project](#) that has negative (but not unexpected) consequences for the owners of freehold mineral rights, while [one of us](#) has questioned whether this decision is connected to the report of David Yager's Energy Futures Panel, which the [Premier has declined to release to the public](#). Others have pointed to the Premier's own comments on renewable energy sources. For example, in her previous lobbying career, Ms. Smith [clearly favoured natural gas generation over renewables](#), while in [her current role](#) she continues to push out into the distant future any targets for decarbonizing Alberta's electricity sector. And the letters from the AESO and the AUC seem to have been manufactured or solicited as political cover rather than as genuine expressions of serious concern from the

relevant experts seeking a moratorium; neither letter mentions a moratorium. Perhaps most disturbing of all are the Premier’s own comments justifying the pause on the grounds that [“the feds are preventing development of backup generation for renewable energy like natural gas.”](#) It would be strange indeed if renewable energy projects become a sacrificial pawn in federal/provincial haggling over decarbonization targets. Concerns that the pause is politically rather than technically motivated can only serve to undermine investor confidence in Alberta’s renewables sector and the independence of the regulators, and will further delay efforts to decarbonize Alberta’s grid, while the rest of the world marches with increasing speed towards a renewable future.

Over the last number of years [Alberta’s renewables sector has worked hard, along with the AESO and the AUC](#), to develop a market regime that encourages investment in renewables and storage projects. The pause (or moratorium) on processing new renewable projects is a giant step backwards.

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