

November 29, 2019

To: Parties currently registered on Proceeding 23796

**Prosper Petroleum Ltd.
Rigel Oil Sands Project Co-Generation Facility
Proceeding 23796
Applications 23796-A001 and 23796-A002**

Ruling on standing

1. In this ruling, the Alberta Utilities Commission considers whether to hold a public hearing to consider applications by Prosper Petroleum Ltd. (Prosper) for approval to construct a 15-megawatt cogeneration power plant (power plant) to provide electricity for the Rigel Oil Sands Project (the project) in the Fort McKay area, and for an industrial system designation for the power plant.

2. The Rigel Oil Sands Project is a new steam-assisted gravity-drainage bitumen-recovery project. The Alberta Energy Regulator (AER) conducted a hearing of the project applications and decided to issue approvals for the project under the *Water Act* and the *Environmental Protection and Enhancement Act*.¹ The AER also decided to grant an *Oil Sands Conservation Act* approval for the project; however, the Lieutenant-Governor in Council has not yet authorized the AER to issue that approval.² The Fort McKay First Nation participated in the AER's proceeding and was granted permission by the Court of Appeal of Alberta to appeal the AER's decision on the Rigel Oil Sands Project.³ The Commission understands that the appeal has been heard by the court and that the court has reserved its decision.

3. Except in the circumstances identified in Section 9 of the *Alberta Utilities Commission Act*, the Commission must hold a hearing if any person or organization that has filed a statement of intent to participate in this proceeding demonstrates that they have rights that may be directly and adversely affected by the Commission's decision. This is called "standing" and gives the person or group the right to participate fully in a hearing, including giving evidence, questioning of witnesses and providing argument.

4. The Commission issued three notices of application for Proceeding 23796. The Commission received statements of intent to participate from:

- Fort McKay First Nation (FMFN)
- Fort McKay Métis Community Association (FMMCA)
- AltaLink Management Ltd.

¹ Exhibit 23796-X0004, Appendix 4 2018 ABAER 005 – Prosper Petroleum Ltd. – Rigel Project.

² *Oils Sands Conservation Act*, Section 10, provides that the AER cannot grant an approval to construct or operate an oil sands or crude bitumen recovery scheme or operation unless the Lieutenant Governor in Council has given prior authorization to the AER.

³ *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2019 ABCA 14.

5. The Commission has authorized me to communicate its decision on standing. For the reasons set out below, the Commission grants standing to the FMFN and denies standing to the FMMCA and AltaLink.

The Alberta Energy Regulator process and decision

6. Prosper filed the AER applications for the Rigel Oil Sands Project in May 2013. The AER received statements of concern from several Indigenous groups, including the FMFN and the FMMCA. The AER granted standing to the FMFN, the FMMCA and one other Indigenous group. Only the FMFN and FMMCA actively participated in the AER's oral hearing.

7. Prosper's applications to the AER provided details that described the central processing facility for the Rigel Oil Sands Project and included technical site maps and equipment lists. This information indicates that the central processing facility would include two 7.5-megawatt gas-turbine generators that would provide power for the project and steam for the steam-assisted gravity-drainage operation.⁴ Application 23796-A001, filed in this proceeding, is Prosper's application for approval to construct and operate those generating units.

8. The AER hearing was presided over by a three-member panel that reviewed the concerns raised by the intervening groups, including concerns relating to project siting, emissions, noise, and environmental impacts. The AER stated in its decision on the Rigel Oil Sands Project⁵ that it considered these concerns and impacts. The AER decided that the project was in the public interest for the reasons given in its decision.

Submissions in the statements of intent to participate

Fort McKay First Nation

9. In this proceeding, the FMFN raised a number of concerns regarding the power plant, including its siting, emissions and environmental impacts, and referenced the FMFN's appeal of the AER's decision to approve the Rigel Oil Sands Project. The FMFN further stated that the project is located in an area relatively undisturbed by development and that the project's location and air quality impacts, including those specific to the power plant, would interfere with its members' ability to exercise their Aboriginal and treaty rights.⁶

10. More specifically, the FMFN raised concerns over the project being sited within the Moose Lake area, near Namur (Buffalo) Lake and Moose (Gardiner) Lake and two of the FMFN's reserves (I.R. 174A and I.R. 174B). In its submission, the FMFN emphasized that the area is historically and culturally significant for the FMFN. It stated that these reserves are "the land base relied on by Fort McKay for the continuity of its way of life, protected by Treaty 8, as the Reserves provide an anchor for the exercise of Treaty 8 within the relatively undisturbed and sacred surrounding Moose Lake area."⁷

⁴ Exhibit 23796-X0009, Exhibit 23796-X0023, Appendix 2 - Rigel Oil Sands Project Application.

⁵ Exhibit 23796-X0004, Appendix 4 2018 ABAER 005 – Prosper Petroleum Ltd. – Rigel Project.

⁶ Exhibit 23796-X0033, FNFM SIP Submission, PDF pages 1-5.

⁷ Exhibit 23796-X0033, FNFM SIP Submission, PDF page 2.

11. The FMFN indicated that the government of Alberta has committed to protecting the 10 kilometres around the Moose Lake reserves through the implementation of a Moose Lake Access Management Plan. In its submission, the FMFN characterized this commitment as a constitutional accommodation, and stated that the Commission must respect FMFN's constitutional right to have the accommodation put in place before the Commission makes decisions on the cogeneration facility applications that will adversely affect its right to the accommodation.⁸

12. The FMFN also raised concerns related to air quality impacts from the proposed cogeneration power plant. The FMFN provided a technical memorandum with its submission that detailed the potential air-quality impacts from the specific equipment used in the Rigel Oil Sands Project. The FMFN indicated that the power plant would contribute approximately 31 per cent of the Rigel Oil Sands Project's total daily nitrogen oxides emissions of 1.1 tonnes/day.⁹

13. Prosper commented on the FMFN submission, stating that the FMFN's focus on the project's siting within the Moose Lake Access Management Plan is not relevant in determining how the Commission's decision may affect the FMFN's rights. Prosper stated that the FMFN's concerns regarding air quality are not specific to the power plant and FMFN's attempt to raise air quality concerns in this proceeding amount to re-litigating a matter that was decided by the AER. Prosper submitted that the FMFN did not establish a connection between the Commission's approval of the power plant and a potential adverse impact on the FMFN's rights.¹⁰

14. In the same submission, Prosper stated that it conducted robust air quality modelling to predict maximum ground-level concentrations of sulphur dioxide, nitrogen dioxide, carbon monoxide, and atmospheric particulate matter associated with the Rigel Oil Sands Project, including emissions from the proposed cogeneration units. The modelling confirmed that the Rigel Oil Sands Project would comply with all applicable ambient air quality objectives and guidelines. Prosper further stated that emissions from the power plant would represent a small portion of the overall emissions from the Rigel Oil Sands Project, which are not expected to affect the environment or land users near the project.¹¹

Fort McKay Métis Community Association

15. The FMMCA raised a number of concerns about the Rigel Oil Sands Project, including the siting of the project, air emissions and other environmental impacts such as the decreased inventory of lands available and suitable for the exercise of Aboriginal harvesting rights. The FMMCA stated that it was particularly concerned about the potential impact of air emissions on Namur Lake and Moose Lake, which support important Fort McKay Métis fisheries.

16. The FMMCA raised concerns regarding the project's siting on Crown land that was historically used, and is currently used by Fort McKay Métis members, to exercise their Aboriginal rights and related traditional activities.¹² The FMMCA stated that Prosper has not

⁸ Exhibit 23796-X0033, FNFM SIP Submission, PDF page 3.

⁹ Exhibit 23796-X0033, FNFM SIP Submission, PDF page 5.

¹⁰ Exhibit 23796-X0056, Letter to AUC re Standing of FMFN and FMM, PDF pages 10-12.

¹¹ Exhibit 23796-X0056, Letter to AUC re Standing of FMFN and FMM, PDF page 7.

¹² Exhibit 23796-X0053, Statement of Intent to Participate Submission and Documents, PDF page 7.

assessed the impact of the power plant on the rights of Fort McKay Métis members, nor has it provided support to enable the FMMCA to conduct such a study.¹³

17. Prosper commented on the FMMCA's submission, stating that the FMMCA did not satisfy the requirement to provide detailed information on the FMMCA's asserted rights and the impacts the Commission's approval of the project would have on those rights. Prosper stated that the FMMCA's claim that no one has examined the potential impacts of the power plant on its rights is false. Prosper also stated that the evidence on potential impacts of the Rigel Oil Sands Project on FMMCA's rights, which include impacts of the power plant, are evident in the AER decision which includes the AER's finding that no impacts on FMMCA's rights are anticipated.¹⁴

AltaLink Management Ltd.

18. AltaLink filed a statement of intent to participate stating that as a transmission facility owner, it could have concerns with the industrial system designation application.¹⁵ Although it reserved the right to actively participate in the proceeding, the Commission did not receive any further information from AltaLink.

How the Commission determines standing

19. Subsection 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]

20. The standing test applies to all persons, groups, bodies corporate and other organizations that want to participate in a Commission hearing. The test has two parts. First, the party seeking to participate must demonstrate that they have a legal right or interest that is recognized by law. Second, they must provide some reliable information demonstrating that their rights may be directly and adversely affected by the Commission's decision in the proceeding. The first part of the test is legal; the second part of the test is factual. Both parts of the test must be satisfied before the party seeking participation rights will be granted standing.

21. In the case of asserted Aboriginal and treaty rights as provided in Section 35 of the *Constitution Act, 1982*, to satisfy the legal part of the standing test it is not enough to merely assert a possible right. There must be sufficient evidence on the record to satisfy the Commission

¹³ Exhibit 23796-X0053, Statement of Intent to Participate Submission and Documents, PDF page 5.

¹⁴ Exhibit 23796-X0056, Letter to AUC re Standing of FMFN and FMM, PDF pages 9-10.

¹⁵ Exhibit 23796-X0051, System generated PDF.

of the existence of a rights-bearing community in the area and that there is a proven or credible assertion of Aboriginal and treaty rights.

22. To satisfy the factual part of the test, the party seeking to participate must show some degree of location or connection between the work proposed and the right asserted. This means, for example, that sufficient information about the traditional activity should be provided, its proximity to the proposed project should be confirmed and the anticipated effects of the project on the activity or the rights-holders' ability to undertake the activity should be described.

23. Where a corporation or organization claims to represent the interests of an Aboriginal rights-bearing community or individual Aboriginal rights holders, it must also demonstrate that it is duly authorized to represent the members of that community or the identified individuals.

Commission ruling

The Alberta Energy Regulator findings and decision are not in question by the Commission

24. The applied-for cogeneration power plant is part of the Rigel Oil Sands Project that was the subject of an AER proceeding as described above.

25. The FMFN's and FMMCA's concerns with the overall impacts of the Rigel Oil Sands Project and the majority of the components comprising it have already been considered by the AER. While the Commission understands that the FMFN has appealed the AER's decision to the Court of Appeal of Alberta, the Commission must treat the AER's decision as valid (and consequently those aspects of the project approved under the AER's jurisdiction) until the court allows the FMFN's appeal. The Commission also understands that the Rigel Oil Sands Project cannot be constructed unless the Lieutenant-Governor in Council authorizes the AER to issue the *Oil Sands Conservation Act* approval.

26. In any event, it is not within the scope of the Commission's authority to review or question the findings and decisions of another independent regulator, in this case the AER, on the project as a whole, made under the AER's exclusive jurisdiction. Only concerns that are specific to the power plant or industrial system designation are within the Commission's exclusive jurisdiction in this proceeding. Accordingly, in assessing whether the FMFN and FMMCA have demonstrated that they have rights that may be directly and adversely affected by the Commission's decision in this proceeding, the Commission will not consider the overall impacts of the Rigel Oil Sands Project as approved by the AER; rather, it will focus on any new or incremental impacts that are solely attributable to the proposed cogeneration power plant and industrial system designation.

27. The Commission acknowledges that the FMFN and the FMMCA raised concerns with the Rigel Oil Sands Project being located within the Moose Lake area, especially the effect that would have on the proposal for a Moose Lake Access Management Plan, and notes that those concerns are the subject of ongoing litigation. The Commission agrees with Prosper that such concerns must be addressed in that litigation and should not be re-litigated in the Commission's proceeding. The Commission also acknowledges Prosper's statement that it will not proceed with the power plant if it does not receive the final approval it requires to proceed with the

Rigel Oil Sands Project.¹⁶ In order to ensure that the power plant only proceeds as part of the Rigel Oil Sands Project reviewed by the AER and not as a stand-alone generation facility, the Commission would consider imposing that requirement as a condition of any approval contemplated in this proceeding.

Fort McKay First Nation has met the standing test

28. The FMFN, a Treaty 8 First Nation consisting of approximately 800 Cree and Dene members, submitted that the power plant is proposed in an area in which its members exercise their Section 35 rights. In its submissions, the FMFN identified a number of traditional land use activities that its members undertake in proximity to the proposed power plant. The Commission is satisfied from the information provided that the FMFN holds rights under Section 35 of the *Constitution Act, 1982* in and around the project area, and accordingly finds that the FMFN has met the first, legal part of the standing test.

29. The Commission must now assess whether the FMFN satisfies the second, factual part of the standing test: whether the FMFN has provided sufficient information to show that the exercise of its Section 35 rights may be directly and adversely affected if the Commission approves the power plant.

30. The FMFN identified specific sites within the Moose Lake area in which its members exercise their rights, including Namur Lake and the Moose Lake reserves. The FMFN also asserted that the exercise of those rights may be adversely affected by effects on air quality through the increase in emissions from the power plant. In support, the FMFN filed a technical memorandum specifying the potential air-quality impacts from the power plant.

31. The Commission considers that the FMFN has provided sufficient information to demonstrate that its members exercise Section 35 rights in proximity to the project, and that the Commission's decision on the proposed cogeneration power plant may have an effect on the exercise of those rights, specifically in relation to the potential impacts on air quality. The Commission therefore grants the FMFN standing.

Fort McKay Métis Community Association

32. The FMMCA, a body corporate created under the *Societies Act*, does not claim to hold Aboriginal rights, which are the legal rights or interests the FMMCA appears to assert will be directly and adversely affected by the project generally or by the power plant more specifically. The FMMCA asserts that it represents the Métis community in Fort McKay, and that the community holds Aboriginal rights protected by Section 35 of the *Constitution Act, 1982*.

33. Before its right to represent that community can be assessed, FMMCA must first establish that such a community exists. To establish that such a community exists, FMMCA must show that the test from the *Powley* decision is met.¹⁷ The Court of Queen's Bench of Alberta addressed this in *Fort Chipewyan MNA Local #125 v Alberta (MNA Local 125)*, as follows:

¹⁶ Exhibit 23796-X0056, Letter to AUC re Standing of FMFN and FMM, PDF page 11.

¹⁷ *R v Powley*, 2003 SCC 43.

Identifying Membership in the Rights-Bearing Community

[341] In determining whether there is a Métis community or whether the claimant belongs to a Métis community, courts must confirm that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific Aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life: *Powley* at para 12. The “continuity” requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself: *Powley* at paras 12, 27; *Enge* at para 182. Three broad factors serve as indicia of Métis identity for the purpose of claiming Métis rights under s 35: self-identification, ancestral connection, and community acceptance: *Powley* at paras 29-30. The membership criteria must be objectively defined and cannot be vague.¹⁸

34. Canadian courts have accepted affidavit evidence and other forms of information about Aboriginal practices, such as the location and frequency of traditional activities, as establishing a credible claim of Aboriginal rights. The courts have been clear, however, that those who seek the benefits of constitutionally-protected rights have to prove their claim and that such status “should not be available just for the asking.”¹⁹ A claim by an organization that it represents an entire Métis community for purposes related to consultation and the exercise of Section 35 rights must be supported by demonstrated facts.²⁰

35. In addition to demonstrating the existence of an Aboriginal rights-bearing Métis community in Fort McKay, FMMCA must also demonstrate that it is authorized to represent that community. In *MNA Local 125*, the court stated that an incorporated society may be able to represent an Aboriginal community; however, it must demonstrate that it has authority to represent the entire community. The court concluded that the society in that case failed to demonstrate it was authorized to represent the Métis community in Fort Chipewyan:

On an objective basis, it is difficult for this Court to accept (or reconcile) the claim by the FCM Local, having a membership that currently stands at 173 members, with the fact that the corporate entity purports to represent the Fort Chipewyan Métis Community, with a potential population of between 350 to 1000 individuals. In other words, a corporate entity with a membership of less than one-fifth of the total population of Fort Chipewyan Métis Community cannot claim to be representative of the entire Aboriginal community for the purpose of asserting Aboriginal rights and seeking consultation.²¹

36. On September 30, 2019, the Commission issued an information request to the FMMCA asking that it clarify the source of its authority to represent the collective rights of the Métis community in the Fort McKay area. The Commission asked the FMMCA to provide the relevant information on or before October 15, 2019.

¹⁸ *Fort Chipewyan MNA Local #125 v Alberta*, 2016 ABQB 713.

¹⁹ *L’Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12, paragraph 16.

²⁰ *Fort Chipewyan MNA Local #125 v Alberta*, 2016 ABQB 713, paragraph 403.

²¹ *Fort Chipewyan MNA Local #125 v Alberta*, 2016 ABQB 713, paragraph 411.

37. The FMMCA did not respond to the Commission's information request. On October 26, 2019, the FMMCA filed a letter with the Commission stating that it had not received notification of the Commission's information request and asked for an extension to November 30, 2019, to file its responses. The Commission approved an extension to November 15, 2019.

38. The FMMCA did not file a response by November 15, 2019. The Commission must therefore consider the FMMCA's request for standing based on the information filed in this proceeding concerning the existence of an Aboriginal rights-bearing Métis community in Fort McKay and the FMMCA's authority to represent that community. The Commission considers that the information provided on those issues falls short of what the court in *MNA Local 125* stated was required. Specifically, the FMMCA has not provided:

- (a) The number or identity of Métis individuals that it represents.
- (b) The total number of individuals comprising the Fort McKay Métis community.
- (c) Evidence of the basis for its authority to represent that community.

39. Accordingly, the Commission finds that the FMMCA has not provided enough information to establish the existence of a rights-bearing Métis community in Fort McKay (i.e., those who meet the *Powley* test). The Commission also finds that the FMMCA has not provided information to demonstrate that the FMMCA is duly authorized to represent the asserted Métis community in Fort McKay (if one had been shown to exist). Based on these findings, the Commission finds that the FMMCA has not met the first, legal part of the standing test.

40. As both parts of the test must be satisfied before the party seeking participation rights will be granted standing, and the first part of the test has not been met, it is not necessary for the Commission to address the second (factual) part of the standing test. The Commission denies the FMMCA standing in this proceeding.

AltaLink Management Ltd.

41. In its statement of intent to participate, AltaLink stated that it does not have concerns with Prosper's application for an industrial system designation for the power plant; however, it reserved the right to file further information should it develop concerns in the future. AltaLink did not file any further information regarding potential concerns. The Commission is satisfied that AltaLink has had an opportunity to consider the details of the application, and has chosen not to file additional information to demonstrate how any rights it may have may be directly and adversely affected. Accordingly, the Commission denies AltaLink standing to participate in this proceeding.

Further process

42. The Commission is required to hold a hearing if a party demonstrates that they have rights that may be directly and adversely affected by the Commission's decision. In this proceeding the Commission has determined that the FMMCA provided sufficient information to demonstrate that it has standing in relation to the proposed cogeneration power plant based on

its concerns about emissions from the plant affecting air quality in the area. However, the Commission notes that the majority of concerns raised by the FMFN relate to the Rigel Oil Sands Project as a whole rather than to the power plant or industrial system designation application.

43. As previously stated in this ruling, it is not within the Commission's authority to review or question the findings or decision of the AER on the Rigel Oil Sands Project applications filed with the AER. Consequently, the Commission's hearing will be limited in scope to considering any new or incremental impacts directly associated with the power plant, rather than the overall impacts of the Rigel Oil Sands Project. In particular, the Commission will not consider any potential impacts on Aboriginal rights or traditional land uses that result from the Rigel Oil Sands Project lands being taken up; that issue engages the broader spectrum of impacts that were considered in the AER hearing and are addressed in the AER's decision. The FMFN's intervention in this proceeding should therefore be limited to any potential new or incremental impacts on air quality in the area that are directly related to emissions from the power plant.

44. Prosper submitted that an expedited written process was warranted in the circumstances, should the Commission determine that a hearing is required.²² Given the limited scope of the issues to be considered in this proceeding, as describe above, the Commission has decided to conduct a written hearing process in this proceeding. A notice of hearing will be issued shortly; however, the written hearing process will be as follows:

Process step	Date
Intervener's information requests to applicant	December 13, 2019
Applicant's deadline to respond to information requests	December 20, 2019
Intervener's evidence	January 17, 2020
Applicant's reply evidence	January 24, 2020
Argument	February 7, 2020
Reply argument	February 14, 2020

45. If you have any questions please contact the undersigned at 403-592-3280 or by email at gary.perkins@auc.ab.ca, or Meghan Anderson at 403-592-4394 or by email at meghan.anderson@auc.ab.ca.

Yours truly,

Gary Perkins
Commission Counsel

²² Exhibit 23796-X0056, Letter to AUC re Standing of FMFN and FMM, PDF pages 12-13.