

November 17, 2020

To: Parties currently registered in Proceeding 25100

**Capstone Infrastructure Corporation**  
**Buffalo Atlee 1, 2 and 3 Wind Power Plants**  
**Proceeding 25100**  
**Applications 25100-A001 to 25100-A003**

**Ruling on standing**

1. In this ruling, the Alberta Utilities Commission decides whether to hold a public hearing to consider applications by Capstone Infrastructure Corporation for the proposed Buffalo Atlee 1, 2 and 3 wind power plants (the Buffalo Atlee projects) in the Jenner area.
2. The Commission must hold a hearing if persons who have filed a statement of intent to participate in Proceeding 25100 have demonstrated that they have rights that may be “directly and adversely affected” by the Commission’s decision. Such a person may participate fully in the hearing, including giving evidence, questioning witnesses and providing argument. This permission to participate is referred to as standing.
3. The Commission issued notices of applications for Proceeding 25100 on January 22, 2020, and September 24, 2020. In response to the notice issued on January 22, 2020, the Commission received statements of intent to participate from Danny Aebly, Dustin Aebly and Special Area No. 2. In response to the notice issued on September 24, 2020, the Commission received statements of intent to participate from Jenner Wind 1 GP Inc. and Jenner Wind LP.
4. The Commission has authorized me to communicate its decision on standing.

**How the Commission determines standing**

5. 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]

6. 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 the 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.<sup>1</sup>

7. 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.”<sup>2</sup> When considering the location or connection, the Commission looks at factors such as residence and the frequency and duration of the person’s use of the area near the proposed site.<sup>3</sup>

8. 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.”<sup>4</sup>

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

## **Ruling**

10. Danny Aebly and Dustin Aebly have demonstrated that they own or occupy land in close proximity to the proposed projects and that their use or enjoyment of that land may be affected by the Commission’s decision on the projects. The potential effects they described include proximity of the projects, shadow flicker, decreased property values, noise impacts, interference with agricultural operations and effects on the environment. The Commission is therefore satisfied that both Danny and Dustin Aebly have demonstrated that they have legal rights that may be directly and adversely affected by the Commission’s decision on the applications and grants them standing.

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<sup>1</sup> *Cheyne v Alberta (Utilities Commission)*, 2009 ABCA 94; *Dene Tha’ First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [*Dene Tha’*].

<sup>2</sup> *Dene Tha’* at paragraph 14.

<sup>3</sup> *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297.

<sup>4</sup> 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.

11. Jenner Wind 1 GP Inc. stated that it owns the approved but not yet constructed Jenner Wind Power Project. It stated that its project and the proposed Buffalo Atlee projects have a common noise receptor in their respective noise impact assessments, and that changes to the layout of the Buffalo Atlee projects has resulted in a turbine being located much closer to both that common noise receptor and a Jenner Wind Power Project turbine. Jenner Wind 1 GP Inc. is concerned that potential noise compliance issues at the shared receptor would affect the Jenner Wind Power Project. It is also concerned that wake effects from the same Buffalo Atlee turbine will negatively affect power output from the Jenner Wind Power Project and have operational and maintenance impacts.

12. Jenner Wind LP, through its subsidiaries Jenner 2 Limited Partnership and Jenner 3 Limited Partnership, has applied to the Commission for approval of Jenner Wind Power Projects 2 and 3. It submitted that its projects and the proposed Buffalo Atlee projects share a common noise receptor in their respective noise impact assessments and that changes to the layout of the Buffalo Atlee projects resulted in a turbine being located much closer to that receptor. Jenner Wind LP's concerns relate to the amended noise impact assessment for the Buffalo Atlee projects, which indicates that the shared receptor's cumulative noise levels may exceed the nighttime permissible sound level under Rule 012: *Noise Control*. It is concerned that potential noise compliance issues at the shared receptor will affect Jenner Wind Power Projects 2 and 3.

13. While Capstone Infrastructure Corporation acknowledged that Jenner Wind 1 GP Inc. and Jenner Wind LP likely satisfied the legal part of the standing test, it submitted that each failed to satisfy the factual part of the test. Capstone submitted that the noise impact assessment undertaken for the Buffalo Atlee projects indicates there would not be any exceedances of the permissible sound levels set out in Rule 012, during either the daytime or nighttime. It added that any suggestions there may be exceedances were hypothetical, speculative and not supported by the noise impact assessment, and there was therefore no basis upon which to assert an adverse effect.

14. Capstone also asserted that Jenner Wind 1 GP Inc. provided no evidence to support its claim that wake effects from the Buffalo Atlee projects would directly and adversely affect power output from the Jenner Wind Power Project or the operational and maintenance costs of that project; that the 1.33 kilometres separating the projects' closest turbines exceed the most conservative industry best practices; and that Jenner Wind 1 GP Inc.'s own turbines are closer to each other, in multiple instances, and so it is conceivable that any wake effects would be associated with Jenner Wind 1 GP Inc.'s own infrastructure.

15. As indicated above, Capstone acknowledged that Jenner Wind 1 GP Inc. and Jenner Wind LP likely satisfied the legal part of the standing test. Further, one noise receptor, designated as R1 in the noise impact assessment for the Buffalo Atlee projects, is also a receptor in the noise impact assessments for the Jenner Wind Power Project and Jenner Wind Power Projects 2 and 3. In this regard, Rule 012 requires that a project's noise impact assessment account for the predicted noise contributions from approved but not yet constructed energy-related facilities, and from proposed energy-related facilities that have been deemed complete. As such, the Commission's determination of the predicted noise effects of the

Buffalo Atlee projects and the actual noise effects once the project is constructed and operating could affect each project's ability to comply with Rule 012. This is the case even if the Buffalo Atlee projects are predicted to comply with the permissible sound levels outlined in Rule 012. The Commission is also of the view that allowing the adjacent project owners to participate in the proceeding could offer additional information and perspectives on noise effects that may be relevant to all of the projects in the area.

16. Despite Capstone's characterization of Jenner Wind 1 GP Inc.'s and Jenner Wind LP's assertions as hypothetical, speculative and unsubstantiated by evidence, the Commission considers that, at this stage of the proceeding, the factual part of the standing test does not require a high degree of proof of the potential for direct and adverse affects. The Court of Appeal of Alberta has stated that a person seeking standing need not demonstrate that the perceived risk [of an impact on their interests] is a certainty, or even likely;<sup>5</sup> it is sufficient if events could arise that could prejudice the party seeking standing.<sup>6</sup> The Commission finds that Jenner Wind 1 GP Inc. and Jenner Wind LP have demonstrated that they have legal rights that may be directly and adversely affected by the Commission's decision on the applications and grants them standing. For certainty, Jenner Wind 1 GP Inc. is also permitted to pursue its assertion that its project will be negatively affected by wake effects from the Buffalo Atlee projects.

17. Special Area No. 2 did not assert that it has a legal right that may be directly and adversely affected by the Commission's decision on the applications, and a review of the information it filed does not indicate that it meets the standing test. However, the Commission has authority over its own process and may allow parties to participate in proceedings notwithstanding their failure to meet the test for standing.<sup>7</sup> That is, the Commission may allow a person who has not demonstrated a potential direct and adverse effect on their rights to participate in a proceeding in either a limited context or with full participation rights, including the ability to file evidence, cross-examine witnesses and submit argument.

18. Special Area No. 2 is the land use authority for the lands within which the projects are proposed, pursuant to the *Special Areas Act*. It stated that the proposed Buffalo Atlee projects do not meet the minimum setback requirements of the *Special Areas - 2, 3 and 4 Land Use Order*, that Capstone would not receive a municipal development permit for the projects, and that it wished to participate in a hearing of the applications. The Commission considers that Special Area No. 2's participation would assist in the Commission's understanding of the local land use requirements relating to the projects and in its assessment of concerns about the proximity of the projects to other land users and occupants. It therefore grants to Special Area No. 2 full rights to participate in the hearing.

19. That said, Special Area No. 2 is not eligible to make a costs claim for its participation. The Commission's Rule 009: *Rules on Local Intervener Costs* will apply to costs claims filed in

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<sup>5</sup> *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325, at paragraph 26.

<sup>6</sup> *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349, at paragraph 37.

<sup>7</sup> *Alberta Utilities Commission Act*, SA 2007, c A-37.2; *Canada (Combines Investigation Act Director of Investigation & Research) v Newfoundland Public Telephone Co.*, [1987] 2 SCR 466; *Society of Composers, Authors and Music Publishers of Canada v Canada (Copyright Board)*, [1993] FCJ 137.

relation to the facility applications filed by Capstone. Under Rule 009, only a local intervener is eligible to potentially recover the costs of its participation in facility applications.

“Local intervener” is defined in the *Alberta Utilities Commission Act* as follows:

22(1) For purposes of this section, “local intervener” means a person or group or association of persons who, in the opinion of the Commission,

(a) has an interest in, and

(b) is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision or order of the Commission in or as a result of a hearing or other proceeding of the Commission on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, but unless otherwise authorized by the Commission does not include a person or group or association of persons whose business interest may include a hydro development, power plant or transmission line or a gas utility pipeline.

20. The Commission has exercised its discretion to allow Special Area No. 2 to participate in the Buffalo Atlee 1, 2 and 3 wind power plants hearing, even though Special Area No. 2 has not met the test for standing. Because Special Area No. 2 has not demonstrated that it holds an interest in land that may be affected by the Commission’s decision on the applications, it does not fall within the definition of “local intervener” under Section 22 of the *Alberta Utilities Commission Act* and Rule 009. Consequently, any costs it incurs to participate in Proceeding 25100 will not be eligible for recovery under Rule 009.

## Schedule

21. The Commission will issue a notice of hearing setting out the schedule for a hearing process in due course. Due to COVID-19 restrictions, the Commission requests that registered parties notify the Commission of their preference for either a written or a virtual hearing no later than **November 24, 2020**.

22. In the interim, the Commission has scheduled the following submission deadlines:

Process step	Date
Information requests to the applicant	November 30, 2020
Applicant’s written information responses	December 11, 2020
Intervenors’ written evidence deadline	January 8, 2021
Applicant’s reply evidence deadline	January 15, 2021

23. Should you have any questions, please contact the undersigned by email at [gary.perkins@auc.ab.ca](mailto:gary.perkins@auc.ab.ca), or contact the lead application officer, Conrad Dalsin, at [conrad.dalsin@auc.ab.ca](mailto:conrad.dalsin@auc.ab.ca).

Yours truly,

Gary Perkins  
Commission Counsel