



Lavesta Area Group

Written Complaint about the Conduct of the
Independent System Operator

March 10, 2010



ALBERTA UTILITIES COMMISSION

Decision 2010-104: Lavesta Area Group

Written Complaint about the Conduct of the Independent System Operator

Application No. 1605627

Proceeding ID. 398

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**LAVESTA AREA GROUP
WRITTEN COMPLAINT ABOUT THE
CONDUCT OF THE INDEPENDENT SYSTEM OPERATOR**

**Decision 2010-104
Application No. 1605627
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1 OVERVIEW

1. For the first time, the Alberta Utilities Commission (AUC or Commission) is being asked to rule on a complaint under section 26 of the *Electric Utilities Act*.
2. Mr. Joseph V. Anglin, on behalf of the Lavesta Area Group (Lavesta), has brought to the Commission a written complaint (Complaint) against the Alberta Electric System Operator (AESO, also known as the Independent System Operator or the ISO).
3. Lavesta alleged in its Complaint that the AESO failed to file a legislatively mandated needs identification document (NID) for a transmission upgrades between Edmonton and Calgary in the not too distant past. Lavesta further alleged that the AESO's failure to file a NID confused the public and elected officials over the need and necessity for this specific line.
4. In coming to its decision the Commission examined section 26 in the context of the *Electric Utilities Act* and other related statutes including the recently enacted Bill 50.¹ Following its consideration of the submissions and the statutory scheme the Commission finds that it has no jurisdiction to order the AESO to file a NID as requested by Lavesta. Further the Commission finds that there is no evidence to suggest that the AESO attempted to mislead Albertans or public officials into believing that the Commission had approved the need for transmission upgrades between Edmonton and Calgary.
5. For the reasons outlined in more detail below, the Commission must dismiss Lavesta's Complaint.

2 BACKGROUND

2.1 Procedural History

6. On November 12, 2009, Lavesta submitted the Complaint to the Commission about the conduct of the AESO pursuant to section 26 of the *Electric Utilities Act*. Section 26 reads as follows:

26(1) Any person may make a written complaint to the Commission about the conduct of the Independent System Operator.

(2) The Commission must dismiss the complaint, giving reasons for the dismissal, if the Commission is satisfied that

¹ *Electric Statutes Amendment Act, 2009*.

- (a) the substance of the complaint has been or should be referred to the Market Surveillance Administrator for investigation,
 - (b) the complaint relates to a matter the substance of which is before or has been dealt with by the Commission or any other body, or
 - (c) the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation or a hearing.
- (3) The Commission may, in considering a complaint, do one or more of the following:
- (a) dismiss all or part of the complaint;
 - (b) direct the Independent System Operator to change its conduct in relation to a matter that is the subject of the complaint;
 - (c) direct the Independent System Operator to refrain from the conduct that is the subject of the complaint.
- (4) A decision of the Commission under subsection (2) or (3) is final and may not be appealed under section 29 of the *Alberta Utilities Commission Act*.

7. On November 19, 2009 the Commission issued a Notice of Complaint requesting interested parties to file submissions on the Complaint by no later than December 7, 2009. The Commission specifically requested parties to address the following questions in their submissions:

- Has the substance of the Complaint been, or should it be referred to the Market Surveillance Administrator for investigation?
- Does the Complaint relate to a matter the substance of which is before or has been dealt with by the AUC or any other body?
- Is the Complaint frivolous, vexatious or trivial or otherwise does not warrant an investigation or hearing?

8. On November 27, 2009 Lavesta requested a right of reply to any submissions filed in response to its Complaint. On December 9, 2009, the Commission granted Lavesta the right to file a response submission by no later than December 16, 2009. Lavesta filed its reply in accordance with the schedule on December 16, 2009.

2.2 The Lavesta Complaint

9. Lavesta alleged that the AESO is not in compliance with section 34(1) of the *Electric Utilities Act* and the *Transmission Regulation*. It argued that this non-compliance has led to public confusion over the necessity and urgency for approving new transmission infrastructure for the Province of Alberta. Lavesta further asserted that the AESO's non-compliance with section 34 of the *Electric Utilities Act* has affected the ability of the public and elected officials to make decisions on Bill 50. Lavesta also referenced section 16 of the *Electric Utilities Act*.

10. Sections 16 and 34(1) of the *Electric Utilities Act* read in part as follows:

16 The Independent System Operator must exercise its powers and carry out its duties, responsibilities and functions in a timely manner that is fair and responsible to provide for the safe, reliable and economic operation of the interconnected electric system and to promote a fair, efficient and openly competitive market for electricity.

...

34(1) When the Independent System Operator determines that an expansion or enhancement of the capability of the transmission system is or may be required to meet the needs of Alberta and is in the public interest, the Independent System Operator must prepare and submit to the Commission for approval a needs identification document that

- (a) describes the constraint or condition affecting the operation or performance of the transmission system and indicates the means by which or the manner in which the constraint or condition could be alleviated,
- (b) describes a need for improved efficiency of the transmission system, including means to reduce losses on the interconnected electric system, or
- (c) describes a need to respond to requests for system access service.

11. Lavesta reviewed the history of the AESO's original needs identification document (NID) for a 500 kV transmission upgrade between Edmonton and Calgary (the Edmonton-Calgary upgrades). Lavesta also noted that the Alberta Energy and Utilities Board (EUB) had voided its decision on that application, which was then vacated by the Alberta Court of Appeal in the fall of 2007. Since that time, Lavesta observed, the AESO had not filed an amended NID for the Edmonton-Calgary upgrades.

12. Given that the Alberta Minister of Energy publically stated on November 5, 2009, that the AESO had determined that there was a critical need for more transmission lines, Lavesta queried the basis of these statements, when the AESO, at that time, had not filed a NID pursuant to section 34 of the *Electric Utilities Act*.

13. Lavesta argued that these public statements by the Minister and the lack of filing by the AESO amount to misleading conduct that is causing confusion among the public and elected officials alike.

14. To remedy the AESO's failure to file a NID, and the perceived confusion caused as a result, Lavesta asked the Commission to order the AESO to change its conduct as follows:

1. Immediately file a NID pursuant to section 34(1) of the *Electric Utilities Act*;
2. Cease making claims that the need for transmission upgrades has been approved until the NID is filed;
3. Post a statement on the AESO website stating that the need for upgrades to the transmission system has not been approved by the AUC; and

4. Apologize to the public and the Minister of Energy for providing misleading information that could lead people to believe that the need for transmission upgrades has been determined and approved.

2.3 Bill 50: *The Electric Statutes Amendment Act, 2009*

15. At the time when the Complaint was filed, the debate on Bill 50 was ongoing in the Legislature.

16. Bill 50 amended various statutes administered by the Alberta Utilities Commission including the *Alberta Utilities Commission Act*, the *Electric Utilities Act* and the *Hydro and Electric Energy Act*.

17. Bill 50 allowed the designation of certain transmission projects as “critical transmission infrastructure,” and removed the requirement that the AESO file a NID for any such critical transmission infrastructure project. In other words, the AESO is no longer required to comply with section 34 of the *Electric Utilities Act* for Critical Transmission Infrastructure projects.

18. One project designated as Critical Transmission Infrastructure consisted of two high voltage direct current transmission facilities between the Edmonton and Calgary regions, with a minimum capacity of 2000 megawatts each. The Commission understands that these transmission facilities were the subject of Lavesta’s Complaint.

19. Bill 50 was given Royal Assent on November 26, 2009 and came into force on December 9, 2009.

3 VIEWS OF INTERESTED PARTIES/LAVESTA’S REPLY SUBMISSION

3.1 Individual Intervenors

20. The Commission received letters of support for the Lavesta Complaint from Dieter Lohmann, Lue-Ann Lohmann, Dan Cunin, Ken Machell, N. Donna Wise, Edwin Erickson, M. Lambert, Connie Jensen, Bill Wyrystok and Jay D. Lukin.

21. These intervenors also expressed their concerns that the AESO had not filed a NID. Some of these intervenors felt that they had been misled into believing that a NID had been filed, and that the need for new transmission lines had been established and approved.

3.2 Donald Bur, Raymond F. Bur and M. Olive Bur

22. These intervenors stated that they have standing to participate in the Complaint proceeding because they own property that will likely be affected by a future application for transmission upgrades between Edmonton and Calgary.

23. These intervenors recognized that the Market Surveillance Administrator (MSA) has the authority to investigate the conduct of the AESO. They argued, however, that this authority must be read within the larger context of the role of the MSA under the *Alberta Utilities Commission Act*. They argued that the primary purpose of the MSA is to investigate market related issues of a nature different from that which arises in this Complaint. They concluded that the Commission is the appropriate body to deal with this Complaint.

24. They also argued that the AESO has a mandatory obligation to file a NID once it identifies a need for expansion and enhancement of the transmission system. They noted that the AESO first filed a NID for the Edmonton-Calgary upgrades in 2004 and that the Court of Appeal vacated all of the decisions and orders related to that NID in October 2007.

25. Furthermore, these interveners argued that, if plans for critical transmission infrastructure were available prior to November 26, 2009, they ought to have been provided to the AUC or, before that, the EUB. These interveners submitted that the AESO has likely been negligent in its obligations under the *Electric Utilities Act*.

26. They noted, however, that because they do not have the information that the AESO apparently provided to the government, such concerns remain conjecture. They argued that the AESO must provide the Commission with evidence of the communication that occurred between the AESO and the Government of Alberta, and provide copies of that information, including advice given to the government.

27. These interveners argued that the Commission is not empowered by section 26 of the *Electric Utilities Act* to provide remedies 2, 3 and 4 requested by Lavesta.

28. Regarding Lavesta's request that the Commission order the AESO to file a NID, these interveners argued that it was first necessary to have the AESO produce all materials provided to the government and communication it has had with the government or government ministers. They suggested that all parties should be entitled to comment on these materials, and that if a need to expand or enhance the system emerges that is not addressed by Bill 50 then the AESO should be subject to the order requested by Lavesta.

3.3 The Alberta Electric System Operator

29. The AESO disagreed with Lavesta.

30. The AESO stated that it has a direct interest in the proceeding because it is the subject of the Lavesta Complaint.

31. The AESO argued that the substance of the Complaint has not been referred to the Market Surveillance Administrator and contended that it should not be so referred. It also stated that the substance of the Complaint has not been dealt with by the Commission or any other body.

32. The AESO did not allege that the Complaint was frivolous vexatious or trivial but did submit that the Complaint should be dismissed, because it did not otherwise warrant an investigation or a hearing.

33. The AESO stated that there are two distinct elements of the Lavesta Complaint. The first element is that the AESO is not in compliance with section 34(1) of the *Electric Utilities Act* because it failed to file a NID for the Edmonton-Calgary upgrades. The second element of the Complaint is that the AESO misled the public into believing that the need for this project has been approved by the AUC.

34. The AESO observed that Bill 50 was given Royal Assent on November 27, 2009. It noted that under the amended Acts, the Edmonton-Calgary upgrades was deemed to be Critical

Transmission Infrastructure, and therefore, sections 34, 35 and 36 of the *Electric Utilities Act* do not apply to Edmonton-Calgary upgrades.

35. The AESO stated that two conditions must be met before it can file a NID under section 34 of the *Electric Utilities Act*. First the AESO must complete the necessary work to determine that an expansion or enhancement of the transmission system is necessary to meet the needs of Alberta and is in the public interest. Second, the AESO must complete the preparation of a NID. The AESO acknowledged that it must carry out its duties in a timely fashion but argued that the timing of the filing of a NID is a matter for the AESO to determine having regard for all relevant circumstances.

36. The AESO confirmed that its June 2009 long term plan recognized that transmission upgrades between Edmonton and Calgary are needed to meet the needs of Albertans and are in the public interest. The AESO stated that it publicly announced its intention to begin work on detailed design, siting and routing of the Edmonton-Calgary upgrades at around the same time that the long term plan was released. The AESO stated that it intended to proceed with a joint filing of a NID and facility applications, which would be dealt with in a single Commission process. It assured the Commission that, had Bill 50 not been enacted, it would have complied with its obligations under section 34 in a timely fashion. It stated that, given the circumstances, no investigation or hearing is warranted.

37. The AESO also argued that the relief requested by Lavesta went beyond a mere “direction” to the AESO to “change its conduct” as is contemplated by subsection 26(3)(b) of the *Electric Utilities Act*. Rather, the AESO described the relief requested by Lavesta to be in the nature of *mandamus*.

38. The AESO argued that such a remedy requires a persuasive demonstration that there is a clear legal right to the relief claimed by, or duty owed to, the specific party claiming relief, which does not involve the exercise of discretion and that such relief has been previously demanded and refused. The AESO argued that mere delay is not sufficient to warrant such relief.

39. The AESO observed that the principal relief sought by Lavesta is an order from the Commission directing the AESO to file a NID for the Edmonton-Calgary upgrades. It argued that, following proclamation of Bill 50, the AESO will have no legislative obligation to file a NID for this project. Given these circumstances, the AESO argued that Lavesta’s primary complaint is academic or moot, and that the Commission has no jurisdiction to grant the remedy sought.

40. Finally, the AESO contended that Lavesta provided no evidence to support its claim that the AESO intentionally misled the public to believe that the need for the Edmonton-Calgary upgrades had been approved. The AESO agreed that a number of its publications acknowledged the need for the Edmonton-Calgary upgrades but that no publication asserted that such need had been approved.

3.4 The Industrial Power Consumers Association of Alberta

41. The Industrial Power Consumers Association of Alberta (IPCAA) stated that it is interested in the Complaint proceeding because there is a need for clarification of the AESO’s

“public interest” obligations for transmission planning; i.e. what is the role of the AESO with respect to ensuring a public interest is met for critical transmission infrastructure projects?

42. IPCAA argued that this matter should not be referred to the MSA, because it is not an issue relating to the necessity for a fair, efficient and openly competitive electricity market and is therefore outside of the MSA’s jurisdiction. It stated that it was not aware of this issue being adequately addressed elsewhere.

43. IPCAA stated that it has significant concerns with the potential implications of transmission additions that may not result in a more efficient, more reliable and more cost effective transmission system. It stated that these public interest concerns have not been adequately addressed by the AESO for critical transmission infrastructure projects. IPCAA concluded that the Commission should hold a public hearing as the matter is of significant financial consequence to IPCAA’s members and to all transmission ratepayers.

3.5 ENMAX Energy Corporation

44. ENMAX Energy Corporation (ENMAX) filed a statement of intention to participate but did not state if it supported or opposed the Complaint. ENMAX stated that it seeks to understand, and may be directly affected by, decisions relating to the roles of the AUC and the AESO in determining the need for new transmission facilities. ENMAX provided no comments on the three questions posed by the Commission.

3.6 Capital Power

45. Capital Power filed a statement of intention to participate in this proceeding. It stated that it is a market participant and has a direct and material interest in the proceeding. Capital Power did not respond to the three questions raised by the Commission and did not take a position on the Complaint.

3.7 AltaLink Management Ltd.

46. AltaLink Management Ltd. (AltaLink) stated that it had an interest in the proceeding as the subject of the Complaint (the Edmonton-Calgary upgrades) falls within its service area. AltaLink argued that the Lavesta Complaint should be dismissed, because it does not warrant an investigation or hearing pursuant to section 26(2)(c) of the *Electric Utilities Act*. AltaLink stated that, with the passing of Bill 50 and the identification of the Edmonton Calgary upgrades as critical transmission infrastructure, there is nothing to investigate because a NID is no longer required for the project.

3.8 Lavesta Reply Submission

47. Lavesta filed its reply submission on December 16, 2009. It stated that there are three distinct elements to the Complaint:

1. The AESO is not (was not) in compliance with section 34(1) of the *Electric Utilities Act*, and the *Transmission Regulation*.
2. This non-compliance has led to public confusion over the necessity and urgency for approving new transmission infrastructure for the province of Alberta, and the public’s interest.

3. The AESO's non-compliance with the *Electric Utilities Act* and the *Transmission Regulation* have clouded the public's ability, and our elected officials' abilities, to make an informed decision about a proposed piece of legislation Bill-50.

48. Lavesta agreed with the AESO and AltaLink that, with the passing of Bill 50, the AESO is no longer required to file a NID for projects deemed to be Critical Transmission Infrastructure. It clarified that the first element of its Complaint relates to the period of time between the issuance of the Court of Appeal's decision regarding the Edmonton-Calgary upgrades on November 20, 2007 and the coming into force of Bill 50 on December 9, 2009.

49. Lavesta stated that the AESO's submission confirms that it identified the urgent need for transmission upgrades quite some time ago. It argued that debates in the legislature reveal the AESO's participation in the government's sponsorship of Bill 50 which gave rise to confusion regarding the AESO's role and the need for transmission upgrades.

50. Lavesta referenced a document entitled "Talk about Bill 50," which was published by the Alberta Department of Energy. That document discussed the need for several critical transmission upgrade projects including the Edmonton-Calgary upgrades. That document also referenced the possibility of wide spread power outages and unreliable service, information Lavesta attributed to the AESO.

51. Lavesta questioned why the AESO failed to file a NID for the Calgary-Edmonton upgrades in the two years since the Court of Appeal's decision despite numerous references by the AESO during that time that these upgrades were urgently needed. Lavesta alleged that this failure to act during this time was a breach of the AESO's mandate to exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances.

52. Lavesta suggested that the AESO prepared a report for the Government of Alberta regarding the urgent need to approve a transmission line. Lavesta questioned why the AESO simply did not file a NID once the need for upgrades was determined to be urgent.

53. Lavesta argued that the AESO has no discretion with respect to the timing for the filing of the NID. Lavesta contended that the wording of section 34(1) of the *Electric Utilities Act* is clear and that the AESO must file a NID when a need for expansion or enhancement to the system has been identified.

54. Lavesta asserted that the Commission has the authority to compel it to file a NID and disagreed with the assertions of the AESO and AltaLink to the contrary. It noted that a NID must include certain technical information and contended that the Commission clearly has the jurisdiction to require the AESO to provide such information regarding a particular transmission line or for the entire transmission system. Lavesta contended that it is incumbent upon the Commission to gather such information for critical transmission infrastructure projects regardless of whether it has authority to approve the need for such projects.

55. Lavesta noted that the *Alberta Utilities Commission Act*, the *Electric Utilities Act* and the *Hydro and Electric Energy Act* all empower the Commission to collect, appraise and disseminate information regarding the demand for, and supply of, electric energy that is relevant to the electric industry in Alberta. Lavesta argued that it is pursuant to this authority that the

Commission has the jurisdiction to compel the AESO to prepare and submit a NID for every determination that the AESO makes that will materially affect the transmission system.

56. Lavesta noted that an employee of the AESO attended a Lavesta information session on Bill 50 in Peace River and alleged that his presence there was to support Bill 50. Lavesta stated that this was substantive evidence that the AESO was not acting in a capacity of neutrality or independence. Lavesta stated that this lack of independence supports the second and third elements of the Lavesta Complaint.

57. Lavesta stated that the AESO members have a duty to “act honestly, and in good faith and in the public interest,” and the AESO itself has a statutory duty, in the public interest “to direct the safe reliable and economic operation of the interconnected electric system.” It contended that the AESO’s failure to submit a NID, if in fact it believed that an expansion or enhancement of the grid was needed, constitutes a breach of its fiduciary duty.

58. Lavesta noted that Bill 50 is not retroactive and argued that the Commission must find the AESO in non-compliance with section 34 prior to the passage of Bill 50. Lavesta also contended that the AESO breached its fiduciary duty to the public by not filing a NID when it had identified an urgent need for upgrades.

59. Lavesta argued that the AESO’s failure to prepare and submit a NID, and its participation in the lobbying efforts to facilitate the passage of Bill 50, created a perception that the AESO was acting as an agent of the government, and not as an independent agency. Lavesta contended that the AESO should have submitted a NID and not engaged in partisan politics for the facilitation of the passage of Bill 50.

60. As a result, Lavesta concluded that the AESO did not act honestly or in good faith and breached its responsibility to act in the public interest.

61. Lavesta argued that the remedies it seeks place no extra burden on the AESO. It further contended that the information provided by the AESO in a NID will serve the public interest well into the life span of a particular project.

4 DECISION

4.1 Introduction

62. The first step of the Commission’s consideration of the Lavesta Complaint is to determine whether it is specific to the need for Edmonton-Calgary upgrades, or if it applied generally to other projects designated as critical transmission infrastructure.

63. While the Lavesta Complaint was phrased as a general complaint, the facts cited by Lavesta in support of the Complaint that all related to the Edmonton-Calgary transmission upgrades. The Commission therefore concludes that the Complaint must be interpreted as applying specifically to the need for Edmonton-Calgary upgrades.

64. The Commission understands that the Complaint has two broad components:

1. First, Lavesta alleges that the AESO breached section 34(1) of the *Electric Utilities Act* by not filing a NID for the Edmonton-Calgary upgrades in the time frame between October 2007 and the coming into force of Bill 50 on December 9, 2009.
2. Second, Lavesta contends that the AESO's breach created a false impression that the need for the Edmonton-Calgary upgrades had been approved by the AUC, which resulted in confusion in the minds of the public and elected officials and compromised the decision making process for Bill 50.

65. Given that this is the Commission's first decision addressing the scope of section 26 of the *Electric Utilities Act*, it is important that the Commission outline the basic steps of its analysis when dealing with a complaint regarding the AESO.

66. Subsection 26(2) lists three circumstances when the Commission must dismiss a complaint about the conduct of the AESO:

- where the substance of the complaint has been or should be referred to the Market Surveillance Administrator;
- where the complaint relates to a matter that has already been dealt with by the Commission or other body; or
- where the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation or a hearing.

67. If a complaint fits with any of these three categories, the Commission is prohibited from conducting a further investigation and must dismiss the complaint. If the Commission, however, is satisfied that a complaint about the conduct of the AESO does not fit in any of these three categories, it may then further process the complaint by way of an investigation or a hearing.

68. When considering whether to investigate or hold a public hearing on a complaint under section 26 of *Electric Utilities Act*, the Commission may consider a number of factors, including:

1. Whether the facts alleged in the complaint are frivolous, vexatious, trivial, or otherwise not worthy of an investigation or hearing;
2. Whether the activities complained about are within the jurisdiction of the Commission over the AESO; and
3. Whether a reasonable remedy exists.

69. The Commission will apply these factors, where necessary, to the two broad claims of Lavesta.

4.2 Are the Facts Alleged in the Complaint Frivolous, Vexatious, Trivial, or Otherwise not Worthy of an Investigation or Hearing?

70. The terms "frivolous," "vexatious" and "trivial" are legal terms of art. The Commission's predecessor, the EUB, previously considered the interpretation of these terms in

Decision 2005-150.² That proceeding addressed a complaint by Milner Power Inc. about an AESO rule pursuant to section 25 of the *Electric Utilities Act*. Under that section the Board was required to dismiss a complaint if it was satisfied that the complaint was frivolous, vexatious, trivial or otherwise did not warrant investigation or hearing. The wording of that section is identical to the wording of subsection 26(2)(c).

71. In Decision 2005-150 the EUB adopted the following definitions for each of these terms from Black's Law Dictionary, 7th Edition:

Frivolous – lacking a legal basis or legal merit; not reasonably purposeful.

Vexatious – without reasonable or probable cause or excuse; harassing; annoying.

Trivial – trifling; inconsiderable; of small worth or importance.

72. The Commission does not view the Complaint as frivolous, vexatious or trivial. The Commission is satisfied that Lavesta outlined a reasonable cause of action regarding the AESO's obligation to file a NID. The Commission considers Lavesta's allegations to have a legal basis as they are premised upon questions of statutory interpretation. Additionally, the Commission recognizes that the expansive language in section 26 of the *Electric Utilities Act* suggests that the Commission may have jurisdiction to grant the broad remedies that Lavesta is seeking.

73. The next step is for the Commission to consider whether the Complaint does not otherwise warrant an investigation or hearing. In making this decision, the Commission must first determine the scope of its jurisdiction under section 26 of the *Electric Utilities Act*.

4.3 Are the Activities Complained of Within the Jurisdiction of the Commission Over the AESO?

4.3.1 The Scope of the Commission's Powers under Section 26 of the *Electric Utilities Act*

74. Section 26 states that "[a]ny person" may complain about the "conduct" of the AESO. On its face, section 26(1) appears to confer broad discretion with respect to those who can complain and the subject matter of the Complaint. The Commission, however, considers that section 26 must properly be interpreted within the context of the broader statutory scheme for the regulation of the electric energy market in Alberta. This is consistent with the rulings of the Supreme Court and the writings of learned scholars.³

75. Administrative agencies, such as the Commission, are "statutory creations ... [that] cannot exceed the powers that were granted to them by their enabling statute," and hence, "they must adhere to the confines of their statutory authority or jurisdiction and they cannot trespass in areas where the legislature has not assigned them authority".⁴ Even when the language of a statute empowered an agency to act in the "public interest," the Supreme Court held that such

² EUB Decision No. 2005-150: Milner Power Inc. Complaint Against the Proposed AESO Line Loss Rule (Application No. 1414213) (Released: December 30, 2005).

³ See e.g. Ruth Sullivan, *Statutory Interpretation, Second Edition* (Toronto: Irwin Law, 2007) page 128 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, Fifth Edition (LexisNexis Canada, 2008), page 358.

⁴ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 35 (citations omitted).

language was “wide and elastic” and did not confer upon such the agency “total discretion over its limitations.”⁵

76. The Commission’s task, therefore, is to understand the scope of section 26 in light of the entire context of the legislative scheme.⁶ This context can be discerned by looking at the act as a whole, especially related provisions, internal groupings within the act, components of the act, and the legislative scheme behind the act. Additionally, related statutes as well as the statute book as a whole can be looked to when adducing the meaning of a particular provision of an act.⁷

77. As one learned scholar observed statutes must be read with four points in mind:

1. the enacting legislature had a purpose, and each provision contributes in some cogent way to accomplishing the purpose;
2. the legislation has been competently drafted, in a straightforward and elegant style, taking care to avoid tautology, inconsistency, or stylistic variation;
3. provisions are set out in an orderly fashion, to reflect a coherent plan; and
4. non-substantive components of the legislation (preambles, titles, headings, and the like) have been used conventionally.⁸

78. The *Electric Utilities Act* is comprised of nine parts: Part 1 Interpretation, Application and Purpose, Part 2 Independent System Operator and Transmission, Part 2.1 Critical Transmission Infrastructure, Part 4 Balancing Pool, Part 5, Liability of the AESO, Part 6 Generation, Part 7 Distribution, Part 8 Retail, and Part 9 Regulation by the Commission.

79. Section 26 is part of Division 3, which itself is part of Part 2. Division 1 of Part 2 establishes the AESO, Division 2 sets the AESO’s duties and authority, Division 3 lists two processes for complaints about the AESO to the Commission, and Division 4 describes the transmission responsibilities of the AESO.

80. The organization of the *Electric Utilities Act* in this manner suggests that section 26 should be read within the context of its place in Division 3 of Part 2, and not as a broad grant of power. Had the Legislature intended section 26 to be of a broader application, the Commission considers that it would have included this authority in Part 9, which deals with regulation by the Commission of all the preceding Parts of the *Electric Utilities Act*.

81. The Commission also finds that the remedies available in section 26 are too broad for the legislature to have intended them to apply to all complaints against the AESO. In contrast, for example, sections 118(2), 121(2), and 122(1) give very specific instructions to the Commission on how to deal with a variety of matters affecting transmission in Alberta. Had the legislature intended for section 26 to be a catchall section that grants it plenary authority over the AESO, there would have been no need for these specific sections later on in the *Electric Utilities Act*.

82. The Commission finds that the remedies available under section 26 of the *Electric Utilities Act* must also be read within the context of that Act and the other acts establishing the

⁵ Ibid.

⁶ Ibid. at para. 49.

⁷ Ibid. Chapter 8.

⁸ Ruth Sullivan, *Statutory Interpretation, Second Edition* (Toronto: Irwin Law, 2007) pages 131-32.

respective jurisdictions of the AESO and the AUC. In this respect the Commission finds that broad wording of section 26 cannot be interpreted as overriding more specific provisions regarding the jurisdiction of the AESO and the AUC found elsewhere in the legislative scheme.

83. In defining the scope of its jurisdiction under section 26, the Commission must also have regard to related provisions in the other statutes administered by the Commission. In this regard, it is important to note that complaints about the conduct of the AESO may also be made to the MSA, pursuant to the *Alberta Utilities Commission Act*. Specifically, section 39 of that Act empowers the MSA to investigate complaints regarding the conduct of the AESO, including breaches of the *Electric Utilities Act* and conduct of the AESO that does not support the fair, efficient and openly competitive operation of the electricity market.

84. If the MSA is satisfied that the AESO has contravened the *Electric Utilities Act* or engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market, the MSA can request the Commission to hold a hearing into the matter.

85. Should the Commission confirm the MSA's allegation, it can order one or all of the following under section 56 of the *Alberta Utilities Commission Act*:

- impose an administrative penalty;
- impose terms or conditions on the person regarding future conduct in the electricity market;
- prohibit the party from engaging in conduct; or
- direct the party to take specific action.

86. The process established by section 26 of the *Electric Utilities Act* appears to the Commission to be intended as a more summary process where the Commission makes a decision on the conduct of the AESO in the absence of a full investigation by the MSA. The Commission's remedies are limited to directing the AESO to change its conduct or to refrain from certain conduct.

87. The Commission also observes that there is a very strong privative clause at the end of section 26. Section 26(4) makes it clear that all decisions under section 26(2) (dismissal of the complaint) or 26(3) (granting relief for the complaint) are "final and may not be appealed under section 29 of the *Alberta Utilities Commission Act*," which grants a statutory right of appeal to the Court of Appeal.

88. Subsection 26(4) is added to the strong privative clause in section 30 of the *Alberta Utilities Commission Act*, which prohibits judicial review of the Commission's decisions, thereby effectively creating a "double-privative clause" which prevents losing parties from seeking judicial review from the Court of Queen's Bench or seeking leave to appeal from the Court of Appeal.

89. The Commission considers the complaint process established under the *Alberta Utilities Commission Act* to be more comprehensive than that provided under section 26 of the *Electric Utilities Act*. The *Alberta Utilities Commission Act* process includes an investigation by the MSA and potentially a public hearing into the matter where the MSA participates in the role of an independent investigator. The Commission is also granted greater discretion in terms of the remedies available to it. The *Alberta Utilities Commission Act* process, in contrast to the

section 26 complaint process, does not have the strong “double-privative clause.” A person who disagrees with a decision of the Commission pursuant to this process may seek leave to appeal that decision pursuant to section 29 of the *Alberta Utilities Commission Act*.

90. Given the nature of the *Alberta Utilities Commission Act* complaint process, the additional remedies available, and the availability of appeal rights, the Commission considers that the MSA investigation process was intended by the legislature to address allegations regarding the conduct of the AESO that have the potential to directly affect substantive rights associated with the fair, efficient and openly competitive operation of Alberta’s electricity market.

91. Having considered the context of section 26 within the *Electric Utilities Act* and within the broader legislative scheme, the Commission finds that the section 26 complaint process is not intended to address complaints about AESO rules or fees or complaints that should properly be referred to the MSA. In the Commission’s view, section 26 was intended to address matters that fall between these two areas. Examples of the types of complaints that the Commission considers section 26 was intended to address include, but are not limited to the following:

- complaints about the AESO’s compliance with Commission rules;
- complaints about the AESO’s consultation with interested parties; and
- complaints about the AESO relating to procedural rights in AESO processes that do not relate to the making of rules or setting of fees.

92. The Commission’s interpretation of the purpose of section 26 is further bolstered by the legislative background and purpose as expressed by the then government member of the Legislature’s Standing Policy Committee on Energy and Sustainability, and later Minister of Energy, Mel Knight. Mr. Knight spoke to the Legislature on the then proposed Bill 3, which subsequently became the new *Electric Utilities Act*. Specifically, he stated:

There is also with respect to that issue a mechanism in the legislation to allow for people that have complaints about the ISO. *If the ISO is felt to be heavy handed or leaning too hard on some individual or some person or a corporation, they can make complaints, Mr. Chairman, and the complaints would be lodged at the EUB.*⁹ (emphasis added)

93. The Commission, therefore, finds that Lavesta’s Complaint is not the type of matter that was meant to be dealt with by section 26.

4.4 Does a Reasonable Remedy Exist?

4.4.1 Can the Commission Order the AESO to Comply with Section 34(1) in Response to a Complaint under Section 26?

94. As noted above, section 34(1) of the *Electric Utilities Act* states that the AESO must prepare and file a NID when the AESO “determines that an expansion or enhancement ... may be required ... and is in the public interest.” Based on the plain wording of section 34, the identification of a need to expand or enhance the transmission system is the trigger for the AESO to *prepare and submit* a NID and not the trigger for the AESO to immediately *submit* a NID.

⁹ Alberta Hansard, March 19, 2003, at page 629.

95. A NID performs two functions: it describes a need to expand or enhance the transmission system and it recommends a preferred option to address the need identified. It is reasonable to expect, especially for significant projects such as the Edmonton-Calgary upgrades, a considerable time gap between the identification of a need for upgrades and the submission to the AUC of the NID describing that need and the technical solution to meet that need.

96. In circumstances where the AESO intends to file a NID in conjunction with a facility application prepared by a transmission facility owner at the direction of the AESO, as was the case for the Edmonton-Calgary upgrades, an even longer gap would not be unreasonable.

97. While the Commission agrees with Lavesta that the AESO is obligated to prepare and submit a NID in a timely manner, it finds that this obligation must be considered within the context of the legislative scheme.

98. Section 17 of the *Electric Utilities Act* describes the duties of the AESO. Those duties include:

- to direct the safe, reliable and economic operation of the interconnected electric system;
- to assess the current and future needs of market participants and plan the capability of the transmission system to meet those needs;
- to make arrangements for the expansion of and enhancement to the transmission system;

99. Section 34 of the *Electric Utilities Act* also prescribes the Commission's jurisdiction with respect to NIDs. When considering a NID, the Commission has only three options; it may approve it, deny it, or refer it back to the AESO with suggestions or directions for changes or additions. Neither section 34, nor any other provision in the legislative scheme, confers upon the Commission the express authority to direct the AESO to prepare and file a NID.

100. The Commission notes that its authority to deny a NID or refer it back to the AESO is further limited by section 38(e) of the *Transmission Regulation* which requires the Commission to consider the AESO's assessment of need to be correct unless an interested party demonstrates that the need assessment was technically deficient or that approval of the NID would not be in the public interest.

101. When sections 17 and 34 of the *Electric Utilities Act* and section 38 of the *Transmission Regulation* are read together, it is clear to the Commission that the legislature intended to reserve specific transmission planning duties, including the preparation and submission of a NID, exclusively to the AESO.

102. Section 34(1) does not establish a time limitation for the preparation of a NID once a need to expand or enhance the transmission system has been identified. The Commission considers that this reflects the intention of the legislature to confer broad discretion on the AESO with respect to the timing for the submission of a NID and to allow the AESO to gather and generate the information that must be included in a NID pursuant to section 11 of the *Transmission Regulation* and section 6.1 of AUC Rule 007: *Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designations*. Further, this allows the AESO to give direction to a transmission facility owner enabling the concurrent filing of a NID and a facility application.

103. Having regard to section 34 specifically and the governing legislation generally, the Commission finds that the AESO has significant discretion with respect to the preparation of a NID and its submission to the AUC. The Commission further finds that this discretion provides significant latitude with respect to the timing for the filing of a NID.

104. The Commission must now consider whether it has the authority to direct the AESO to file a NID pursuant to section 26(3).

105. As noted in the previous section, neither section 34 nor any other provision in the governing legislation confers upon the Commission the express authority to direct the AESO to prepare and file a NID. Further, the Commission found that decisions regarding the preparation and submission of a NID are matters that fall within the exclusive jurisdiction of the AESO.

106. The remedies available to the Commission under section 26 are to direct the AESO to change the conduct that was the subject matter of a complaint or to refrain from conduct that is the subject matter of the complaint. The Commission does not accept that these general remedies were intended by the legislature to displace the specific reservation of authority over NIDs to the AESO found in section 34 of the *Electric Utilities Act*. Had the legislature intended the Commission to exercise such supervisory authority the Commission is satisfied that such a provision would have been included in the legislation.

107. The Commission concludes that it does not have now, nor has it ever had, the authority to require the AESO to prepare and submit a NID.

4.4.2 Does a Remedy Exist in Light of Bill 50: Mootness

108. Lavesta also argued that the Commission is empowered by section 2(d) of the *Hydro and Electric Energy Act* to collect, appraise and disseminate information regarding the demand for, and supply of, electric energy that is relevant to the electric industry in Alberta. Pursuant to this authority Lavesta asserted that the Commission can compel the AESO to file a NID for every determination it makes that will materially affect the enhancement or expansion of the transmission system, even if that project has been designated Critical Transmission Infrastructure.

109. Subsection 2(d) of the *Hydro and Electric Energy Act* does not authorize the Commission to disregard the clear direction of the *Electric Utilities Act* with respect to the Commission's jurisdiction under section 26. That direction is found in section 41.2 which succinctly states that "Sections 34, 35 and 36 do not apply to critical transmission infrastructure."

110. The "implied exception" rule of statutory interpretation applies here. That rule is explained as follows:

When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general¹⁰

¹⁰ Ruth Sullivan, *Construction of Statutes Fifth Edition* (Markham: LexisNexis, 2008) page 343.

111. The Commission finds that Section 41.2 of the *Electric Utilities Act* prevails over section 2(d) of the *Hydro and Electric Energy Act* because section 41.2 is the more specific of the two provisions.

112. The Commission further finds that the result of this determination is that the Complaint, as it relates to a potential breach of section 34(1) of the *Electric Utilities Act*, was rendered moot by the coming into force of Bill 50.

113. The principle of mootness was explained by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.¹¹

114. The Court identified three broad rationales for the doctrine: (1) the need for a controversy for the court to adjudicate, (2) judicial economy, and (3) the proper law making function of the Court. The Court explained the third rationale as follows:

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch...¹²

115. The Commission considers that the same rationale may be applied in an administrative context. In the current circumstances the direction from the legislature with respect to the necessity for a NID for critical transmission infrastructure is clear; no NID is required. Given this clear direction, it would be improper for the Commission to direct the AESO to do something that the legislature has specifically stated it is no longer required to do.

4.5 Conclusion: the AESO's non-Compliance with Section 34 of the *Electric Utilities Act*

116. The Commission is satisfied that, even prior to the passage of Bill 50, it had no authority to order the AESO to submit a NID for the Edmonton-Calgary upgrades. As Bill 50 is now in force, the AESO is no longer required to file a NID for the Edmonton-Calgary upgrades and the Lavesta Complaint has been rendered moot. Based on these two conclusions the Commission

¹¹ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353.

¹² *Ibid.*

finds that this element of the Lavesta Complaint must be dismissed because it does not otherwise warrant an investigation or a hearing.

4.6 Did the AESO Mislead the Public and Elected Officials?

117. The Commission has reviewed the evidence cited by Lavesta and others in support of this aspect of the Complaint and finds that there is no convincing evidence to support the contention that the AESO misled, intentionally or otherwise, the public and elected officials into believing that the need for transmission upgrades between Edmonton and Calgary had been approved by the AUC.

118. The Complaint and reply submission cite two sources for the confusion regarding whether the need for the Edmonton-Calgary upgrades has been approved. First, Lavesta contends that this confusion arises from various publications and statements made by the AESO regarding the need for the Edmonton-Calgary upgrades.

119. Second, Lavesta argues that this confusion has developed as a result of a close relationship between the AESO and the Government of Alberta. Lavesta suggests that evidence of this close relationship is found in reports prepared by the AESO for the Government of Alberta regarding the need for critical transmission infrastructure and the inclusion of information provided by the AESO regarding the need for critical transmission infrastructure in documents published by the Government of Alberta. Lavesta also noted that an AESO employee attended a Lavesta information session on Bill 50 with a Government of Alberta employee.

120. Mr. Bur and his clients shared Lavesta's concern regarding communication between the AESO and the Government of Alberta and requested the disclosure of any reports prepared by the AESO at the request of the Government of Alberta.

121. The Commission recognizes that the AESO has, since the fall of 2007 when the EUB need decisions were vacated by the Court of Appeal, maintained that there is a need to upgrade and reinforce the transmission system between Edmonton and Calgary. Indeed, the AESO acknowledges in its submission that a number of its publications express the need for the Edmonton-Calgary upgrades.

122. The Commission does not regard the AESO's various pronouncements on the need for transmission upgrades between Edmonton and Calgary to be misleading or otherwise confusing. Forecasting transmission need is one of the AESO's primary functions.

123. The AESO is Alberta's transmission system planner. The AESO has a statutory mandate under section 17 of the *Electric Utilities Act* to assess the present and future needs of market participants and plan the capability of the transmission system to meet those needs. Sections 9 and 10 of the *Transmission Regulation* specifically require the AESO to forecast or project the need for new transmission facilities in 10 and 20-year outlook documents.

124. Lavesta's assertion that the AESO should essentially be prohibited from expressing its opinion on the need for transmission upgrades until a NID addressing that need has been approved by the Commission is contrary to the specific wording of the statutory scheme and to its spirit and intent.

125. With respect to the concern expressed by Lavesta and by Mr. Bur and his clients about reports prepared for the Government of Alberta by the AESO on transmission need, the Commission observes that the AESO is obligated by section 15(3) of the *Electric Utilities Act* to prepare such reports.

126. Having considered all of the information filed, the Commission finds that Lavesta has not demonstrated that the AESO misled or attempted to mislead Albertans and their elected officials into believing that the need for the Edmonton-Calgary upgrades had been approved by the AUC.

127. Further, the Commission does not find that the provision of report(s) prepared by the AESO to the Government of Alberta on the issue of critical transmission infrastructure was untoward or would reasonably give rise to any confusion regarding the approval of such projects.

128. Having regard to the foregoing, the Commission finds that this aspect of the Complaint must also be dismissed on the basis that it does not otherwise warrant a hearing or investigation. Accordingly Lavesta's request for remedies 2, 3, and 4, is likewise denied.

4.7 Is a Further Investigation or Hearing into the Lavesta Complaint Otherwise Required?

129. IPCAA argued that the Commission should convene a hearing into the Complaint because, in its opinion, public interest concerns have not been adequately addressed by the AESO for critical transmission infrastructure projects. It further argued that a hearing is warranted because the matter is of significant financial consequence to IPCAA's members and to all transmission ratepayers.

130. The Commission finds that the grounds cited by IPCAA do not warrant an investigation or hearing into the Complaint because these concerns are rendered moot by the coming into force of Bill 50. As explained earlier in this decision, section 41.2 of the *Electric Utilities Act* specifically states that section 34 of the *Electric Utilities Act* does not apply to critical infrastructure.

131. Mr. Bur and his clients argued that the Commission should further investigate the Lavesta Complaint by requiring the AESO to file a copy of all materials provided to the government and communication it has had with the government or government ministers with the Commission. The rationale for this request, the Commission understands, is to determine if the AESO has been negligent in its obligations under the *Electric Utilities Act*. For the reasons expressed above, the Commission finds that there is no need to require the filing of additional information for the purposes of determining this Complaint.

5 CONCLUSION

132. The Commission has determined that the Lavesta Complaint does not warrant an investigation or a hearing.

133. The Commission has considered the Complaint and the submissions of the parties and finds that the Lavesta Complaint been rendered moot by the coming into force of Bill 50.

134. To the degree that the Lavesta Complaint related to matters pre-dating the coming into force of Bill 50, the Commission finds that it lacks the jurisdiction to award the remedy sought by Lavesta, that is to order the AESO to file a NID.

135. The Commission further finds that Lavesta has not demonstrated that the AESO misled or attempted to mislead the public and elected officials into believing that the need for the Edmonton-Calgary upgrades had been approved by the AUC.

136. In accordance with subsection 26(2)(c), the Commission must dismiss the Lavesta Complaint.

Dated on March 10, 2010.

ALBERTA UTILITIES COMMISSION

(original signed by)

Tudor Beattie, Q.C.
Panel Chair

(original signed by)

Moin A. Yahya
Commissioner

(original signed by)

Anne Michaud
Commissioner

APPENDIX 1 – PROCEEDING PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative
Lavesta Area Group (Lavesta) J. V. Anglin
Individual Interveners D. and L. Lohmann D. Cunin K. Machell N. D. Wise E. Erickson M. Lambert C. Jensen B. Wyrostok J. D. Lukin
D. Bur, R. Bur, M. O. Bur D. Burr
Alberta Electric System Operator (AESO or ISO) J. H. Smellie H. Kirrmaier
Industrial Power Consumers Association of Alberta (IPCAA) M. Forster V. Bellissimo S. Fulton R. Mikkelsen
ENMAX Energy Corporation (ENMAX) J. Schlauch P. Haldane R. Stubbings
Capital Power D. Crowther A. Yamamoto K. L. Meyer
AltaLink Management Ltd. (AltaLink) D. Farmer Z. Lazic R. Lavergne

Alberta Utilities Commission

Commission Panel

T. Beattie, Q.C., Panel Chair

M. A. Yahya, Commissioner

A. Michaud, Commissioner

Commission Staff

JP Mousseau (Commission Counsel)