

September 21, 2016

To: Parties currently registered on Proceeding 21394

**Power Renewable Energy Corporation, Alberta Electric System Operator and  
AltaLink Management Ltd.  
Jenner Wind Power Project and Interconnection  
Proceeding 21394  
Applications 21394-A001 to 21394-A005**

**Ruling on standing**

**Introduction and background**

1. In this ruling the Alberta Utilities Commission decides whether to hold a public hearing to consider applications by Power Renewable Energy Corporation (PRE), the Alberta Electric System Operator (AESO) and AltaLink Management Ltd. These applications are all part of Proceeding 21394, which relates to a new wind farm project and associated transmission facilities located near Jenner, Alberta (the Jenner wind project). The Commission must hold a public hearing if it appears to it that its decision on these applications may directly and adversely affect the rights of a person (or a group of persons). A person who meets this criterion is said to have “standing” before the Commission.
2. The Commission issued two notices of applications for Proceeding 21394; the first on April 18, 2016, the second on June 22, 2016. The Commission received statements of intent to participate from Ms. Carmen Stopanski, the Alberta Wilderness Association (AWA), the Friends of Science Society (FSS) and Ms. Rylee Osadczuk.
3. The Commission has authorized me to write to registered parties to communicate its ruling on standing and its reasons for that ruling.

**Statements of intent to participate**

4. Carmen Stopanski filed a statement of intent to participate on May 6, 2016. Ms. Stopanski submitted that she has lived in the Jenner area for 25 years and is “vehemently opposed” to the project. She submitted that the project would destroy the “pristine prairies and beautiful views” and would have a negative effect on the environment, in particular the avian wildlife in the area.<sup>1</sup>
5. On August 12, 2016, the Commission wrote to Ms. Stopanski and asked her to confirm the location of the lands that she owns or occupies in the project area. The Commission received no response to its letter.

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<sup>1</sup> Exhibit 21394-X0019, Stopanski letter 2016-05-03.

6. Andrea Johancsik, on behalf of Alberta Wilderness Association (AWA) filed a statement of intent to participate on May 12, 2016. AWA described itself as “a representative of over 7000 members and supporters in Alberta and across Canada that works towards protection of the unique and vital landscapes that are the source of our clean water, clean air and wildlife habitat. AWA remains committed to ensuring protection of wildlife and wild places in Alberta for perpetuity for Albertans and Canadians, including public lands and endangered grassland habitats.” AWA expressed concerns about the location of the project on native prairie and the potential adverse effects of the project on wildlife.<sup>2</sup> AWA endorsed the recommendations of the Foothills Restoration Forum and Native Prairie Working Group’s “Recommended Principles and Guidelines for Minimizing Disturbance of Native Prairie from Wind Energy Development” and provided this document as part of its submission.<sup>3</sup>

7. The Friends of Science Society (FSS) filed a statement of intent to participate on May 13, 2016. The FSS describes itself as “a registered non-profit society in Alberta, a group of earth, atmospheric, solar scientists, engineers and interested citizens (numbering about 350) who have been studying climate science, policy and economics for 14 years and issuing related reports and commentaries.” The FSS expressed that the project would result in burdensome costs to taxpayers and consumers of electrical power in Alberta for little or no power or environmental benefit.<sup>4</sup>

8. On May 16, 2016, Rylee Osadczuk filed a statement of intent to participate. The submission included a comparative analysis between the Alberta Environment and Parks Wildlife Sensitivity range maps and the associated project with the objective of identifying all key wildlife habitat features for species with special conservation status in the project area that may be impacted by the project. The submission concluded that because the project is located partially on native prairie grassland in close vicinity to wetlands and the Red Deer River, the project would result in the loss of habitat and wildlife mortality of sensitive species. The submission recommended that alternative routing which parallels existing infrastructure or disturbances and occurs only on already developed agricultural lands should be considered to reduce fragmentation of important wild life habitat. It also recommended that areas of high conservation value be avoided.<sup>5</sup>

9. On September 2, 2016, Ms. Terri-Lee Oleniuk, on behalf of PRE, submitted comments on the standing of the parties that filed statements of intent to participate. PRE stated that its understanding was that Ms. Osadczuk is not seeking standing in the proceeding and does not intend to participate further in the AUC process.

10. PRE argued that Ms. Stopanski should be denied standing because her concerns are general in nature and that she has not provided any information about where her home is located relative to the project.

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<sup>2</sup> Exhibit 21394-X0036, Specific objections to the Jenner Wind Farm project.

<sup>3</sup> Exhibit 21394-X0033, Attachment to AWA Letter: Principles and Guidelines for Minimizing Disturbances.

<sup>4</sup> Exhibit 21394-X0036, Specific objections to the Jenner Wind Farm project.

<sup>5</sup> Exhibit 21394-X0042, Osadczuk SIP.

11. PRE submitted that the AWA and FSS are organizations that claim to represent the public interest but neither asserts any legal rights held by their organizations or members that may be impacted by the project. PRE stated that the concerns that the groups expressed are general in nature. PRE added that the AWA had been denied standing previously because the Commission had determined that it had not shown that it had a legal right that may be directly and adversely affected by the project. PRE stated that the same rationale applies in this case to both the AWA and FSS.

12. PRE submitted that no party has demonstrated that they have standing in this proceeding and requested that the Commission consider the applications before it without holding a hearing.

13. On September 9, 2016, the FSS wrote to the Commission and argued that Ms. Oleniuk's firm, Osler, Hoskin & Harcourt, did not register to participate in the proceeding until September 7, 2016. The FSS submitted that Ms. Oleniuk's submissions on behalf of PRE should be disregarded because they were filed out of time. The FSS also provided further information about its concerns with Alberta's Climate Leadership Plan and related policies.

### **How the Commission determines standing**

14. Standing before the Commission is determined in accordance with Section 9(2) of the *Alberta Utilities Commission Act* which states:

- (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.

15. In *Cheyne v. Alberta (Utilities Commission)*,<sup>6</sup> the Alberta Court of Appeal characterized Section 9(2) as the equivalent of Section 26(2) of the *Energy Resources Conservation Act* and confirmed that there is a two-part test for standing. First, a person must demonstrate that the right he or she is asserting is recognized by law. Second, a person must provide some information that shows that the Commission's decision on the application may directly and adversely affect his or her rights. The first part of the test is legal; the second part of the test is factual. For the factual part of the test, the Alberta Court of Appeal stated in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* that "some degree of location and connection between the work proposed and the right asserted is reasonable."<sup>7</sup>

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<sup>6</sup> 2009 ABCA 94 at paragraph 13.

<sup>7</sup> *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para 14. (Dene Tha)

16. In *Sawyer v. Alberta (Energy and Utilities Board)*, the Alberta Court of Appeal commented further on the factual component of the standing test and stated that "...in considering the location or connection, the Board is entitled to look at factors such as residence, the presence or absence of other wells in the area, and the frequency and duration of the applicant's use of the area near the proposed site."<sup>8</sup>

17. The Commission examined, in detail, the meaning of the phrase "directly and adversely affected" in Decision 3110-D02-2015.<sup>9</sup> It reviewed two judgements of the Alberta Court of Appeal relating to decisions of the Public Health Advisory Board where the phrase "directly affected" was interpreted (the CUPE decision<sup>10</sup> and the FOTA decision<sup>11</sup>). The Commission also reviewed a decision of the Alberta Court of Queen's Bench which applied to the Court of Appeal's interpretation of the phrase "directly affected" (the Kostuch Decision<sup>12</sup>), and concluded as follows:

The Commission's test for standing ... requires a person to demonstrate the potential for both direct and adverse effects arising from the Commission's decision. The Concise Oxford Dictionary succinctly defines the word adverse as "harmful; unfavorable."<sup>13</sup> The Merriam-Webster Online Dictionary similarly defines adverse as "bad or unfavourable: not good."<sup>14</sup> In accordance with those definitions and the CUPE, FOTA and Kostuch decisions, this means that under Section 9(2), the potential effects associated with a decision of the Commission must be personal rather than general and must have harmful or unfavourable consequences. Further, those decisions, when read together with the Dene Tha' decision, highlight the need for persons seeking standing to demonstrate the degree of connection between the rights asserted and potential effects identified.

18. The Commission assesses the potential for direct and adverse effect on a case-by-case basis, having regard for the specific circumstances of each proposed project application and each application for standing. It considers that the expression of general or broad concerns about a proposed project, without some link or connection to the demonstrated or anticipated characteristics of a proposed project will generally be an insufficient basis for establishing the potential for a direct and adverse effect. In the Commission's view, this is the very mischief that the Alberta Court of Appeal identified when it opined that "some degree of location or connection between the work proposed and the right asserted"<sup>15</sup> is a necessary ingredient for standing.

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<sup>8</sup> 2007 ABCA 297 at para 16.

<sup>9</sup> Decision 3110-D02-2015, Market Surveillance Administrator allegations against TransAlta Corporation et al. – Phase 2 Preliminary matters: Standing and Restitution, September 18, 2015.

<sup>10</sup> *Canadian Union of Public Employees, Local 30 v WMI Waste Management of Canada Inc.*, 1996 ABCA 6.

<sup>11</sup> *Friends of Athabasca Environmental Association v Public Health Advisory and Appeal Board*, 1996 ABCA 11.

<sup>12</sup> *Kostuch v Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)*, 1996 CanLII 10565 (AB QB).

<sup>13</sup> *Concise Oxford Dictionary*, tenth edition, Oxford University Press, 2001.

<sup>14</sup> *Merriam-Webster Dictionary*, <http://www.merriam-webster.com/dictionary/adverse>, retrieved on September 17, 2015.

<sup>15</sup> *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para 14.

## Standing ruling

19. The Commission finds that the FSS, the AWA, Ms. Stopanski, and Ms. Osadczuk do not have standing because none of these parties established the existence of a right or interest that is known to law that may be directly and adversely affected by the Commission's decision on the applications in this proceeding. The Commission's reasons for this ruling follow.

20. The FSS did not describe in its statement of intent to participate the rights or interests it was asserting or explain how it or its members may be directly and adversely affected by the Commission's decision on the Jenner wind project. Rather, the FSS expressed general concerns about the potential economic, environmental, and social impacts associated with wind generation. Standing in the proceeding is denied to the FSS because these general concerns do not satisfy the legal test.

21. The FSS was also concerned that Ms. Oleniuk registered to participate in the proceeding and filed her submission after the Commission's August 26, 2016 deadline. Ms. Oleniuk is acting as PRE's lawyer and, as such, her submissions were made on behalf of PRE. As the applicant in this proceeding, PRE was entitled to respond to statements of intent to participate filed in relation to its applications and could only have done so after the deadline for filing statements of intent to participate had passed. In the Commission's view, there was nothing improper about Ms. Oleniuk's registration or her filing of a response to the statements of intent to participate on behalf of her client.

22. Ms. Stopanski's concerns with the Jenner wind project relate generally to the potential for environmental impacts. The Commission is prepared to assume that Ms. Stopanski is asserting some form of property-based rights because she stated that she lives in the Jenner area. However, Ms. Stopanski did not respond to the Commission's request for further information on the location of her property. Without more information from Ms. Stopanski about the location of her property in relation to the project, and about how the Commission's decision on the applications may affect any associated rights, the Commission cannot assess the potential for direct and adverse impacts upon the rights she appears to be asserting. In the circumstances, the Commission must deny Ms. Stopanski standing in the proceeding.

23. Ms. Osadczuk's concerns about the Jenner wind project also relate to the potential for environmental impacts, including impact to wildlife habitat and native prairie in the project area. In the letter that accompanied her statement of intent to participate, Ms. Osadczuk made a number of recommendations to the Commission should it decide to approve the project. While Ms. Osadczuk indicated on her statement of intent to participate that she would like to participate in a hearing if one were held, she provided no information about how the Commission's decision may affect her, her land, her business or any of her activities. Without this information, the Commission cannot assess the potential for direct and adverse impacts upon the rights she appears to be asserting and must deny Ms. Osadczuk standing in the proceeding.

24. The AWA's concerns about the Jenner wind project also related to potential effects on the environment. The Commission finds that the AWA has not satisfied the factual part of the test for standing as it has not demonstrated that it has legal rights or interests that may be directly and adversely affected by the Commission's decision on the application. Consequently, it must deny the AWA standing in the proceeding.

25. Because there are no parties with standing in this proceeding, an oral hearing will not be scheduled. The Commission wishes to acknowledge the thoughtful submissions made by Ms. Osadczuk and the AWA regarding the potential environmental effects of the project. The information was relevant, useful and well prepared, and the Commission will take that information into account when deciding if approval of the project is in the public interest.

Yours truly,

JP Mousseau  
Commission Counsel