

March 4, 2019

To: Parties currently registered on Proceeding 24077

**Three Creeks Power GP Ltd.
Three Creeks Power Plant Amendment
Proceeding 24077
Application 24077-A001**

Ruling on standing

Introduction

1. In this ruling, the Alberta Utilities Commission decides whether to hold a public hearing to consider an application by Three Creeks Power GP Ltd. (TCP) for approval to amend the 690-megawatt Three Creeks Power Plant. TCP proposed to alter the power plant from simple cycle to combined cycle. The Three Creeks Power Plant is situated wholly on Crown land and is located approximately 40 kilometres northeast of the town of Peace River, wholly within the Peace River In-Situ Expansion Project, Carmon Creek Central Processing Facility area (Carmon Creek Facility).
2. On January 22, 2019, the Commission received a statement of intent to participate (SIP) from the Métis Nation of Alberta Region 6 (Region 6), with an accompanying document entitled Statement of Concern that provided information about Region 6's concerns. On January 30, 2019, TCP responded to Region 6's SIP.
3. The Commission must hold a hearing if Region 6 has demonstrated that the Métis individuals it states it represents have rights that may be directly and adversely affected by the Commission's decision on the application. This is called "standing." Standing gives Region 6 the right to participate fully in a hearing, including giving evidence, questioning witnesses and providing argument.
4. For the reasons set out below, the Commission has determined that Region 6 has not met the test for standing in this proceeding. The Commission has authorized me to communicate its decision on this matter.

Statement of intent to participate

5. In its SIP, Region 6 expressed concerns over the proposed project's affect on the collectively held rights, claims and interests of Métis in Alberta, and stated that there has been no consultation capable of addressing such concerns to date. Region 6 submitted that the proposed project is located on the traditional lands of the Métis Nation of Alberta within the administrative boundaries of Region 6. Region 6 stated that its citizens engage in the ongoing exercise of Aboriginal rights on the lands in question and assert ongoing Aboriginal title over those lands.
6. Region 6 stated that it was concerned with the project's potential adverse affects on Métis harvesting rights and related interests in land, and asserted Métis commerce and trade rights.

Specifically, Region 6 expressed concerns with cumulative effects of development within the northern boreal forest area, wetlands and ecosystems, and with the project's impact on its members' ability to exercise their Aboriginal rights, such as gathering and traditional cultural activities in the project area.

7. Region 6 submitted that the project will result in disturbance to forest areas, wetlands and ecosystems during and after construction as a result of increased traffic, noise, emissions, potential spills and off-road vehicle activity, leading to decreased or disturbed animal populations and impacts on harvesting and traditional economic activities. Region 6 further submitted that the ongoing presence and operation of the project post-construction is incompatible with harvesting activities which will be rendered unsafe in proximity to the project. Region 6 stated that taking up land for the project over which it asserts claims of Aboriginal title would have the effect of industrializing the site, effectively rendering it occupied, resulting in negative affects on historical, contemporary or future claims respecting that portion of the Métis Nation land base.

8. In response, TCP asked the Commission to disregard Region 6's concerns on the basis that the current application seeks only to amend an already approved project (i.e., AUC Approval 22488-D02-2017¹) and that all necessary environmental approvals and consultations were previously completed. TCP stated it has engaged with the Aboriginal Consultation Office (ACO) regarding the proposed amendments and the ACO indicated that no further consultation was required for any Indigenous communities, highlighting the fact that all environmental approvals were in place, the ground had already been disturbed and the site was fenced off. TCP submitted that given the disturbance that has already occurred in accordance with the previous approval and that TCP is not expanding the project footprint, Region 6 is not directly and adversely affected.

9. TCP further stated that despite not requiring consultation by the ACO, TCP held an open house on October 22, 2018, to detail the current application to interested parties. It invited all Indigenous groups in the region to attend, including Region 6. TCP submitted that members from Region 6 attended the open house, including the Region 6 vice president who voiced his support for the project. TCP further submitted that Shell Canada Ltd., the previous project proponent, conducted extensive consultation with Indigenous groups in the region.

How the Commission determines standing

10. 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]

¹ Power Plant Approval 22488-D02-2017, Proceeding 22488, Application 22488-A001, March 30, 2017.

11. The standing test applies to all persons, companies, organizations and groups that want to participate in Commission hearings. The test has two parts. First, you must demonstrate that you have a right or interest that is recognized by law. Second, you must provide reliable information that shows that if the Commission approves the power plant amendment, your 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, you must show some degree of location or connection between the work proposed and the right asserted.² This means, for example, that sufficient information about the traditional activity; i.e., hunting or trapping or gathering berries or plants, should be provided, its proximity to the proposed project confirmed and the effect of the project on the activity described.

Commission ruling

12. The Commission is prepared to assume, without deciding, that Region 6's members (Region 6 refers to them as citizens) are entitled to exercise the asserted Aboriginal rights in the traditional areas it identified, and that Region 6 is authorized to represent those members in this proceeding. The Commission therefore finds that the first part of the standing test is presumed to be met. 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.

13. Region 6 submitted that the project would, either alone or in combination with other industrial development in the region, impact lands its members have historically used and currently use to exercise unextinguished Aboriginal rights such as harvesting, gathering and pursuing other traditional economic and cultural activities. Region 6 identifies these activities and impacts in a general sense, without providing any information about traditional land uses or impacts upon or in some proximity to the lands on which the power plant is situated.

14. The Commission notes that the current application to amend an existing power plant does not result in any significant increase in impacts that were contemplated or addressed in the original approval where it was decided that stakeholder consultation, including Indigenous consultation, and environmental assessment, including construction impacts, were appropriately considered and mitigated. The proposed power plant amendment would increase generation efficiency and reduce emissions, rather than further disturb the land and environment on which it is sited or near that site.

15. The Commission also notes that the project is on previously disturbed Crown land within the footprint of the approved Carmon Creek Facility. The environmental evaluation filed with the application states that the project is located on approximately 20.35 hectares of previously cleared, graded and graveled land, located within the previously approved Carmon Creek Facility area. Associated topsoil and subsoil from the project development area was previously salvaged and stockpiled during site-preparation for the Carmon Creek Facility. No vegetation clearing or soil handling is required for construction of the proposed power plant.³

² *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, paragraph 14.

³ Exhibit 24077-X0003, rpt_three_creeks_auc_007_20181122_fin (1), PDF page 49.

16. It is evident from the map of the proposed project⁴ that the lands on which the project will be located are not available for use by Region 6 members. These lands have been cleared and are being prepared for industrial development, and they are entirely incompatible with any of the historical or traditional land uses identified in Region 6's SIP. The Commission also notes that Region 6 did not provide any site specific information or examples of how their members use lands located within or in proximity to the proposed project. General statements of concern do not, without more information, meet the factual test for standing. There must be specific information that establishes a causal connection between the project and affects on the asserted rights.

17. As a result, the Commission has decided there is no information showing that Region 6's members have rights that may be directly and adversely affected by the Commission's decision in this proceeding. The Commission denies standing to Region 6.

Consultation

18. Region 6 also states that Crown consultation in relation to TCP'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 Aboriginal 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.

19. In this proceeding, where the Commission has found that there is no potential for the rights asserted by Region 6 to be adversely affected by the project, no Crown consultation duty arises. In addition, TCP's participant involvement program summary indicates that Region 6 received notice of the application and attended a project open house on October 22, 2018.⁵ TCP stated that it engaged with the ACO regarding the proposed amendments. The ACO indicated that no further consultation was required for any of the Indigenous communities, given that all environmental approvals were in place, the ground had already been disturbed and the site was fenced. Moreover, the current application proposes to amend an existing power plant approval and consultation in these circumstances would only be owed in relation to the effect of the amendment on asserted rights, not on the original approval for the power plant that was approved as part of the Carmon Creek Facility.⁶

20. If you have any questions, please contact the undersigned at 403-592-3280 or gary.perkins@auc.ab.ca, or Rob Watson at 403-592-4360 or rob.watson@auc.ab.ca.

Yours truly,

Gary Perkins
Commission Counsel

⁴ Exhibit 24077-X0003, rpt_three_creeks_auc_007_20181122_fin (1), PDF page 28.

⁵ Exhibit 24077-X0002, rpt_three_creeks_auc_007_app_b_pip_20181122_fin, PDF pages 9 and 52.

⁶ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, paragraphs 82–84.