

February 6, 2020

To: Parties currently registered on Proceeding 25047

**Capital Power Generation Services Inc.
Halkirk 2 Wind Power Project Time Extension
Proceeding 25047
Application 25047-A001**

Ruling on standing and confidentiality motion

Background

1. In this ruling, the Alberta Utilities Commission decides whether to grant standing to parties that have filed statements of intent to participate in the proceeding as well as a motion for confidential treatment of certain submissions.

2. Capital Power Generations Services Inc. submitted an application for approval of a time extension to construct the approved Halkirk 2 Wind Power Project and to extend the timeframe of Condition 6 of Power Plant Approval 22563-D02-2018¹ (the time extension application). Condition 6 requires that Capital Power engage with specific stakeholders related to the placement of Wind Turbine T051² no later than April 11, 2020. The time extension application seeks approval to extend the construction completion date for the project to December 1, 2022, and to extend the time to engage with specific stakeholders from April 11, 2020 to July 15, 2021.

3. The Commission must hold a hearing if persons who have filed a statement of intent to participate in Proceeding 25047 have demonstrated that they have rights that may be “directly and adversely affected” by the Commission’s decision on the time extension application. Such persons may participate fully in the hearing, including giving evidence, questioning of witnesses and providing argument. This permission to participate is referred to as standing.

4. The Commission issued a notice of application for Proceeding 25047 on November 21, 2019. The Commission received statements of intent to participate from the following persons or groups:

- Dwayne Felzien
- Barry Jackson
- Tyler and Katrina Smith

¹ Power Plant Approval 22563-D02-2018, Proceeding 22563, Application 22563-A001, April 11, 2018.

² As required by condition 6 of the power plant approval, 22563-D02-2018.

- Gerard and Donna Fetaz
- Terry Vockeroth
- Donald and Geraldine Coulthard
- Carmen Felzien
- Ralph Gurnett
- Jason Felzien
- Denice Wiart
- the Halkirk 2 Extension Opposition group
- Peggy Vockeroth
- Brenda Anderson and Gerald Borgel
- Doug and Lynne Potter
- Lauren and Clint Saruga

5. These individuals stated that they own or reside upon, or in the case of the Halkirk 2 Extension Opposition group represent persons and a business who own or reside upon, land in close proximity to the approved Halkirk 2 Wind Power Project. In addition to a combined submission, the Halkirk 2 Extension Opposition group submitted individual statements of intent to participate for parties listed in Appendix A. The concerns raised by these parties include consultation, environmental impacts including wildlife impacts, noise impacts, health impacts, safety, interference with business and agricultural operations, land use impacts, interference with aerodromes, property value impacts, emergency response impacts, increased traffic and road dust, land sterilization, estate planning, uncertainty and negotiation of contracts with Capital Power. Several parties requested that the Commission cancel Capital Power's existing project approval and suggested that a project amendment is likely forthcoming.

6. In response to the statements of intent to participate, Capital Power submitted that the statements failed to demonstrate a potential direct and adverse effect as a result of the time extension application but are rather expressions of opposition to the project itself which seek to re-litigate matters addressed at the hearing and improperly challenge the Commission's prior approval of the project.³

7. On January 15, 2020, the Commission requested additional information from parties regarding how Capital Power's request for a time extension, from December 31, 2019 to

³ Exhibit 25047-X0060, Capital Power Response to AUC re SIPS, PDF page 1-2, 6, January 6, 2020.

December 1, 2022, to complete construction of the project would directly and adversely affect them.⁴

8. In response to the Commission's request, the Halkirk 2 Extension Opposition group and Denice Wiart filed additional submissions. In addition, the Halkirk 2 Extension Opposition group filed a motion to provide further submissions of six of its members confidentially. It described these submissions as relating to ongoing familial division and strife, mental health challenges, financial hardship, physical health challenges and business closures or potential business closures.⁵ In the Halkirk 2 Extension Opposition group's view, the harm that would result in having these matters become part of the public domain would be a breach of their privacy and dignity.

9. On January 28, 2020, Capital Power responded to the confidentiality request and stated that in light of there being nothing on the record to support granting standing to members of the Halkirk 2 Extension Opposition group, the confidentiality request would not be in the public interest and should therefore be denied.⁶ Specifically, Capital Power stated that the motion did not include information on how the submissions were "necessary to prevent a serious risk to an important public interest" as required by Section 28.9 of Rule 001: *Rules of Practice*.⁷ Capital Power reiterated its view that members of the Halkirk 2 Extension Opposition group have not demonstrated that they have legal rights that may be directly and adversely affected by the time extension application.

10. The Commission has authorized me to communicate its decision on standing and the request for confidentiality.

Ruling on standing

How the Commission determines standing

11. 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]

⁴ Exhibit 25047-X0063, AUC letter – Request for additional information, January 15, 2020.

⁵ Exhibit 25047-X0066, LT to AUC re Confidential Submission Request, January 22, 2020.

⁶ Exhibit 25047-X0069, Capital Power Response to AUC's January 23, 2020 Letter re HEO's Confidentiality Request, January 28, 2020.

⁷ Exhibit 25047-X0069, Capital Power Response to AUC's January 23, 2020 Letter re HEO's Confidentiality Request, January 28, 2020.

12. The meaning of the key phrase, “directly and adversely affect,” has been considered by the Court of Appeal of Alberta 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.⁸

13. 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.”⁹ When considering the location or connection, the Commission looks at factors such as residence and the frequency and duration of the applicant’s use of the area near the proposed site.¹⁰

14. 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.”¹¹

15. Where an applicant seeks an amendment to an existing approval, a person must show that the proposed amendment may directly and adversely affect their rights. When determining standing for amendments, the Commission only considers the potential additional effects of the amendment in comparison to the existing approved project. An amendment application does not re-open consideration of the project as a whole. The Court of Appeal of Alberta has stated, “[i]f the expansion will have no measurable impact, then permitting standing would amount to a collateral re-examination of the permit originally given for the existing facility.”¹²

16. In this case, the amendment requested is in relation to the construction completion date and the timing of a condition requiring that Capital Power consult with specific stakeholders. No other changes to the proposed project were requested.

17. The Commission assesses the potential for a “direct and adverse effect” 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 will generally be insufficient to establish

⁸ *Cheyne v Alberta (Utilities Commission)*, 2009 ABCA 94; *Dene Tha’ First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [*Dene Tha’*].

⁹ *Dene Tha’*.

¹⁰ *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297.

¹¹ 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.

¹² *Visscher v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 209.

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

Ruling

18. In its notice of application, the Commission stated that “This proceeding is restricted to the Commission’s consideration of the time extension application. It is not a re-consideration of the previously approved project.”¹³ This was reiterated in the Commission’s request for additional information letter.¹⁴

19. The Commission notes that a public oral hearing for the Halkirk 2 Wind Power Project commenced on November 21, 2017, and that many of the concerns expressed by stakeholders in this proceeding were brought forward during that hearing. The Commission found that the Halkirk 2 Wind Power Project was in the public interest as outlined in Decision 22563-D01-2018.¹⁵ The proceeding for the time extension application is not an opportunity to re-litigate the Commission’s decision that the project was in the public interest. Instead the Commission must determine standing on the basis of a change to the requested in-service-date and timing of Condition 6 of Approval 22563-D02-2018.

20. The members of the Halkirk 2 Extension Opposition group and other individuals that filed statements of intent to participate indicated that they own, reside on or farm land in the Halkirk area. Each of those interests in land is a legal interest that meets the first part of the standing test.

21. With respect to the second, factual part of the standing test, the Commission has considered whether any of the individuals who filed statements of intent to participate provided sufficient information to show that the Commission’s decision on the requested time extension application may directly and adversely affect their rights as a landowner, resident or occupant of land. The concerns raised by these parties include consultation, environmental impacts, noise impacts, health impacts, safety, interference with business and agricultural operations, land use impacts, interference with aerodromes, property value impacts, emergency response impacts, increased traffic and road dust, land sterilization, estate planning, uncertainty and negotiation of contracts with Capital Power.

22. The Commission has also considered the non-confidential description of the additional submissions provided by the Halkirk 2 Extension Opposition Group in support of its request for confidentiality and is satisfied that additional information is not required to make a determination on standing.

23. The Commission observes that the concerns expressed by stakeholders in this proceeding relate to the previously approved project and not the requested time extension application. The Commission finds that no registered party has demonstrated how the requested time extension application may directly and adversely affect the land-based rights they have asserted given that

¹³ Exhibit 25047-X0022, AUC notice of application, November 21, 2019.

¹⁴ Exhibit 25047-X0063, AUC letter – Request for additional information, January 15, 2020.

¹⁵ Decision 22563-D01-2018: Capital Power Generation Services Inc. – Halkirk 2 Wind Power Project, Proceeding 22563, Applications 22563-A001 and 22563-A002, April 11, 2018.

the Commission has found that approval of the project was in the public interest and the only change contemplated by the application is a change to the required completion date for the project and a change to the date to engage with specific stakeholders. Based on the foregoing, the Commission concludes that no party is granted standing to participate in this proceeding. Because there are no parties with standing in this proceeding, the Commission will not schedule an oral hearing.

Ruling on confidentiality motion

24. Given that there are no parties with standing, the Commission does not consider it necessary to rule on the Halkirk 2 Extension Opposition group's confidentiality request. Upon request of the Halkirk 2 Extension Opposition group, the Commission will either return the USB containing the additional submissions or, destroy it.

25. Should you have any questions about the matters addressed in this letter, please contact the undersigned at 403-592-4360 or by email at rob.watson@auc.ab.ca.

Yours truly,

Rob Watson
Commission Counsel

Attachment

**Appendix A – Statements of intent to participate filed by the Halkirk 2 Extension
Opposition group on behalf of individuals, families and businesses**

Gerard and Donna Fetaz
Alden and Sandra Fuller
Adam and Rhonda Fuller
Colette Fetaz
Circle Square Ranch
Brian Perrault
Trisha Fuller
Stacy Fuller
Tim and Amanda Fuller
Tom and Doreen Brown
Chris Blumhagen
Joseph and Sarah Felzien
Tony and Lorraine Freimark
Richard Brown
Levi Jackson
Steve Maier