

November 22, 2018

To: Parties currently registered on Proceeding 23753

**Enel Alberta Wind Inc.
Castle Rock Ridge Phase II Wind Power Project
Proceeding 23753
Application 23753-A001**

Ruling on standing

1. In this ruling, the Alberta Utilities Commission decides whether to hold a public hearing to consider an application by Enel Alberta Wind Inc. (Enel) to amend its existing approval for the Castle Rock Ridge Phase II Wind Power Project located within the municipal district of Pincher Creek, Alberta.

2. The Commission must hold a hearing if persons who have filed a statement of intent to participate in Proceeding 23753 have demonstrated that they have rights that may be “directly and adversely affected” by the Commission’s decision. Such a person may participate fully in the hearing, including giving evidence, questioning of witnesses, and providing argument. This permission to participate is referred to as standing.

3. The Commission issued a notice of application for Proceeding 23753 on September 4, 2018. The Commission received statements of intent to participate from:¹

- Chris Hylton
- Blood Tribe Kainaiwa
- Brandon YellowWings
- Morris Littlewolf
- Shirley Gilmour

4. The Commission has authorized me to communicate its decision on standing. For the reasons described below, the Commission denies standing to the persons listed above.

¹ Listed in the order of receipt.

How the Commission determines standing

5. Section 9(2) of the *Alberta Utilities Commission Act* sets out how the Commission must determine standing:

(2) If it appears to the Commission that its decision or order on an application **may directly and adversely affect the rights of a person**, the Commission shall

- (a) give notice of the application in accordance with the Commission rules,
- (b) give the person a reasonable opportunity of learning the facts bearing on the application as presented to the Commission by the applicant and other parties to the application, and
- (c) hold a hearing. [Emphasis added]

6. The meaning of the key phrase, “directly and adversely affect,” has been considered by the Alberta Court of Appeal on multiple occasions, and the legal principles set out by the court guide the Commission when it determines standing. Standing is determined by application of a two-part test. The first test is legal: a person must demonstrate that the right being asserted is recognized by law. This could include property rights, constitutional rights or other legally recognized rights, claims or interests. The second test is factual: a person must provide enough information to show that the Commission’s decision on the application may “directly and adversely affect” the person’s right, claim or interest.²

7. To determine if a right is “directly” affected, the court has said that “[s]ome degree of location or connection between the work proposed and the right asserted is reasonable.”³ When considering the location or connection, the Commission looks at factors such as proximity of residence and the frequency and duration of the applicant’s use of the area near the proposed site.⁴

8. The Commission summarized court decisions relating to the meaning of the phrase “directly and adversely affected” in a decision issued in 2015 and concluded that to pass the test for standing, “the potential effects associated with a decision of the Commission must be personal rather than general and must have harmful or unfavourable consequences.” The Commission further commented that the court decisions “highlight the need for persons seeking standing to demonstrate the degree of connection between the rights asserted and potential effects identified.”⁵

9. The Commission assesses the potential for whether a person may be “directly and adversely affected” on a case-by-case basis. It considers the specific circumstances of each proposed project application and each statement of intent to participate that it receives. In the past, the Commission has decided that general or broad concerns about a proposed project are

² *Cheyne v Alberta (Utilities Commission)*, 2009 ABCA 94; *Dene Tha’ First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [*Dene Tha’*].

³ *Dene Tha’*.

⁴ *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297.

⁵ Decision 3110-D02-2015: Market Surveillance Administrator - Allegations against TransAlta Corporation et al., Phase 2 Preliminary matters; Standing and Restitution, Proceeding 3110, September 18, 2015.

typically insufficient to establish standing, unless a more specific link or connection to the demonstrated or anticipated characteristics of a proposed project is established.

Ruling

10. The Commission finds that Chris Hylton has not provided sufficient information to demonstrate that he holds rights that will be directly and adversely affected by the Commission's decision in this proceeding. Mr. Hylton indicated that he owns property located more than 2,000 metres from the project boundary. The Commission understands that Mr. Hylton's property is in Castleview Ridge Estates, which is approximately four kilometres from the project. While proximity to a project is not the only factor that the Commission considers when reviewing an application for standing, it is an important one. Given Mr. Hylton's distance from the project, the Commission does not consider that there is a sufficient connection between the potential impacts described by Mr. Hylton in his statement of intent to participate and the rights asserted. The Commission accordingly denies standing to Mr. Hylton.

11. The statements of intent to participate from the Blood Tribe Kainaiwa, Brandon YellowWings and Morris Littlewolf appear to raise similar issues, namely, that insufficient time was provided for the Blood Tribe Kainaiwa to consider the application and any potential adverse effects on their rights, and that the duty to consult under Section 35 of the *Constitution Act, 1982* has not been discharged. Mr. Littlewolf and Mr. YellowWings also stated that the project will impact wildlife and its habitat, and fishing and hunting. Mr. Littlewolf listed noise and visual impacts as issues to be considered, but he did not identify his residence or any location that was associated with those concerns.

12. In response to the letter filed by the Blood Tribe Kainaiwa, the Commission issued a letter on October 12, 2018. In it, the Commission noted that the deadline for filing a statement of intent to participate in the proceeding had passed, and the Commission was in a position to decide if it would hold a hearing on the project. The Commission is obligated to do so if any person who filed a statement of intent to participate has demonstrated that he or she has rights that may be directly and adversely affected by the application. The Commission further stated:

If, after reviewing the application, you wish to submit additional information about how you believe the project may directly and adversely affect your Aboriginal and Treaty rights, you should submit a letter to the Commission, on the eFiling System, requesting an extension of time to file that material without delay. Please note, the Commission does not require detailed or technical information about a [statement of intent to participate (SIP)] filer's concerns with a project; the Commission only needs sufficient information to understand what rights a SIP filer has and how they believe those rights could be directly and adversely affected by the application.⁶

13. To date, the Commission has not received any correspondence from the Blood Tribe Kainaiwa indicating that it intends to participate in the proceeding or any information relating to the rights asserted by the Blood Tribe Kainaiwa or how those rights could be directly and adversely affected by the Commission's decision on the application. More specifically, the Blood Tribe Kainaiwa has not stated what rights it believes may be affected by the application, where those rights are exercised, or how the proposed project could affect the rights. The

⁶ Exhibit 23753-X0049, AUC letter – Response to statement of intent to participate of Blood Tribe, PDF page 1.

Commission has no information indicating that the project land or other land near it is being used by the Blood Tribe Kainaiwa's members. Mr. YellowWings and Mr. Littlewolf have not identified lands on which they hunt or fish, and so the Commission cannot conclude that the application may directly and adversely affect the activities conducted by those individuals.

14. Based on the information available to it, it does not appear to the Commission that the Blood Tribe Kainaiwa, Brandon YellowWings or Morris Littlewolf have rights that may be directly and adversely affected by the application, and accordingly the Commission has decided they do not have standing in this proceeding. Should the Blood Tribe Kainaiwa, Mr. YellowWings or Mr. Littlewolf wish to provide further information in order to participate in the proceeding, the Commission continues to request that they provide additional information to demonstrate whether they fulfill the standing test by **December 3, 2018**.

15. The Commission finds that Shirley Gilmour has not provided sufficient information to demonstrate that her rights may be directly and adversely affected by the Commission's decision in this proceeding. As noted above, in assessing standing, the Commission considers the potential for whether a person may be "directly and adversely affected" on a case-by-case basis, considering the specific circumstances of each proposed project application and each statement of intent to participate it receives. Ms. Gilmour indicated that she owns property which is located more than 2,000 metres from the project, and raised concerns with decreased property values, visual effects and increased noise. The detailed mapping filed by Enel shows that Ms. Gilmour's property is approximately 2,400 metres from the project.⁷

16. In assessing the potential for a direct and adverse impact on Ms. Gilmour's property rights in these circumstances, the Commission has considered the concerns raised by Ms. Gilmour in light of her proximity to the project area and the nature of the project. Enel has applied to alter the existing approval for Phase II of the Castle Rock Ridge project (Power Plant Approval 22539-D02-2017) to reduce the number of turbines from 14 to seven, alter the turbine type, and relocate those turbines within the previously approved project area.⁸ In assessing the potential for a direct and adverse impact on Ms. Gilmour's property rights, the Commission must take into account only the potential impacts that may occur as a result of its decision on the application currently before it. Based on the location of her property and the impacts identified specifically relating to the current application, the Commission has decided that Ms. Gilmour has not demonstrated that the Commission's decision on the application has the potential to result in a direct and adverse effect on her rights.

17. Please contact me at 403-592-4385 or at kim.macnab@auc.ab.ca if you have any questions about the matters addressed in this ruling.

Regards,

Kim Macnab
Commission Counsel

⁷ Exhibit 23753-X0011, Attachment LOE-PP-F Maps and Figures – Part 2 of 2, at PDF page 11.

⁸ The previously approved project area is located adjacent to the already constructed Phase I of the Castle Rock Ridge project.