

January 31, 2019

To: Persons currently registered on Proceeding 23957

**Suncor Energy Inc.**  
**Suncor Base Plant Cogeneration Facility and Related Facilities**  
**Proceeding 23957**  
**Applications 23957-A001 to 23957-A005**

**Ruling on standing**

1. In this ruling, the Alberta Utilities Commission decides whether to hold a public hearing to consider applications by Suncor Energy Inc. (Suncor) relating to the Suncor Base Plant Cogeneration Facility project located near Fort McMurray, Alberta. The project includes the replacement of three petroleum coke-fired boilers with a new Inglis Island Plant 27 Cogeneration Power Plant, a new Inglis Island Substation, alterations to the existing Voyageur and Millennium Substations and new transmission lines 29PL9-25/29PL9-25 and 29PL9-26.
2. The Commission issued a notice of applications for Proceeding 23957 on November 19, 2018. The Commission received statements of intent to participate from Fort McKay Métis Community Association (Fort McKay Métis) and Métis Nation of Alberta Association McMurray Métis Local 1935 (McMurray Métis).
3. The Commission must hold a hearing if Fort McKay Métis or McMurray Métis demonstrates that it has rights that may be directly and adversely affected by the Commission's decision. This is called "standing." Standing gives a person or group the right to participate in a hearing, including giving evidence, questioning witnesses and providing argument.
4. The Commission has decided that neither Fort McKay Métis nor McMurray Métis meets the test for standing in this proceeding. The Commission has authorized me to communicate its decision on standing.

**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 standing test applies to all individuals, corporations, organizations and groups that want to participate in a Commission hearing. The test has two parts. In this proceeding, each group requesting standing must first demonstrate that it or its members have or assert a right or interest that is recognized by law. Second, each group must provide information showing that if the Commission approves the power plant and transmission facilities proposed in the Suncor Base Plant Cogeneration Facility project, the group's legal rights may be directly and adversely affected. The first part of the test is legal; the second part of the test is factual. It is not enough to merely assert a possible Aboriginal or treaty right, the group must show some degree of location or connection between the work proposed and the right asserted.<sup>1</sup> It is also not enough to demonstrate that the proposed development occurs within the territory that the group has or exercises a proven or asserted right.<sup>2</sup> This means, for example, that sufficient information about the traditional activity: i.e., hunting or trapping, should be provided, including its proximity to the proposed project and the anticipated effect of the project on the activity described.

7. For the purposes of deciding standing in this proceeding, the Commission is prepared to assume, without deciding, that Fort McKay Métis and McMurray Métis are each entitled to exercise the rights asserted by them. The Commission therefore finds that the first part of the standing test is presumed to be met.<sup>3</sup> The Commission must therefore decide the factual part of the test by assessing whether the Commission has reliable information that shows the rights asserted may be directly and adversely affected if the Commission approves the project.

### **Information about the potential to be directly and adversely affected**

8. Fort McKay Métis asserts that its members will be directly and adversely affected by emissions from the project, which it states will be the largest NOx emission source in the region. Fort McKay Métis acknowledges, however (in its letter to the Canadian Environmental Assessment Agency attached as part of Exhibit 23957-X0033), that by replacing the existing petroleum coke-fired boilers with natural gas-powered units, Suncor will reduce SOx, NOx and particulate matter emissions from the cogeneration site. Fort McKay Métis also states that the project will impact lands it has historically used and currently uses to exercise unextinguished Aboriginal rights to hunt, fish, trap and gather. Fort McKay Métis says it owns and leases lands in the Hamlet of Fort McKay, located about 22 kilometres north of the project. It states the

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<sup>1</sup> *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68, at paragraph 14.

<sup>2</sup> *O'Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348, at paragraphs 37-45.

<sup>3</sup> The Commission notes that the question whether the McMurray Métis represent a group of individuals that meet the test from *R. v Powley*, 2003 SCC 42, was raised but left undecided in *Métis Nation of Alberta Association Fort McMurray Local Council 1935 v Alberta*, 2016 ABQB 712. No information was filed in this proceeding to indicate if the question was decided or settled following the issuance of that decision.

project would result in emissions that would directly and adversely impact the air in the Hamlet of Fort McKay, and on Crown lands within Fort McKay Métis's traditional territory.

9. McMurray Métis states the project is located within the boundaries of its traditional territory, being lands its members have used for trapping, hunting, harvesting and cultural activities. It also states that the project may have adverse and direct impacts on its members' sites of occupancy, places of cultural and spiritual importance, wildlife habitats, hunting areas, fishing, traditional transportation routes, plant harvesting and trapping activities. It identified the tie into the Thickwood Hills Substation as an area where McMurray Métis have exercised their traditional subsistence hunting practices and trapping rights.

10. The Commission notes that the project will be located within the footprint of Suncor's existing base plant, which is an integrated oil sands mine operation. In the application and in its response to Suncor-AUC-2018NOV19-003,<sup>4</sup> Suncor confirmed that the proposed new cogeneration plant, substation and transmission lines, and the proposed modifications to existing substations, will all be located within Suncor's existing base plant operation, on either titled lands owned by Suncor or on Crown land for which Suncor has an existing mineral surface lease. The routing maps filed by Suncor<sup>5</sup> show the location of the new and existing project facilities superimposed on Suncor's existing base plant operation. It is evident from these maps that none of the lands on which the project will be located are available for use by Fort McKay Métis or McMurray Métis, or for use by any of their members. These lands are and have for some time hosted an extensive industrial development, and they are entirely incompatible with any of the historical or traditional land uses identified in the groups' respective submissions. The Commission also notes that Fort McKay Métis and McMurray Métis did not provide any site-specific information or examples of how their members use lands located within or in proximity to the project or Suncor's base plant operation.

11. Suncor stated that replacing the existing petroleum coke-fired boilers with the proposed gas-fired units will result in the following reductions in emissions:

- 46 per cent reduction of sulfur dioxide (SO<sub>2</sub>)
- 17 per cent reduction of nitrogen oxide (NO<sub>x</sub>)
- 66 per cent reduction of particulate matter

12. Fort McKay Métis acknowledged these reductions but stated it was still concerned about emissions from the new cogeneration units. While Fort McKay Métis may still have those concerns, the information filed with the Commission clearly indicates that air emissions will be reduced by the project.

13. McMurray Métis also raised concerns about the required tie into the Thickwood Hills Substation, which it stated is also an area where the McMurray Métis exercise their Aboriginal and treaty rights. Suncor stated in its application that the design, permitting, consultation, construction and operation of two interconnections from the Suncor industrial system to the

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<sup>4</sup> Exhibit 23957-X0001, CoGen Facility Application; and Exhibit 23957-X0035, AUC IR-2-23957\_X0031\_AUCinformationrequest-round2 Suncor Response, at page 4.

<sup>5</sup> Exhibit 23957-X0002.01, Appendix D – Maps and Drawings, at pdf pages 12 and 16.

Ruth Lake Substation and Thickwood Hills Substation are the responsibility of ATCO Electric Ltd. and are not within the scope of Suncor's applications in this proceeding. The Commission confirms that a tie into the Thickwood Hills Substation is not part of this proceeding.

14. As a result, the Commission has decided there is no information showing that either Fort McKay Métis or McMurray Métis have rights that may be directly and adversely affected by the Commission's decision in this proceeding. The Commission denies standing to Fort McKay Métis and McMurray Métis.

### **Consultation**

15. Fort McKay Métis and McMurray Métis each assert that Crown consultation in relation to Suncor's project was owed to them, in accordance with *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*). The Commission understands from *Haida* that the Crown may have a duty to consult with Indigenous groups when the Crown has knowledge, real or constructive, of the potential existence of an Indigenous right or title and contemplates conduct that might adversely affect it. The Commission also understands that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

16. In this proceeding, where the Commission has found that there is no potential for the rights asserted by Fort McKay Métis or McMurray Métis to be adversely affected by the project, no Crown consultation duty arises. In addition, Suncor's stakeholder engagement summary indicates that Fort McKay Métis and McMurray Métis each received notice of the applications, email updates, and in the case of Fort McKay Métis, an in-person update clarification on November 1, 2018. Suncor stated that its stakeholder and Aboriginal relations team submitted an assessment request for the project to the Aboriginal Consultation Office (ACO). The ACO completed its assessment and concluded that traditional land use activities would not be directly or adversely affected by the project, and no further consultation was required.<sup>6</sup>

17. Please contact the undersigned at 403-592-3280 or by email at [gary.perkins@auc.ab.ca](mailto:gary.perkins@auc.ab.ca) if you have any questions about the matters addressed in this ruling.

Yours truly,

Gary Perkins  
Commission Counsel

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<sup>6</sup> Exhibit 23957-X0035, AUC IR-2-23957\_X0031\_AUCinformationrequest-round2 Suncor Response, PDF page 4.