



My Landman Group Inc.

Preliminary Question
Review and Variance of Decision 2008-006

Reasons for Decision

August 27, 2010



ALBERTA UTILITIES COMMISSION

Decision 2010-420: My Landman Group Inc.

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Application No. 1606126

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ALBERTA UTILITIES COMMISSION

Calgary Alberta

**MY LANDMAN GROUP INC.
PRELIMINARY QUESTION
REVIEW AND VARIANCE OF DECISION 2008-006
REASONS FOR DECISION**

**Decision 2010-420
Application No. 1606126**

1 INTRODUCTION

Decision 2008-006

1. On August 22, 2006, Montana Alberta Tie Ltd. filed Application No. 1475724¹ with the Alberta Energy and Utilities Board (EUB or Board) requesting approval to construct and operate a 230-kV electric power international merchant transmission line (Power Line) from its proposed substation site northeast of Lethbridge to the United States border in the vicinity of LSD 4-3-1-17 W4M, with the Power Line terminating in the vicinity of Great Falls, Montana. The EUB processed applications no. 1458443 (Alberta Electric System Operator) and no. 1492150 (AltaLink Management Ltd.) concurrently with MATL's application due to the related nature of all three applications. On January 31, 2008, the EUB issued Decision 2008-006² (Montana Alberta Tie Ltd., 230-kV International Merchant Power Line, Lethbridge Alberta to Great Falls Montana) which conditionally approved the construction and operation of the Power Line.

Review Request

2. By cover letter dated April 14, 2010, the Alberta Utilities Commission (Commission or AUC) received a request for a review and variance of EUB Decision 2008-006 by My Landman Group Inc. (Landman Group) on behalf of approximately 30 landowners (Landowners) as identified within the review request. The Commission also received a submission from counsel (Stringham Denecky LLP) on behalf of the Landman Group in support of the review request dated April 21, 2010, providing submissions on the time limits set out in [Rule 016: Review and Variance of Commission Decisions](#) (Rule 016) and the Commission's authority to review.

Commission Process

3. On April 28, 2010, the Commission issued a process letter establishing a schedule for comments from interested parties to be filed with the Commission by May 12, 2010, and reply comments from the Landman Group to be filed by May 27, 2010. The Commission received correspondence relating to this review request, which resulted in further process for submissions by interested parties, and final replies by the Landman Group on May 15, 2010 and June 2, 2010. The Commission considers the record of this proceeding to have closed on June 2, 2010.

¹ Application No. 1475724 considered jointly with related Application Nos. 1458443, and 1492150.

² Decision 2008-006: Montana Alberta Tie Ltd., 230-kV International Merchant Power Line, Lethbridge Alberta to Great Falls Montana (Applications No.:1475724 – Montana Alberta Tie Ltd., 1458443 – Alberta Electric System Operator, 1492150 – AltaLink Management Ltd.) (Released: January 31, 2008).

2 VIEWS OF PARTIES

Landman Group on behalf of Landowners

4. Landowners claim that MATL is not complying with various commitments and conditions of its Permit and Licence and is requesting that the Commission rescind the Permit and Licence, or at least take steps to ensure MATL abides by its commitments and conditions.

5. The Landman Group states that, despite EUB Decision 2008-006, Landowners are not obligated to allow MATL access to their lands for construction of the Power Line, with the jurisdiction to enforce access to lands residing with the Surface Rights Board and not the Alberta Utilities Commission. Landowners are asking the AUC to enforce the conditions and commitments that MATL has made and if the AUC declines, Landowners will ask for similar relief from the Surface Rights Board:³

MATL then characterizes the landowner strategy of ongoing challenges to MATL's license with the AUC, refers to the fact that the landowners have been counselled not to sign ROW agreements with MATL and that My Landman Group's strategy has been a deliberate attempt to frustrate and defeat the MATL IPL. What is the matter with that? **Our Review and Variance request stems from the fact that MATL is not abiding by the conditions and commitments attached to the IPL. We have also shown that the MATL's ROW agreement violates EUB Decision 2008-006. We are not opposing the IPL; we are attempting to prevent MATL from abdicating their responsibilities.**

Our position is not that the IPL license needs to be defeated; it is that MATL is failing to abide by the terms and conditions of the IPL license. **We are simply asking the AUC to enforce the conditions and commitments that MATL has already made. If the AUC declines, we will ask the SRB to help redress the situation.**

[emphasis added by Landowners]

6. Landowners submit that Decision 2008-006 only directed that MATL establish a process to engage landowners in negotiations and further submit that the finding in Decision 2008-074⁴ was not a statement that all conditions had been fulfilled, but rather that only a process had been established. Landowners submit that the AUC now needs to ascertain whether that process has worked and to determine whether the process established led to fulfillment of all conditions, which Landowners contend has not occurred.

7. Landowners also specifically rely on the Board's views set out at page 51 of 2008-006:⁵

The Board's view of negotiation, mediation and arbitration, is that, irrespective of which of these processes the parties choose, when dealing with mitigation of adverse impacts, as between mitigation and compensation, much greater effort and emphasis must be given to mitigation, even if, on a comparative basis, mitigation may be somewhat more costly than compensation without mitigation. In the Board's view, **it would not be sufficient for MATL to just offer compensation where mitigation is possible or to seek relief from**

³ Landman Group letter of reply dated June 2, at page 3.

⁴ Decision 2008-074: Montana Alberta Tie Ltd., 230-kV International Merchant Power Line, Lethbridge Alberta to Great Falls Montana, Supplement to Decision 2008-006 (Applications No.:1475724 – Montana Alberta Tie Ltd., 1458443 – Alberta Electric System Operator, 1492150 – AltaLink Management Ltd.) (Released: August 12, 2008).

⁵ Landman Group letter of reply, dated June 2, at page 5.

the Surface Rights Board in circumstances where mitigation is possible. In the Board's view, mitigation, within reasonable financial limits, is in the public interest and will more likely contribute to, and promote harmonious co-existence between, MATL's proposed IPL and pre-existing agricultural operations and other land uses. For, after all, if constructed, the MATL project would have a decided effect on the landscape of southern Alberta for many decades to come. It is therefore imperative that all those affected collaborate through meaningful, good faith discussions in an attempt to minimize the impacts of the MATL project.

[emphasis added by Landowners]

8. Landowners submit that once MATL obtained their licence, it stopped engaging in negotiations and mitigation and cancelled meetings with landowners until survey permission was sought and a final offer was delivered, which, for certain landowners, was over two years later.

9. Landowners submit that they have been attempting to discuss and negotiate outstanding matters with MATL, without any success. Landowners believe that MATL does not intend to meet to negotiate, including making any changes to their proposed right-of-way agreements, with first and final offers having been the same, with no unique conditions between the unique needs of individual landowners. Landowners question how these practices can reasonably be characterized as negotiation and mitigation. Landowners believe that the concept of negotiation implies willingness by both parties to compromise, with Landowners effectively believing that MATL is not negotiating in good faith or engaging in mitigation.⁶

10. Landowners also believe that many provisions of MATL's proposed Right-of-Way Agreement is in contravention of the EUB Permit and Licence, including clauses which grant access to land without compensation, as well as clauses pertaining to telecommunications, non-exercise of rights, liability, withholding of compensation until construction begins, and reservations of property from title.

11. Landowners also submit that there are outstanding issues relating to the Warner West Water Co-op (Water Co-op), because the Water Co-op maintains an underground water pipeline that provides water services to its member landowners within the County of Warner, and that the proximity of the Power Line may overlap the current water line so as to impact regular maintenance and repair to the water line in close proximity to the Power Line. Landowners submit that resolution of outstanding issues with the Warner West Water Co-op should be a "pre-condition" to MATL applying to the Surface Rights Board for other right of entry orders.

12. Landowners also contend that there are similar outstanding issues involving the St. Mary's River Irrigation District (SMRID), submitting that they rely on the infrastructure and that MATL refuses to discuss or mitigate effects of the Power Line on pumping stations, dugouts, electrical power sources, and relocation of feeder canals. Landowners also note that the EUB provided a summary of findings, conclusions, directions, and conditions, set out at Section 11 of Decision 2008-006.⁷

13. Stringham Denecky LLP's submission on behalf of the Landman Group urged the Commission to waive time limits as may be set out in Rule 016, arguing that it was clear that the decision approving MATL's permit was conditional on MATL following through on the

⁶ Landman Group letter dated June 2, at page 3.

⁷ [Appendix 2](#): Summary of Board Findings from Section 11 of Decision 2008-006.

directions and conditions given by the EUB, and that it would not make any sense to disallow a review merely because the review period set out in Rule 016 had expired.

Individual Landowners

14. The Commission also received support for the request to review Decision 2008-006 by way of an email dated May 10, 2010 from Mr. Clarence Halma and Ms. Henrietta (Rita) Halma (the Halmas), who own property along the approved Power Line route. The Halmas indicated that they had engaged the Landman Group to represent their concerns in this application and were included in the list of landowners represented by the Landman Group.

15. The Halmas' May 10, 2010 email submission also referenced and attached a letter from the Halmas to the Alberta Electric System Operator (AESO), MATL, and AltaLink Management Ltd., which was dated March 21, 2007. The Halmas' March 21, 2007 letter expressed concerns with impacts on land use, aerial spraying, irrigation, internet access, Global Positioning System (GPS) technology and equipment, health, quality of life, visual and auditory impacts, as well as disappointment over negotiations with MATL, including waiting for over 18 months to receive formal responses from MATL in respect of their concerns. The Halmas similarly stated that MATL has not complied with conditions of its Permit and Licence.

16. The Halmas also indicated that they recently noticed that the Power Line would be immediately above their power source for an irrigation pumping unit. The Halmas indicated that they were concerned about the impact of the Power Line on the electrical controls, the pumping unit, and the operators who would need to work in the immediate area.

17. The Commission also received a letter dated May 6, 2010 from Mr. Barry Snow dated May 6, 2010 expressing concerns relating to compensation and rights of access to Mr. Snow's lands. The Commission also received letters from several other interested parties in support of the review request, similarly expressing disappointment over the status of negotiations with MATL, alleging that MATL has not complied with conditions of its Permit and Licence, as well as expressing specific concerns respecting impacts on their lands. These parties are:

- Mr. Tony Bos (Boston Farms Ltd.), letter dated May 11, 2010;
- Mr. Norman and Mrs. Dianne Sincennes, letter dated May 7, 2010;
- Mr. Dave Van Pelt (Dave Van Pelt Farms Inc.), letter dated May 4, 2010; and
- KCL Cattle Company Ltd., letter dated May 5, 2010.

18. The Commission also received a letter in support of the review request dated May 16, 2010 from Graves Engineering Corporation, on behalf of Mr. Dwayne Goodstriker.

19. The Commission also received letters from the AESO dated May 18, 2010, and from NaturEner dated May 6, 2010 and May 18, 2010. The AESO opposes the review request, and NaturEner reserved its interest to participate in a review should the Commission proceed to a review on the merits of the request.

Montana Alberta Tie Line Ltd.

20. MATL argues that the request for a review should be dismissed because it is out of time, it raises no reviewable issue as to the correctness of the Decision sought to be reviewed, and that the Landowners' review request instead relies on the Decision and MATL's Permit and Licence conditions, and essentially alleges issues of non-compliance.

21. MATL notes that section 4(2) of Rule 016 sets out a 60-day time limit to review a decision relating to transmission lines, and that the review period elapsed long ago as Decision 2008-006 was issued on January 31, 2008, and Decision 2008-074 was issued on August 12, 2008. MATL notes that on November 13, 2008, the MacLachlan Landowner Group, which includes several landowners common to the current review request application, applied to the EUB for a similar review and variance of Decision 2008-006 and similarly alleged non-compliance with conditions imposed by that Decision, particularly relating to landowner engagement. The Commission dismissed the MacLachlan Landowner review request on November 21, 2008 because the application was beyond the review period set out in Rule 016. MATL notes that the Commission also dismissed a second review request on December 2, 2008, again for the same reason.

22. MATL submits that Landowners have not raised any error of law, jurisdiction or error of fact which could raise a substantial doubt as to the correctness of the decision. MATL further submits that the review request did not allege any new facts, or a change in circumstances, or facts not previously placed in evidence, which may similarly raise a reasonable possibility that any such new facts could lead the Commission to materially vary or rescind the decision.

23. MATL submits that, in substance, the review request actually relies on the Decisions and Permit and Licence, but alleges issues relating to non-compliance with conditions and commitments.

24. As regards allegations of non-compliance, MATL submits that there is no substantive basis for Landowners' allegations of non-compliance with express or implicit conditions attached to either Decision 2008-006 or 2008-074, or MATL's Permit and Licence. MATL confirms that commitments made by it, including mitigation, have either been or will be fully satisfied in the appropriate time frame. MATL submits that, to the extent that Landowners do not consider MATL's right-of-way proposals to be sufficient or acceptable, Landowner may seek relief from the Surface Rights Board within the scope of the Surface Rights Board's jurisdiction.

25. MATL disputes Landowner assertions that it discontinued consultation and negotiation with landowners after the EUB issued Decision 2008-074, finding that MATL had satisfied the pre-conditions for the issuance of MATL's Permits and Licences. MATL submits that it has paid over \$300,000 to landowners and their representatives to engage in negotiations. MATL submits it has executed approximately 40 percent of the linear miles for the Power Line and notes that, whether landowners have executed a right-of-way or if landowners elect to pursue their rights before the Surface Rights Board, MATL will continue to incorporate design flexibility where possible in consultation with landowners who are willing to engage in consultation with MATL. As an example, MATL notes it has worked with its design engineers to improve the Power Line, including amendments to vertical clearances through pivot irrigation areas and maximizing ground clearances to ensure safe operation of farm vehicles.

26. MATL believes matters relating to compensation for land acquisition and damages are within the legislated mandate of the Surface Rights Board, and not the AUC, and that compliance concerns relating to Global Positioning System technology are being raised prematurely, as well as other concerns, such as impacts on radio, television, internet interference and weed management issues.

27. As regards mitigation related to pole locations, MATL submits that, where right-of-way agreements have been mitigated, the areas to be avoided for pole locations have been discussed and accommodated to the extent possible. Where no right-of-way agreements have been executed, MATL submits that it has invited landowners to discuss areas to be avoided for pole locations, and made accommodations to the extent possible.

28. Where no right-of-way agreement has been executed, MATL is now proceeding to apply to the Surface Rights Board for a right of entry order. MATL states that it will continue to consult with willing landowners on final pole locations following the issuance of right of entry orders, within the flexibility available under MATL's final engineering design.

29. MATL acknowledges that, while it has not entertained some of the mitigative measures that various landowners have proposed, the Surface Rights Board will have the opportunity to address the reasonableness of such measures. MATL also acknowledges that, where there are differences between MATL and some of the parties with respect to both the magnitude and the heads of damage advanced for compensation, the Surface Rights Board will again have the opportunity to arbitrate those differences.

30. As regards Landowners' comments respecting MATL's final offers being unchanged from the first, MATL submits that service of a "Final Offer" upon landowners is a procedural requirement of the *Surface Rights Act*, and given MATL's intended construction schedule it determined that it could no longer delay initiating its applications with the Surface Rights Board for right of entry orders where required. MATL notes that, notwithstanding service of "Final Offers" to unsigned landowners, MATL continues to consult and to negotiate with landowners, and notes in particular that parties are at liberty to conclude a right-of-way agreement at any time, including after the Surface Rights Board has issued a right of entry order. Landowners stated in reply that they believe that MATL is being disingenuous in making this statement.

31. As relates to Landowner comments respecting liability of landowners and MATL, MATL states that it believes that its proposed right-of-way agreement is consistent with the terms and conditions imposed on MATL, noting that the specific words set out in its right-of-way agreement are based on AltaLink's precedent, and hence presumed to be reflective of practices approved by the Commission. However, MATL also notes that any form of easement would only be concluded where there is agreement by both parties on all particulars, including agreement on contentious compensation matters, and that where parties do not reach agreement, rights of entry and any conditions thereto would be within the purview of the Surface Rights Board.

32. As regards the specific concerns of the Halmas relating to the impact of the Power Line on the power source for the irrigation pumping unit, MATL submits that this was a general concern that was raised and addressed in Decision 2008-006.⁸ As regards Mr. Snow, MATL

⁸ EUB Decision 2008-006, at page 48.

submits that it has since offered to hold meetings towards completing right-of-way agreements with Mr. Snow. MATL further submits that, where Mr. Snow does not wish to grant MATL a right-of-way, MATL will apply to the Surface Rights Board for a right of entry order, as would be the case with any other landowner who chooses not to enter into a right-of-way agreement.

33. As regards the Warner West Water Co-op (Water Co-op), MATL notes that Decision 2008-006 included a condition providing that MATL must file maps showing the exact location of the Water Co-op water line in relation to the Power Line, as well as a detailed proposal for mitigating any negative impacts on the water line caused by the construction and operation of the Power Line. MATL notes that, in Decision 2008-074, the EUB had concluded that MATL had filed materials that satisfied that condition. As regards interference with maintenance and repair of the water line in close proximity to the Power Line, MATL states that it is continuing to work on its proposal to relocate those portions of the water line that run parallel to and are situated within MATL's proposed right-of-way.

34. As regards the SMRID, MATL notes that SMRID has not intervened to participate in this review request and submit that information provided by the Landman Group regarding the status of MATL's engagement with SMRID is not correct. MATL further notes that it is actively engaging with SMRID to mitigate the impact of the Power Line on SMRID's facilities, with some issues resolved, and others remaining outstanding.

3 AUTHORITY TO REVIEW

35. The Commission may review its decisions pursuant to section 10 of the *Alberta Utilities Commission Act*, S.A. 2007, c.A-37.2. Commission Rule 016 establishes the procedures and test to be applied to an application for a review and variance of a Commission decision.

36. A review process under Rule 016 ordinarily follows a two-step process, the first being the preliminary question of whether to grant a review, and the second dealing with the substantive issues under review:⁹

11 The Commission shall decide, with or without a hearing, the preliminary question of whether the decision made by it should be reviewed as requested in the application for review.

37. If the Commission finds that the test for the preliminary question has been met and grants the application for review, the Commission will issue a notice of review and hold a new hearing or other proceeding in accordance with the Commission's Rules of Practice.¹⁰

38. With respect to the preliminary question, section 12(a) of Rule 016 sets out that the Commission shall grant a review of a decision if the Commission determines that: (i) where an applicant has alleged an error of law or jurisdiction or an error of fact, which in the Commission's opinion, the applicant has raised a substantial doubt as to the correctness of the decision or (ii) where the applicant has alleged new facts, a change in circumstances or facts not

⁹ Commission Rule 016: *Review and Variance of Commission Decisions*, section 11.

¹⁰ Commission Rule 016: *Review and Variance of Commission Decisions*, section 13.

previously placed in evidence as the evidence was not known, there is a reasonable possibility such new facts could lead the Commission to materially vary or rescind the decision.¹¹

4 COMMISSION FINDINGS

39. On January 31, 2008, the EUB issued Decision 2008-006 which conditionally approved the construction and operation of the Power Line. Decision 2008-006 included a condition that, before the EUB would issue a permit to construct and a licence to operate the Power Line and related facilities, the Board would need to be satisfied that MATL had established a process that would engage affected landowners in negotiations. This condition (the ADR Condition) is detailed at Section 9.4 of Decision 2008-006. The ADR Condition essentially required MATL to engage an ADR service provider who would conduct meetings between MATL and unsigned landowners, and subsequently deliver a report to the EUB on the outcomes of such meetings:¹²

Accordingly, before the Board will issue a permit to construct and a licence to operate MATL's proposed IPL and facilities, the Board must be satisfied that MATL has established a process that would engage affected landowners in meaningful discussions and negotiations. In reaching a determination on this condition, and prior to the issuance of any permit, the Board must be satisfied that:

- MATL has engaged an experienced and suitable ADR professional (ADR service provider) whose appropriate dispute resolution qualifications include experience and demonstrated competence in the design of ADR programs for multi-stakeholders and who has extensive knowledge about the Board's public consultation guidelines and directives;
- The ADR service provider conducted an initial ADR meeting(s) (PADR) between MATL and unsigned landowners such that MATL and each affected landowner should be expected to have an informed understanding of:
 - the issues to be resolved;
 - the impacts on, and needs and interests of, the other party; and
 - the appropriate resolution option to select for their specific situation (including "interest based" mediation and binding arbitration) on unresolved mitigation issues or referral to the Surface Rights Board for right of entry and/or compensation).

MATL will cause the ADR service provider to deliver a report to the Board on the outcomes of the initial ADR meetings addressing the items described in the previous bullet and a summary description for each landowner of the follow up process resulting in:

- (i) a signed ADR agreement selecting a specific ADR process (commit to ADR, confidentiality, process, etc.); or

¹¹ Commission Rule 016: *Review and Variance of Commission Decisions*, section 12(1)(i).

¹² Decision 2008-006, at page 52-53.

- (ii) a decision of a landowner not to proceed to ADR and to have right of entry and compensation decided by the Surface Rights Board or otherwise as applicable.

The Board would expect to receive the above report from the ADR service provider on or before April 30, 2008. On the recommendation of the ADR service provider, the Board may extend this timeline as it recognizes that reasonable flexibility may be in the best interests of all stakeholders.

The Board has attached as Appendix F hereto a flow chart and narrative that is intended to provide guidance to all concerned.

40. The ADR report was to detail the issues to be resolved, the impacts, needs and interests of each landowner, and the appropriate resolution option for each landowner's specific situation, which could include mediation, arbitration, or referral to the Surface Rights Board for the purposes of seeking right of entry orders and addressing matters relating to compensation.

41. Appendix F of Decision 2008-006 further provided a flowchart of the EUB directed ADR process, which ultimately contemplates the Surface Rights Board deciding rights of entry and compensation where parties are unable to settle, mediate or arbitrate matters privately:¹³

Step 6: The outcome of the ADR process can be:

- Settlement between MATL and landowners
- Mediation unsuccessful
- Final and binding arbitration award
- SRB decides right of entry and/or compensation

42. On August 12, 2008, the EUB issued Decision 2008-074, wherein the EUB concluded that the ADR condition, as described at Section 9.4 of Decision 2008-006, had been satisfied:¹⁴

Having regard for all of the submissions related to the ADR condition, the Panel concludes that the condition has been satisfied. The intent of the condition was to establish a process through which good fair negotiations could take place in regard to the design and construction of the international power line considered by the panel in Decision Report 2008-006. The Panel appreciates that negotiations between landowners and proponents can often be challenging even with the best of intentions and the assistance of experienced third-party facilitators. The Board understands that, notwithstanding these challenges, all landowners have now selected direct negotiations without PADR or have been through the PADR process and reached an ADR agreement. Based on the information before it the Panel notes that only one of the landowners now falls into the category of an "informed no."

The Board does believe that it would be helpful to clarify the scope of the binding arbitration process as it may relate to compensation issues. The Panel included the ADR condition to assure that appropriate discussions took place between the proponent and the landowners concerning the design of the transmission line and the appropriate mitigation measures so as to minimize the adverse effects on landowners. During the course of the

¹³ Decision 2008-006, at Appendix F.

¹⁴ Decision 2008-074, at pages 4-5.

hearing the Panel heard considerable evidence from MATL as to what measures could be taken to respond to various landowners individual situations. The Panel also heard from landowners at the hearing that to that point they had not had sufficient discussions with MATL to determine what mitigation measures would best serve their individual situations. The Board's condition established a process that it believes will provide for their productive negotiations on the mitigation matters. The Board expressed a clear expectation that, where there were choices to be made, mitigation options should be favoured over financial compensation. Clearly such an approach must have regard for the relative cost; however, the Board believes that some premium should be associated with the mitigation before compensation approach.

The voluntary binding arbitration ADR option is not intended to displace the jurisdiction of the Surface Rights Board except where MATL and any landowner have expressly agreed to do so. The mandate and jurisdiction of the Surface Rights Board to determine land compensation issues is separate and distinct from the jurisdiction of the EUB. Compensation issues can and should be discussed between the parties as part of the negotiation process, however, failing a negotiated or arbitrated resolution of matters that relate to land compensation, it is not open to the Board to direct a process that is not provided for in its legislated mandate. That said, the Board retains jurisdiction over MATL and its mitigation undertakings and intends to continue its scrutiny and assessment of MATL's compliance with its mitigation undertakings in a manner that the Board deems to be in the public interest.

[emphasis added]

43. In Decision 2008-074, the Board concluded that all conditions precedent to the issuance of an EUB permit as set out in Decision 2008-006 had been satisfied, and subsequently the Board prepared and approved several permits and licences:¹⁵

6 Board Conclusion

The Board has concluded that all conditions precedent to the issuance of an EUB permit set out in Decision Report 2008-006 have been satisfied. Consequently, the Panel has prepared and approved:

- a) EUB Permit and License No. U2008-267 (Appendix A)
- b) EUB Permit and Licence No. U2008-268 (Appendix B)
- c) EUB Connection Order No. U2008-266 (Appendix C)
- d) EUB Permit and Licence No. U2008-270 (Appendix D)
- e) EUB Permit and Licence No. U2008-265 (Appendix E)
- f) EUB Need Assessment Approval No. U2008-269 (Appendix F)

[emphasis added]

44. Because Decision 2008-006 and Decision 2008-074 were issued on January 31, 2008 and August 12, 2008 respectively, the Commission finds that the review request has been filed beyond the 60-day time limitation set out in Rule 016.

45. The Commission has previously dismissed similar requests for review of Decision 2008-006 and 2008-074 by the MacLachlan Landowners Group, by way of two separate letter rulings, dated November 21, 2008 and December 2, 2008, on the basis that those review requests were filed beyond the 60-day time period set out in Rule 016. Many of the landowners comprising the

¹⁵ Decision 2008-074, at page 6.

MacLachlin Landowners Group include landowners common to the current review request application.

46. The Commission has set out timelines for submissions of applications for review in Rule 016 so as to provide clear parameters for bringing into question a decision of the Commission. These parameters ensure that a decision of the Commission is final unless the Commission initiates a review of a decision on its own motion. In essence, the timelines set out in Commission Rules are intended to provide certainty to parties.¹⁶

47. Accordingly, the Commission dismisses the review request on the basis that it has been filed beyond the time limitations set out in Rule 016.

48. Nonetheless, as noted by Landowners, the Commission may consider whether there are exceptional circumstances in relation to a review request for the Commission to exercise its jurisdiction to review under section 2 of Rule 016. Hence, the Commission will consider whether Landowners have shown that exceptional circumstances exist sufficient to warrant a review pursuant to section 2 of Rule 016.

49. The Commission finds that Landowners did not raise any error of law, error of jurisdiction, or error of fact which could raise a substantial doubt as to the correctness of Decision 2008-006 or appear to similarly challenge the correctness of Decision 2008-074 itself on the basis of error of law, jurisdiction or fact:¹⁷

The issue of being “out of time” is a moot point. We are not seeking to appeal or change the terms of Decision 2008-006; rather we are seeking their enforcement. Secondly, we are not challenging the correctness of the Decision. For the record, we are relying on the Decision and Permit conditions and the issue of review is the fact that MATL is non-compliant with the Conditions and Commitments attached to the MATL Permit and Licence.¹⁸

50. With respect to the submissions of Landowners regarding dissatisfaction with the status and development of consultation, negotiation and mitigation of ongoing issues arising out of the specific location and routing of the Power Line and other similar related impacts, and Landowner assertions that Decision 2008-074 only established a process for negotiations and that the AUC now needs to ascertain whether the process has worked, the Commission notes that the EUB specifically stated that the intent of the ADR Condition in Decision 2008-006 was to establish a process by which fair negotiations could occur, and then subsequently determined in Decision 2008-074 that “...all conditions precedent to the issuance of an EUB permit set out in Decision 2008-006 [had] been satisfied.”

51. In addition, the Commission finds that there is nothing before the Commission in this proceeding that demonstrates that the process has not been followed. The Commission finds that Landowner submissions simply indicate that the Landowners are not satisfied with the results of

¹⁶ Decision 2009-081: Keith and Cheryl Greschner, Kevin and Vicki Greschner, Greschner Enterprises Ltd. (Greschners), Decision on Preliminary Question, Review and Variance of Alberta Utilities Commission Permit and Licence No. U2008-329 (Application No. 1604904) (Released: June 10, 2009) at paragraphs 36, and 27. Also *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 094, at paragraph 30.

¹⁷ My Landman Inc. Letter of Reply dated May 15, 2010.

¹⁸ My Landman Inc. Letter of Reply dated May 15, 2010.

the process and that they have not reached an agreement with MATL. In this latter regard, the Commission notes that Decision 2008-006 specifically contemplated that the Surface Rights Board has the jurisdiction to issue right of entry orders and to address matters involving compensation, such as impacts from final pole locations, where private negotiations between landowners and MATL remain unsuccessful.

52. Consequently, the Commission finds that the potential for MATL to avail itself of the jurisdiction of the Surface Rights Board was not an unforeseen, or potential, process step but rather that it was specifically contemplated by the EUB in the event that negotiations were not successful with individual landowners. Further, the Commission recognizes that resort to the Surface Rights Board for such matters is provided for by legislative scheme.

53. Accordingly, with respect to Landowner concerns relating to dissatisfaction with the status and development of consultation, negotiation and mitigation of ongoing issues arising out of the specific location and routing of the Power Line, and other similar related impacts, the Commission finds that Landowners have not shown that any exceptional circumstances, particularly as may be based on changed facts or new circumstances, which would lead the Commission to initiate a review pursuant to section 2 of Rule 016 at this time.

54. With respect to the submissions of Landowners relating to the Power Line, which are operational and ongoing in nature, the Commission has reviewed the submissions of all parties and finds that these particular matters raised are not exceptional and do not warrant a review of Decision 2008-006 pursuant to section 2 of Rule 016, particularly because the Power Line has not been constructed or energized, nor is it near to being in-service.

55. As regards concerns which Landowners raised specific to impacts on GPS systems, and the condition placed on MATL in Permit and Licence U2010-136¹⁹ (then U2008-267²⁰) with respect to consultation, negotiation and mitigation relating to adverse effects on GPS Systems that are identified by either MATL or landowners as a result of the Power Line, the Commission also finds these specific concerns to not be exceptional, again for the reason that the Power Line has not been constructed or energized, nor is it near to being in-service:²¹

5. MATL will fully and fairly consult, negotiate in good faith and mitigate adverse effects on GPS systems that are identified by MATL or landowners as a result of the Transmission Line;

56. In regard to Landowner comments specific to the Warner West Water Co-op, the Commission notes that Decision 2008-006 included a condition providing that MATL must file maps showing the exact location of the Warner Water Co-op water line in relation to the Power Line, as well as a detailed proposal for mitigating any negative impacts on the water line caused

¹⁹ Permit and Licence No. U2010-136: Appendix 1 to Decision 2010-302, Montana Alberta Tie Ltd., Time Extension for New Transmission Link 941L (Application No. 1605967, Proceeding No. 535) (Released: June 28, 2010).

²⁰ Permit and Licence No. U2008-267: Montana Alberta Tie Ltd., New Transmission Line 941L (Application No. 1475724) (Released: August 12, 2008).

²¹ U2008-267 and U2010-136, Condition No. 5.

by the construction and operation of the Power Line. In Decision 2008-074, the EUB had determined that MATL had filed materials that fully addressed the said condition.²²

Decision Report 2008-006 imposed several conditions on the proposed international power line (IPL). The majority of the conditions are operational in nature and do not require further assessment by the Board prior to issuance of a permit. Aside from the ADR condition discussed extensively in this report, one other condition required satisfaction before the Alberta Utilities Commission can issue a permit. That condition provided that MATL file maps showing the exact location of the Warner Water Co-Op water line in relation to the IPL and a detailed proposal for mitigating any negative impacts on the water line caused by the construction and operation of the IPL. The Panel and the AUC have received and reviewed MATL's July 29, 2008 filing concerning the Warner Water Co-Op. The Panel is satisfied that the filed submission fully addresses the subject condition.

[emphasis added]

57. Accordingly, the Commission finds that that Landowners have not provided any persuasive argument that the EUB's determination respecting the Water Co-op involved any error of fact, or that the condition specifically relating to the Water Co-op remains otherwise outstanding.

58. For these reasons, the Commission concludes that Landowners have not provided any persuasive arguments in support of their request that the Commission grant a review on its own motion pursuant to section 2 of Rule 016 and accordingly the Commission dismisses the request for review.

Dated on August 27, 2010.

ALBERTA UTILITIES COMMISSION

(original signed by)

Tudor Beattie, Q.C.
Panel Chair

(original signed by)

Anne Michaud
Commissioner

(original signed by)

Mark Kolesar
Commissioner

²² Decision 2008-074, at page 5.

APPENDIX 1 – PROCEEDING PARTICIPANTS

| Name of Organization (Abbreviation) Counsel or Representative |
|--|
| My Landman Group Inc. (Landman Group) D. Bennett S. C. Stenbeck, Stringam Denecky LLP |
| Mr. C. and Ms. H. Halma |
| Boston Farms Mr. T. Bos |
| Mr. N. and Mrs. D. Sincennes |
| Mr. B. Snow |
| Dave Van Pelt Farms Inc. Mr. D. Van Pelt |
| KCL Cattle Company Ltd. L. Wall |
| Graves Engineering J. Graves D. Goodstriker |
| Alberta Electric System Operator J. H. Smellie, Gowling Lafleur Henderson LLP |
| NaturEner Energy Canada Inc. (NaturEner) E. Young |
| Montana Alberta Tie Ltd. (MATL) A. L. McLarty, Q.C., Fraser Milner Casgrain LLP L. Estep, Fraser Milner Casgrain LLP |

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| Alberta Utilities Commission |
| Commission Panel T. Beattie, Q.C., Panel Chair A. Michaud, Commissioner M. Kolesar, Commissioner |
| Commission Staff C. King (Commission Counsel) |

APPENDIX 2 – SUMMARY OF BOARD FINDINGS FROM DECISION 2008-006

[\(return to text\)](#)

11 BOARD FINDINGS, CONCLUSIONS, DIRECTIONS AND CONDITIONS

Following is a compilation of the Board directions and conditions that are found throughout this Decision Report in order of their occurrence in the report and the reference to where they occur.

The Board makes the AESO approval conditional on the Board (or Alberta Utilities Commission) being satisfied that MATL has commenced construction. (page 16)

Therefore, the Board conditionally approves Application No. 1458443 and will issue a NID Approval to the AESO with the conditions as proposed herein. (page 16)

The Board directs that MATL will accept the responsibility and cost for repairing any damage to its IPL except in cases of where it is obvious that the damage was premeditated and willful. Furthermore, the Board directs that MATL will compensate landowners and any other parties whose property may be damaged as a result of the operation of the MATL IPL. (page 21)

On the basis of the evidence and submissions considered by the Board, the Board concludes that MATL failed to fully and adequately address the impacts that its proposed IPL would likely have on the numerous landowners who convincingly demonstrated how their farming operations and land uses would be materially and adversely affected by the MATL project unless appropriately mitigated. (page 21)

Accordingly, as fully described in section 9.4, no permit will be issued by the Board unless and until MATL has undertaken and completed its engagement with landowners on the basis outlined in this **Decision Report. (page 22)**

The Board, noting the impacts on the residences along road allowances that the MATL line would have on Alternates C and D and, further noting, that at no time during the hearing did MATL request either alternate route be approved over its preferred route, the Board rejects Alternates C and D for the routing of MATL's 230-kV transmission line. (page 24)

Therefore, since, in the Panel's view, since none of the conditions listed in s. 58.28 of the NEB Act apply to MATL's IPL, the requirements of s. 58.31 do not apply to the MATL IPL. The Board, therefore, concludes that should any operator require the use of power operated equipment in the vicinity of the MATL IPL, once it is in place, using due care and attention, that operator can proceed to do so without any notification to or permission from the NEB. (page 26)

For the above reasons, the Board rejects MATL's request for a safety zone option and directs that MATL acquire the full width of ROW required for the construction, operation, maintenance, and repair of its transmission line facilities including the full expected width of overswing of the conductors. (page 27)

The Board finds that MATL presented a clear written description of its centreline location in its application and also clearly indicated the centreline on its right-of-way cross sectional diagrams.

This is the centreline being approved herein. If MATL requires any relocation of the centreline, it would need to make such application to the Board. (page 27)

For the above reasons, the Board denies MATL's request for the flexibility to arbitrarily move the centreline of its right-of-way without further Board input. (page 27)

Accordingly, the Board would therefore impose a condition on any permit issued to ensure that MATL satisfies its commitment to fully and fairly consult, negotiate in good faith and mitigate adverse effects and impacts on GPS systems that are identified by MATL or landowners as a result of MATL's IPL. (page 29)

In conclusion, the Board requires MATL to engage in negotiations with the SMRID as to the location of its line with respect to SMRID facilities as the Board is requiring of MATL to do with all other affected parties. Meaningful consultation with the SMRID is required of MATL, as it is for all other portions of its line, in order for the Board to issue a permit to MATL for the construction of its IPL. (page 31)

Accordingly, it is a condition of this decision that once MATL identifies the exact location of the water line operated by the Co-op, MATL must file with the EUB maps showing the location of the water line in relation to the power line and a detailed proposal for mitigating any negative impacts on the water line caused by the construction and operation of the proposed IPL. (page 33)

As conditioned earlier in this report no permit will be issued by the Board unless and until MATL has undertaken and completed its engagement with landowners on the basis outlined throughout this **Decision Report but particularly in section 9.4. (page 36)**

The Board notes that within its EPP, MATL has included a Saturated Soils Contingency Plan. The Board requests MATL to pay particular attention to the soil moisture conditions in this area during construction, maintenance, inspection, and repairs. (page 43)

The Panel has carefully weighed the evidence before it concerning the health impacts of chronic exposure to EMF, and has concluded, consistent with the views of the NEB, that the evidence does not establish a causal relationship between EMF and serious human health impacts. (page 50)

Nevertheless, the Panel expects MATL to meet its commitments to measure EMF at any landowner's residence on request and to monitor EMF literature and other information on an ongoing basis and post any new information on the MATL website and also provide it to interested landowners. (page 50)

The Board directs that a copy of Shel-Bar Electronics Industries' report, done in association with MATL's project, be filed with the EUB. (page 51)

Accordingly, before the Board will issue a permit to construct and a licence to operate MATL's proposed IPL and facilities, the Board must be satisfied that MATL has established a process that would engage affected landowners in meaningful discussions and negotiations. In reaching a

determination on this condition, and prior to the issuance of any permit, the Board must be satisfied that:

- MATL has engaged an experienced and suitable ADR professional (ADR service provider) whose appropriate dispute resolution qualifications include experience and demonstrated competence in the design of ADR programs for multi-stakeholders and who has extensive knowledge of the Board’s public consultation guidelines and directives;
- The ADR service provider conducted an initial ADR meeting(s) (PADR) between MATL and unsigned landowners such that MATL and each affected landowner should be expected to have an informed understanding of:
 - the issues to be resolved;
 - the impacts on, and needs and interests of, the other party;
 - the appropriate resolution option to select for their specific situation (including “interest based” mediation and binding arbitration) on unresolved mitigation issues or referral to the Surface Rights Board for right of entry and/or compensation).

MATL will cause the ADR service provider to deliver a report to the Board on the outcomes of the initial ADR meetings addressing the items described in the previous bullet and a summary description for each landowner of the follow up process resulting in:

- (i) a signed ADR agreement selecting a specific ADR process (commit to ADR, confidentiality, process, etc); or
- (ii) a decision of a landowner not to proceed to ADR and to have right of entry and compensation decided by the Surface Rights Board or otherwise as applicable. (page 52)

The Board adopts the reasoning of the *Emera Brunswick* decision. The EUB concludes that there is no meaningful difference or distinction to be made between “public convenience and need” and “public convenience and necessity” and regards them as synonymous. (page 54)

The Board concludes that if the mitigation measures that MATL has proposed in its evidence before the Board are substantially successful in meeting the needs and reasonable expectations of those directly and adversely affected by the proposed transmission line, their interests, too, will have been satisfied as well as the public interest as a whole. (page 57)

Therefore, the Board approves Application No. 1492150 conditional upon MATL receiving a permit and licence for its IPL. Accordingly, no permit and licence will be issued to AltaLink for the construction and operation of its facilities associated with the MATL IPL until such time as MATL receives a permit and licence to construct and operate the said IPL. (page 59)