



AUC

Alberta Utilities Commission

Livingstone Landowners Guild

**Decision on Preliminary Question
Application for Review of Decision 2009-126
Alberta Electric System Operator
Needs Identification Document Application
Southern Alberta Transmission System Reinforcement
as amended**

March 17, 2016

Alberta Utilities Commission

Decision 20846-D01-2016

Livingstone Landowners Guild

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Proceeding 20846

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1 Introduction and background

1. This decision explains the Alberta Utilities Commission’s reasons for not granting the request of the Livingstone Landowners Guild for review of Decision 2009-126.

2. On September 4, 2015, the Livingstone Landowners Guild emailed a letter (review application)¹ asking the Commission to exercise its discretion under Section 2 of AUC Rule 016: *Review of Commission Decisions* to review Decision 2009-126² on the Commission’s own motion. The Commission designated the review application as Proceeding 20846 in its eFiling system.

3. The Livingstone Landowners Guild described itself in the review application as representing interested landowners in southern Alberta in the Oldman River watershed north of Highway 3 and east of the Livingstone range to the Porcupine Hills. It expressed concerns regarding a proposed Castle Rock Ridge to Chapel Rock electricity transmission line which it said was going to traverse the heart of the area occupied by its members, from the Oldman River reservoir in the south to near the Whaleback in the north. For reasons detailed in the review application and its submissions, it questioned the continued need for this part of the Southern Alberta Transmission Reinforcement project, the need for which the Commission had approved in 2009 in Decision 2009-126.

4. Under the *Electric Utilities Act* the Alberta Electric System Operator (AESO)³ is responsible for planning and arranging for the expansion and enhancement of the Alberta interconnected electric system and providing electricity generators access to it. Section 34 of the *Electric Utilities Act* requires that when the AESO determines that an expansion or enhancement of the capability of the transmission system is or may be required to meet the needs of Alberta and is in the public interest, the AESO must prepare and submit to the Commission for approval in a process usually called a “need or NID application” a “needs identification document” or NID. This needs identification document must describe the constraint or condition affecting the operation or performance of the transmission system and indicate the means by which or the manner in which the constraint or condition could be

¹ Exhibit 20846 – X0001

² Decision 2009-126: Alberta Electric System Operator Needs Identification Document Application Southern Alberta Transmission System Reinforcement, September 8, 2009

³ The Alberta Electric System Operator or AESO is the tradename used by the corporation known as the Independent System Operator or ISO established pursuant to Section 7 of the *Electric Utilities Act*.

alleviated, describe a need for improved efficiency of the transmission system, or describe a need to respond to requests for system access service. Under sections 14 and 15 of the *Hydro and Electric Energy Act* a permit to construct and a licence to operate any transmission line must also be obtained from the Commission.

5. Decision 2009-126, which the Livingstone Landowners Guild seeks to have reviewed, dealt with the approval of the NID applicable to the proposed Castle Rock Ridge to Chapel Rock electricity transmission line required pursuant to Section 34 of the *Electric Utilities Act*, rather than the Commission permit and licence also required to construct and to operate these transmission facilities.

6. The Livingstone Landowners Guild's review application and subsequent submissions questions the continued need for the proposed Castle Rock Ridge to Chapel Rock transmission line based on material changes which it alleges had occurred since the Commission's 2009 approval of the Southern Alberta Transmission Reinforcement project.

7. In its review application, the Livingstone Landowners Guild quoted AESO statements in its 2008 need application that "the proposed reinforcements are required to principally respond to the anticipated development of wind generation in Southern Alberta" and that the then proposed 240-kV looped system would "enable the connection of up to 2,700 MW of wind power currently proposed for connection throughout the region" over the next 10 years. The Livingstone Landowners Guild contend that the development of wind farms in the Pincher Creek area has essentially stopped - alleging that of the predicted 2,700 MW of wind development in southern Alberta, only 620 MW has in fact been developed, such that the total installed wind capacity in southern Alberta is still only about 1,120 MW with only 427 MW of existing wind generation in the Pincher Creek area.

8. The Livingstone Landowners Guild dispute the AESO's reliance on an estimated additional 589 MW of future wind generation in the Pincher Creek area - based on the connection queue maintained by the AESO - in order to satisfy a 600 MW wind generation forecast for the Pincher Creek area. It says that the majority of the Pincher Creek wind development in the AESO's connection queue will almost certainly never be built and that given current economic circumstances in Alberta, such as low power pool prices and low oil and gas prices, the likelihood of this future wind development proceeding is remote in the extreme. It added that subsequent changes to turbine technology have made areas of high wind speed, such as the Pincher Creek area, less desirable as wind farm locations and further reduced the likelihood of wind generation development there. Additionally, the Livingstone Landowners Guild alleges that significantly increased project cost estimates also call the need for the proposed Castle Rock Ridge to Chapel Rock transmission line into question.

9. On September 30, 2015, the Commission issued correspondence⁴ - notifying the Livingstone Landowners Guild that although the Commission was not prepared to undertake the requested review of its own motion, it was prepared to treat the letter from the Livingstone

⁴ Exhibit 20846 – X0007

Landowners Guild as a review application seeking to review Decision 2009-126 under Section 4(d)(ii) of Rule 016 - based on new facts or changed circumstances, and seeking leave under Section 3(3) of the same Rule to seek such relief more than 60 days after issuance of the decision sought to be reviewed. By correspondence dated October 1, 2015⁵ the Livingstone Landowners Guild accepted the Commission's decision on how it might proceed.

10. The Commission's September 30, 2015 correspondence also outlined a two-step procedure to consider the review application, in the first step determining whether the decision in question should be reviewed. In its correspondence, the Commission also established a process allowing parties to the original proceeding 171 determined by Decision 2009-126 to register to participate in the review application and to make submissions regarding the review application.

11. The Commission received statements of intent to participate stating positions from some 40 parties – including the AESO, the Municipal Districts of Pincher Creek and Ranchlands, four other local communities and authorities, several Pincher Creek area wind farms, some 20 local landowners, landowner associations, and businesses, Industrial Power Consumers Association of Alberta (IPCAA) and the transmission facility operator for the proposed Castle Rock Ridge to Chapel Rock transmission line.

12. The AESO, Enel Alberta Wind, Inc., and Heritage Wind Farm Development Inc./Benign Energy Canada Inc. filed written submissions opposing grant of the review application. The Livingstone Landowners Guild and IPCAA filed written submissions supporting grant of the review application.

11 The Commission considers that the close of record for this proceeding was December 21, 2015 when the Livingstone Landowners Guild filed its final submission.

13. The members of the respective Commission panels who authored the decisions sought to be reviewed will be referred to in this decision as the "hearing panel" and the members of the Commission panel presently considering the review application will be referred to as the "review panel."

14. In reaching this decision, the review panel has reviewed the relevant portions of Decision 2009-126, as amended by Decisions 2010-343 and 2014-004, and considered all submissions made in this proceeding and all relevant materials comprising the record of this proceeding and the other proceedings approving the need for the proposed Castle Rock Ridge to Chapel Rock transmission line.

15. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the review panel's reasoning relating to a particular matter and should not be taken as an indication that the review panel did not consider all portions of the records relevant to the review application.

⁵ Exhibit 20846 – X0008

2 Test for review

16. The Commission's authority to review its own decisions is found in Section 10 of the *Alberta Utilities Commission Act*, SA 2007, cA-37.2. Rule 016: *Review of Commission Decisions*, most recently amended effective March 31, 2014, was made in accordance with Section 10 of the *Alberta Utilities Commission Act*.

17. Rule 016 sets out procedures applicable to an application for review. Section 4(d) provides that an application for a review must set out the grounds for the application; these grounds may include that "new or previously unavailable facts or a change of circumstances have arisen that were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence (new facts or changed circumstances)." Section 6(2) provides that the Commission shall grant a review based on these grounds if it determines that the review applicant has raised a reasonable possibility that the alleged new facts or changed circumstances could lead the Commission to materially vary or rescind the decision.

18. Section 3(d) of Rule 016 provides that an application for review of a decision must be filed within 60 days of the issuance of the decision, unless otherwise authorized by the Commission.

19. If the review panel grants a review of a decision under Section 6, Section 7 of the Rule requires the Commission to proceed to issue a notice of hearing and commence a new hearing or other proceeding where it will determine whether the decision should be confirmed, rescinded or varied.

20. In this decision, the review panel addresses the preliminary question of whether a review of the decision should be granted based on the grounds put forward by the Livingstone Landowners Guild.

21. In 2008 the Alberta Court of Appeal addressed the high degree of deference due to a tribunal's original decision in *AltaGas Utilities Inc. v Alberta (Energy & Utilities Board)* 2008 ABCA 46.⁶ Mr. Justice O'Brien stated:

While the legislation setting out review provisions provides the Board with wide discretion, the case law has established restrictive guidelines for use by tribunals when considering whether to review and vary their decision. The reasons for these guidelines, or criteria, are to ensure and preserve the integrity of decision of a tribunal. A decision of a tribunal should be final, subject to decision or appeal. If a tribunal could review and change its decisions at will, the certainty of the decision of the tribunal would be in jeopardy.

⁶ At paragraphs 39-40. The continued importance as a matter of public policy of finality and certainty in the conduct of litigation when deciding whether to review an existing final decision because of newly discovered evidence is reiterated recently in *Hill v Hill*, 2016 ABCA 49.

Therefore, in considering whether a review is warranted, the Board must address whether or not the [review applicant] has established substantial doubt as to the correctness of the Decisions. This determination will be based on the following established criteria:

Where new evidence, which was not known or not available at the time evidence was adduced and which may have been a determining factor in the decision, became known after the decision was made.

22. In Decision 2012-124⁷ the Commission described the role of a review panel and the test applicable to review of findings made by an original hearing panel, stating:

30 ... [F]indings of fact or inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error. In the Commission's view, this approach is consistent with that prescribed by the Supreme Court in *Housen v Nikolaisen*⁸ and by the Court of Appeal in *Ball v Imperial Oil*⁹. It is also consistent with the general principle that the trier of fact is better situated than a subsequent review authority to make factual findings or draw inferences of fact given the trier of fact's exposure to the evidence and familiarity with the case as a whole.

31 [T]he review panel's task is not to retry the [application] based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel.

23. Justice Fruman stated in *EPCOR v Alberta (Energy and Utilities Board)* 2003 ABCA 374: "The Board is free to accept or reject evidence presented by the parties and, as an expert tribunal, it is entitled to use its expertise to arrive at different conclusions than the parties."¹⁰

24. The review panel will determine in this decision whether the Livingstone Landowners Guild has raised a reasonable possibility that the new facts or changed circumstances alleged by the Livingstone Landowners Guild in the review application could lead the review panel to materially vary or rescind Decision 2009-126, as amended by Decisions 2010-343 and 2014-004. Certain of the Livingstone Landowners Guild's submissions are summarized in this decision, however, in making its decision, the review panel considered the full text of all of its submissions. All submissions made are available for reference on the record of this proceeding.

3 Analysis and review panel findings

25. Since the existence of new facts or changed circumstances is at issue, careful examination of the context and factual basis of Decision 2009-126 and amending decisions is required to ascertain what was known or contemplated when these decisions were made.

⁷ Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution and Transmission Inc., Decision on Request for Review and Variance of Decision 2011-436, Heartland Transmission Project, May 10, 2012

⁸ *Housen v Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33

⁹ *Ball v Imperial Oil Resources Limited*, 2010 ABCA 111

¹⁰ at paragraph 23

26. On September 8, 2009 in Decision 2009-126 the Commission approved, following a hearing, a needs identification document submitted to it by the AESO describing the Southern Alberta Transmission Reinforcement project and a particular Alternative 1A identified in the needs identification document as the means by which constraints or conditions then affecting the operation or performance of the transmission system could be alleviated and requests for system access by wind farms met.

27. The Southern Alberta Transmission Reinforcement project contemplated three stages of development. The proposed Castle Rock Ridge to Chapel Rock transmission line of concern in this proceeding was one of five components of stage 2 of the project. At the time, this project was referred to as the Goose Lake to Crowsnest transmission line.

28. In Decision 2009-126 the Commission made the following findings¹¹ regarding the need for the Southern Alberta Transmission Reinforcement project which are relevant: “The Commission considers that by staging the development of the proposed upgrades, the approval of the NID will contribute to a transmission system in southern Alberta that is flexible and preserves options for future growth ...will foster an efficient and reliable system ...¹²” and “The Commission finds that Alternative 1A ...will improve system reliability in southern Alberta...will contribute to system reliability...will improve operational flexibility ...¹³”

29. Alternative 1A approved in the AESO’s NID as the means to satisfy the need for the Southern Alberta Transmission Reinforcement project contemplated construction of the proposed transmission facilities at a future date. Consequently section 11(4) of the *Transmission Regulation* was applicable and required that “the ISO must be reasonably certain that, in the future, a transmission facility is needed, and, for the purpose of determining the certainty of the need, the ISO may specify milestones, including ...generation addition ... and identify the process by which the ISO will monitor and determine whether the milestones identified... are met.” This is the genesis of the references to milestones made in the review application.

30. In Decision 2009-126 the Commission made the following additional findings regarding forecasting of future wind generation which are relevant to this proceeding: “The Commission is satisfied that the AESO took into account, in a general fashion, the characteristics and expected availability of wind-powered generation in its 10-year Transmission System Plan (2007-2016) ... AESO discussed problems identified in the region based on generation forecasts that included a forecast of high wind-powered generation¹⁴”; “The Commission finds that the AESO explicitly considered availability of future generating units by virtue of its staged approach to transmission development that incorporates milestones with construction triggers and off ramps. This mechanism ensures that anticipated in-merit electricity in southern

¹¹ In Exhibit 20846-X0079, the applicant confirms that it “is not asking the Commission to re-open Decision 2009-126 because we believe that the Commission made errors based on evidence that was before the Commission at that time.”

¹² at paragraph 206

¹³ at paragraph 209

¹⁴ at paragraph 79

Alberta can be dispatched without constraint without danger of materially overbuilding the system¹⁵”; “The Commission is satisfied that the proposed [milestone identification and monitoring] process [proposed in the NID] has identified effective milestones for determining the ongoing certainty of the need identified in the NID... the Commission is satisfied that the process proposed is reasonable and transparent and will allow the AESO to effectively monitor the triggers for future transmission components contemplated in the NID.¹⁶”; and “...When the upgrades proposed in the NID are complete, there is no reason to believe that the forecast wind-powered generation will not generate electric energy when conditions allow.¹⁷” As the Livingstone Landowners Guild cites in its final reply, the Commission stated in Decision 2010-343 that the “AESO also noted that to the extent a milestone has not been met by the end of 2017 (the Southern Alberta transmission system planning period), the underlying NID Approval and basis for any facility application related to the milestone would no longer be valid.”¹⁸

31. On July 29, 2010 the milestone identification and monitoring process proposed in the NID received further specific Commission consideration in Decision 2010-343 when the AESO submitted an enhanced process applicable to stages 2 and 3 of the project as directed by the Commission in Decision 2009-126. The AESO proposed to use only construction milestones and described the process proposed to monitor and determine when such milestones are met.

32. In Decision 2010-343 the Commission found that the AESO’s revised milestones for the Southern Alberta Transmission Reinforcement project were “clear, understandable and easily measurable” and that the proposed monitoring process was “based upon reasonable indicators that will allow the AESO to meaningfully assess whether the need for the proposed upgrades continues to be certain.”¹⁹ The Commission found the milestone identification and monitoring process and its approval in the public interest and approved the process.

33. On January 27, 2014 the particular need for the proposed Castle Ridge Rock to Chapel Rock electricity transmission line of concern in this proceeding was specifically addressed by the Commission in Decision 2014-004 determining proceeding 2349 when the AESO applied for approval to amend the portion of the existing NID applicable to it. The decision recites that in the amendment application, the AESO acknowledged “that there is a large degree of uncertainty associated with future wind power development²⁰” “ and confirmed that two wind projects ... in the area had been cancelled, but ...total existing and future generation capacity in the north Pincher Creek area would nonetheless total 992 MW.²¹” Other parts of stage 2 of the Southern Alberta Transmission Reinforcement project had already been constructed or were in course of construction at that time – as referenced in the decision. The proposed Castle Rock Ridge to Chapel Rock transmission line under consideration in this proceeding remained to be

¹⁵ at paragraph 82; paragraphs 153 and 154 are to the same effect.

¹⁶ at paragraph 115

¹⁷ at paragraph 152

¹⁸ at paragraph 99

¹⁹ at paragraph 15

²⁰ at paragraph 26

²¹ at paragraph 57

constructed and applications seeking a permit to construct and licence to operate these facilities are still to be filed with the Commission. Various routing and location specific environmental concerns were voiced by some interveners. Those concerns may be raised and should be dealt with in the facilities application which is yet to be filed with the Commission. Such concerns for consideration in the facilities application include determining the implications of the requirements of the South Saskatchewan Regional Plan approved in 2014.²² Section 2.2 of the decision provides a useful summary of prior Southern Alberta Transmission Reinforcement needs identification document approvals and amendments.

34. The Livingstone Landowners Guild participated in proceeding 2349 as the Livingstone Landowners Group. Decision 2014-004 reports that the “Livingstone Landowners Group supported approval of the AESO’s preferred alternative 2” – an alignment extending from Goose Lake 103S substation to Castle Rock Ridge 205S substation (then under construction) and then westward to Chapel Rock 491S substation, on a corridor primarily south of the Oldman Reservoir and “recommended that the Chapel Rock substation be located in the southern part of the study area towards the original Crowsnest location in order to minimize the impacts on the environmentally sensitive areas adjacent to the Livingstone Range.”²³

35. In Decision 2014-004 the Commission also “accepted the evidence filed in this proceeding that development of the transmission facilities in the Pincher Creek area remains necessary to expand and enhance the capability of the electric system, to alleviate constraints and to enhance efficiency. While some parties questioned the need for the project, no party satisfied the Commission that the AESO’s assessment of the need for the project is technically deficient or that approval of the proposed amendments would not be in the public interest.”²⁴

36. The Livingstone Landowners Guild asked for review of Decision 2009-126 in the review application; however, as outlined above, the specific need for the proposed Castle Rock Ridge to Chapel Rock transmission line is currently approved under Decision 2014-004. Consequently, the Commission takes the review application as intended to extend to a review of the need as amended in Decision 2014-004.

37. The original hearing panels made explicit factual findings in decisions 2009-126, 2010-343 and 2014-004 that there were additional needs for the proposed Castle Rock Ridge to Chapel Rock transmission line besides only connection of wind generation in the Pincher Creek area and throughout identified uncertainties attendant upon actual future wind development. To specifically deal with the uncertainties, the original panels gave extensive consideration to putting in place an effective milestone identification and monitoring process as a measure to respond adequately to future evolving circumstances such as changing economic conditions, regulatory policy and possible deviations of generation forecasts from actual future needs. The review panel concludes that the new facts or changed circumstances alleged in the review application were not new or different circumstances but rather future contingencies expressly

²² Exhibit 20846 – 0079 page 10 and footnote 22; the *Alberta Utilities Commission Act* s.8.1

²³ see paragraphs 40 & 42

²⁴ at paragraph 68

contemplated in deciding prior need approvals applicable to the proposed Castle Rock Ridge to Chapel Rock transmission line. The review panel also finds that there is no reasonable possibility that these alleged new facts or changed circumstances could lead the Commission to materially vary or rescind any of these three decisions approving need. No basis has been shown leaving the review panel with a substantial doubt as to the reasonableness of the various findings identified above made in these regards by the original panels in decisions 2009-126, 2010-343 and 2014-004. In particular, the review panel has no substantial doubt that the milestone identification and monitoring process implemented in Decision 2010-343 was a reasonable way for the original hearing panel to address the certainty required in the future that the proposed Castle Rock Ridge to Chapel Rock transmission line will still then be needed and to have the AESO make this assessment when the time came for construction of the transmission facilities.

38. In its reply the Livingstone Landowners Guild contend that “it is clear that...since October, 2009,...there has been no meaningful monitoring carried out by the AESO to reassess whether the need for the CRRCR project ‘continues to be certain’” and detailed why “the continued need for the CRRCR project is anything but certain” and “that the milestones for the CRRCR project has not been met and will not be met by the end of 2017.”²⁵ There is no obligation that the changing prospects of wind development be assessed at this point in time and the review panel concludes that it is both speculative and premature to venture to do so before the end of 2017. Nothing demonstrates more how relevant circumstances may change significantly at any time than the November 22, 2015 Alberta government announcement of its new Climate Leadership Plan and Climate Leadership Report which discusses opportunities for generation from renewables resulting from the replacement of coal-fired generation which is to be phased out.²⁶

39. The AESO has confirmed that it “has been monitoring and will continue to monitor developments that could affect the timing and need for the [Castle Rock Ridge to Chapel Rock transmission line] project.... The AESO will only allow construction of the CRRCR project to commence if, at the time, it is satisfied that the construction milestone is met.”²⁷ The review panel has no substantial doubt that it may rely upon the AESO to perform its duty in this connection, as directed in Decision 2010- 343, and that the AESO is qualified to make the required assessment.

40. The review panel is also not persuaded that the Livingstone Landowners Guild has shown the exceptional circumstances²⁸ which could justify the granting of leave to seek review outside the 60 day period prescribed under Rule 016.

²⁵ Exhibit 20846-X0079

²⁶ Exhibit 20846-X0081 paragraph 17; Exhibit 20846-X0082 paragraph 9

²⁷ Exhibit 20846 – X0083

²⁸ The requirement that the review applicant must establish exceptional circumstances justifying this required time extension to seek leave is addressed in Decisions 2014-097, 2013-379, 2012 -202 and 2010-420.

4 Order

41. A second stage consideration of review of Decision 2014-242 as amended is denied.

Dated on March 17, 2016.

Alberta Utilities Commission

(original signed by)

Willie Grieve, QC
Chair

(original signed by)

Tudor Beattie, QC
Commission Member

(original signed by)

Anne Michaud
Commission Member