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Alphabow's Regulatory Appeal: The AER Hearing Panel Misunderstood Their Job

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Decision Commented on: *Alphabow Energy Ltd: Regulatory Appeals of AER Orders (Regulatory Appeals 1943516 and 1943521)*, [2024 ABAER 001](#) (Alphabow)

This is a comment on an Alberta Energy Regulator (AER) hearing panel decision following a regulatory appeal of enforcement action against a company that was failing to meet the AER's expectations for regulatory compliance.

Because of an administrative law mistake by the AER hearing panel, the decision is not what it should be. The AER's handling of financially troubled corporations with large closure liabilities, significant unpaid debts, compliance troubles, and financial problems is a multi-billion dollar policy problem for Alberta. The decision should have assessed the AER's policy approach to one of these companies, but the hearing panel misunderstood their role and assessed only procedural fairness and 'reasonableness' in the restricted sense that word applies on judicial review. As a result, the decision is less interesting than it should be, since it only finds that what the AER did was legal and says nothing about whether it was good policy or in the public interest.

Background: The AER's Enforcement History with Alphabow Energy Ltd.

Alphabow, initially called Sequoia Operating Corp. was created in a series of amalgamations in 2018. Alphabow is a result of the same set of transactions that produced the more well-known Sequoia Resources Corp that is the subject of the complex and [ongoing litigation](#) in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, with the most recent decision of [2022 ABQB 592 \(CanLII\)](#). At the time Alphabow was created, problems with the AER's liability management system meant that corporations with unreasonably high closure liabilities relative to valuable assets could be spun off from other oil and gas corporations – [the 'liability dumping' problem](#). The trustee in the *PricewaterhouseCoopers Inc v Perpetual Energy Inc* matter filed litigation taking the position that Sequoia Resources Corp was also a case of illegal liability dumping, and back in July 2019 had filed litigation alleging a similar thing about Alphabow – but the trustee [has not reported any steps in that litigation since April 2020](#).

Ever since that inauspicious creation, "AlphaBow has experienced financial challenges for much of its corporate life" (at para 4). The AER allowed Alphabow to operate their assets in the hopes of bringing Alphabow into compliance with their regulatory obligations.

Information on Alphabow's size and liability is scattered through the decision. Alphabow "holds 8147 AER licences comprising 3785 wells, 322 facilities, and 4040 pipeline segments. The

estimated liability for these licences is \$264 million, and the inactive portion equates to \$155 million (about 58% of AlphaBow's assets)" (at para 3). Alphabow "is ranked 27 out of 382 licensees in Alberta for total liability and is responsible for the eighth largest inactive liability" (at para 135). As of November 2023, Alphabow "owed taxes to five specified municipalities totalling \$12 223 903.17" (at para 104). Alphabow "has over a hundred contaminated sites", about which "the AER has very limited information because AlphaBow has not provided updates on the sites despite repeated requests" (at para 215).

In July 2020, the AER began gradually reforming their approach to oil and gas closure liabilities to attempt to address the historical failure of past approaches, a process that remains incomplete (at paras 23-25). Those reforms entail changes to the AER's exercise of discretion and therefore create uncertainty about the AER's regulatory expectations. The AER's behaviour from 2002-2020 cannot be relied on as a guide to the AER's future regulatory approach.

In a [July 2022 order](#), the AER barred Alphabow from acquiring new well or facility licences (which I commented on [here](#)) because of Alphabow's below average field compliance rating, concerns about Alphabow's ability to meet its regulatory and liability obligations, and Alphabow's outstanding municipal taxes and surface lease payments (at para 5).

The AER issued [a reasonable care and measures order to Alphabow on March 30, 2023](#), and after failed negotiations with Alphabow's management, [a suspension order on June 5, 2023](#) (at paras 6-9). The AER granted an interim stay of the June order but then cancelled the interim stay in August 2023. In September 2023, the AER directed the orphan well association to suspend Alphabow's sites (at para 10), but Alphabow remains the license holder and is responsible for the costs of the orphan well associations' suspension work (at para 231). None of Alphabow's assets are therefore 'orphans' [in the technical sense](#).

Alphabow sought a regulatory appeal of the two 2023 orders, and the hearing was held from November 27 to December 1, 2023. As an internal appeal process, two different parts of the AER were involved in the hearing: the appeal was heard by an AER hearing panel, with the AER's closure and liability management branch (CLM) supporting their orders and Alphabow challenging the orders. The hearing was mostly public, but some parts of the hearing and the decision relating to financial statements were kept confidential (at paras 14-15). Eight paragraphs relating to the "Requirement to Provide Third-Party Audited Annual Financial Statements" were partially or fully redacted (see paras 144, 148-151, 153-155).

The Decision

Alphabow alleged the two 2023 orders were procedurally unfair for a variety of reasons (at paras 35 and 170).

First, on the requirements of adequate notice, knowledge of the case against them, and the opportunity to be heard, a chain of misunderstandings resulted in no meeting being held between Alphabow and CLM in advance to discuss the specific enforcement action, but CLM had been holding quarterly meetings with Alphabow since 2020 (at paras 41-54). The Hearing Panel concluded that the ongoing communications and meetings between CLM and Alphabow were

sufficient notice of the order in the overall context, which included the opportunity to have the order varied after it was made (at para 70).

Second, on the reasonable apprehension of bias, Alphabow took the position that it had been unfairly targeted by the closure and liability branch relative to peer companies, with an intent of driving Alphabow into insolvency (at paras 75-77, 80, and 86). CLM argued that Alphabow received more attention due to specific problems: Alphabow's high financial and liability risk, and "the high turnover rate within AlphaBow's financial department and at its executive level" (at para 85). The hearing panel found that Alphabow did not provide evidence about the AER's standard treatment of other licensees, and that the requirements of the March 2023 order were consistent with the AER's stated expectations and powers (at paras 94-95), concluding that Alphabow's argument relied on "very selective quotes or excerpts of documents, sometimes out of context or after the March Order was issued," and that this did not meet the test for a reasonable apprehension of bias (at para 105-106). Relating to the June suspension order, the hearing panel found that CLM was not permitted to accept some of the approaches Alphabow proposed (at para 202) and that Alphabow's position on their ability to post security was unclear and contradictory (at para 204), concluding that CLM adequately considered Alphabow's submissions (at para 205).

Third, Alphabow argued the decision was procedurally unfair as it was not aligned with AER norms, guidelines, and precedents. The hearing panel interpreted this argument as relating to the consistency of the orders with AER enabling legislation and guidance documents, and quickly found the legislation and guidance documents gave the AER the "discretion and flexibility" to issue the orders (at paras 107-109).

The hearing panel then assessed the reasonableness of the March reasonable care and measures order (at para 107). Alphabow submitted that the approach should be drawn from *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#), while CLM argued that *Vavilov* does not apply to "an internal review of a statutory decision", only to a review by a court (at para 111). The CLM referred instead to *Moffat v Edmonton (City) Police Service*, [2021 ABCA 183 \(CanLII\)](#) as guidance on 'reasonableness'. The hearing panel noted that *Moffat* drew from *Vavilov* and could not identify the difference between the positions of Alphabow and the CLM (at para 113).

The hearing panel found that the requirement of a reasonable care and measures plan from Alphabow was sufficiently clear, and that the requirement for a \$15 million security deposit (representing 10% of Alphabow's inactive deemed liability) was reasonable (at paras 118-143).

The hearing panel's discussion of the requirement for Alphabow to provide third-party audited annual financial statements contains redactions so that it cannot be fully understood. CLM appears to have been concerned about the risk of fraud, as the hearing panel wrote:

it remains puzzling to us, given the number of assets and complexity of AlphaBow's operations, that standard planning tools such as an annual operational plan and budget, company reserves, financial statements, and cash flow projections were not readily available. (at para 155)

The panel found the requirement for audited financial statements was not unreasonable or procedurally unfair (at paras 156-157).

For the June suspension order, Alphabow took the position that the order was unreasonable because it would have impacts contrary to the goals of the AER: forcing Alphabow into insolvency, leading to staff layoffs, ending payments to municipalities, shifting assets to the orphan well association, and damaging the environment (at paras 211-212, and 226). CLM argued that the decision was made to protect the environment and the public, providing evidence that Alphabow's compliance was deteriorating (at paras 216-221, and 228). The hearing panel concluded Alphabow had not shown that the June suspension order was procedurally unfair or intended to force Alphabow into insolvency (at paras 224 and 236).

The hearing panel also considered and dismissed Alphabow's argument that section 27 of the *Oil and Gas Conservation Act*, [RSA 2000, c O-6](#), could only be used on a site-specific basis, not for a company wide order (at paras 237-261).

The hearing panel confirmed both the March reasonable care and measures order and the June suspension order (at para 272).

Commentary: The Role of an AER Hearing Panel

The *Alphabow* decision would be appropriate and well-reasoned if it had been issued by a court on judicial review, but an AER hearing panel is not a court. The hearing panel misunderstood their role and the purpose of the standard of review. The hearing panel considered *Vavilov* and *Moffat* and used the language of 'reasonableness' throughout the decision (see for instance, paras 66, 110, 122, 132, 134, 161, 206-208, 223, 236, and 262-263). This is bizarre because the standard of review analysis is designed for the review of decisions by the executive branch by the judicial branch of government (*Vavilov* at para 23). The judiciary developed 'reasonableness' around concerns about the appropriate role of the judiciary relative to administrative decision makers (*Vavilov* at para 14). Furthermore:

Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers... (*Vavilov* at para 13)

Nothing in *Vavilov* requires the AER hearing panel to take a deferential approach to the decisions of CLM. *Moffat* even includes a clear explanation of why the standard of review approach to judicial review does not apply to internal appeals, noting that "determining an internal standard of review is primarily a question of interpreting the relevant legislative regime to discern the respective roles given to the first instance decision-maker and the appellate administrative tribunal" (*Moffat* at para 54). In determining their approach to conducting the review, the AER hearing panel should have considered the role assigned to them under *Responsible Energy Development Act*, [SA 2012, c R-17.3](#) (*REDA*) and the *Alberta Energy Regulator Rules of Practice*, [Alta Reg 99/2013](#). Notably, subsection 13(2)(a) of *REDA* allows hearing commissioners to

participate in the development of the Regulator’s practices, procedures, and rules. Past AER hearing panels have in fact considered the statutory context for regulatory appeals (see *Whitecap Resources Inc: Reclamation Certificate No 382273*, [2022 ABAER 002](#) at paras 73-74; *Regulatory Appeals of the Decision to Issue Declarations Naming Darren O’Brien and Jeffrey Young Pursuant to Section 106 of the Oil and Gas Conservation Act*, [2021 ABAER 003](#) at paras 44-48).

AER regulatory hearings are quasi-judicial, but the role of hearing commissioners is very different from the role of the judicial branch, because AER hearing panels can and should be considering the wisdom of AER policy. The hearing panel for *Alphabow* consisted of one lawyer, one geologist, and an engineer. Restricting their review to considerations of procedural fairness and ‘reasonableness’ wasted the panel’s non-legal expertise. The *Alphabow* decision should have been a consideration of the wisdom of the CLM’s approach to financially troubled high-closure liability corporations. Instead, it is a highly legalistic review of procedural fairness and basic legality.

What’s Next for Alphabow?

Because of the redactions relating to Alphabow’s finances, it is not clear what will happen next. Alphabow claimed that the 2023 orders would force them into insolvency (at paras 204, 211, and 225-226). But Alphabow has taken [a variety of legal measures](#) to try to recover the right to operate their sites, so they may seek permission to appeal from the court of appeal before they are forced to throw in the towel.

The AER will continue slowly rolling out the new approach to closure and liability management. Their next step is the [Site Reduction Reclamation Certificate Pilot](#), which allows reclamation certificates for ‘unused portions’ of well sites even though the well site itself is still ‘in use’ by a well that has not been reclaimed.

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