

February 3, 2021

To: Parties currently registered in Proceeding 25909

**Capital Power Generation Services Inc.
Whitla Phase 3 Wind Power Plant
Proceeding 25909
Application 25909-A001**

Ruling on standing

1. In this ruling, the Alberta Utilities Commission decides whether to hold a public hearing to consider an application by Capital Power Generation Services Inc. for the proposed Whitla Phase 3 Wind Power Plant in the Maleb area.
2. The Commission issued a notice of application for Proceeding 25909 on October 27, 2020. On December 15, 2020, the Commission received a statement of intent to participate from the Stoney Nakoda Nations (Stoney Nakoda), comprised of the Bearspaw First Nation, the Chiniki First Nation and the Wesley First Nation. The Stoney Nakoda filed additional information on January 15, 2021.
3. The Commission must hold a hearing if the Stoney Nakoda have demonstrated that they have rights that may be directly and adversely affected by the Commission's decision. This is called "standing." Standing gives the Stoney Nakoda the right to participate fully in a hearing, including giving evidence, questioning witnesses and providing argument.
4. The Commission has authorized me to communicate its decision on standing.
5. For the reasons outlined below, the Commission has decided that the Stoney Nakoda do not have standing in this proceeding.

How the Commission determines standing

6. 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]

7. The standing test applies to all persons, companies, organizations and Indigenous groups who want to participate in Commission hearings. The test has two parts. First, you must demonstrate that you have a right or interest that is recognized by law. Second, you must provide reliable information that shows that if the Commission approves the development or activities proposed in the proceeding, your rights may be directly and adversely affected. The first part of the test is legal; the second part of the test is factual. It is not enough to merely assert a possible aboriginal or treaty right, you must show some degree of location or connection between the work proposed and the right asserted.¹ This means, for example, that sufficient information about the traditional activity; i.e., hunting or trapping or gathering berries or plants, should be provided, its proximity to the proposed project confirmed and the effect of the project on the activity or the site at which it occurs described.

8. The Commission accepts that as signatories to Treaty 7 in 1877, the Stoney Nakoda hold treaty rights that are recognized and affirmed in Section 35 of the *Constitution Act, 1982*. The Commission therefore finds that the first part of the standing test has been met.

9. The Commission must also consider the factual part of the standing test and decide if there is reliable information that makes it appear that the Stoney Nakoda's Section 35 rights may be directly and adversely affected by the Commission's decision on the project application.

Views of Stoney Nakoda

10. The Stoney Nakoda stated that their aboriginal and treaty rights may be practiced on all unoccupied Crown lands, occupied Crown and private lands to which they have a right of access, and occupied Crown and private lands where there is no visible use of the land that is incompatible with the exercise of the right. The Stoney Nakoda also stated that they have a historic and contemporary presence and use throughout southern Alberta for the exercise of their rights and for other cultural and traditional use activities. They further stated that their members have used and continue to use the project lands for hunting and for other land and resource use activities.

11. In response to the Commission's request for information² that shows some degree of location or connection between the work proposed and the rights asserted by the Stoney Nakoda, the Stoney Nakoda stated that they have been unable to access and review their records in order to provide details of this information due to the sharp escalation of COVID-19 cases in their community and the additional restrictions on Stoney Nakoda offices and staff as a result of the Stoney Tribal Council declaring a local state of emergency. They also stated that these kinds of land use details are normally collected and provided through the consultation process for a project.

¹ *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 (*Dene Tha'*), at paragraph 14.

² In Exhibit 25909-X0028, AUC letter to Stoney Nakoda Nations - Emails regarding Proceeding 25909, the AUC's Indigenous Consultation Lead asked the Stoney Nakoda representatives who had emailed the AUC about the project to complete and file a statement of intent to participate. In Exhibit 25909-X0040, AUC Proceeding 25909 - Amended SNN statement of intent to participate.final, which is the statement of intent to participate form that was completed and filed by the Stoney Nakoda Nations, Question 2b) asks for information about land use in the area of the project.

12. The Stoney Nakoda submitted that the consultation process for the project has been insufficient, and that the Stoney Nakoda may not have specific information regarding the locations of potential impacts from the project because they have not been provided with capacity from Capital Power to conduct a traditional land use study. The Stoney Nakoda confirmed that they had an initial meeting with Capital Power but added that meaningful consultation for the project had not occurred. They requested further consultation and a hearing to enable a proper assessment of impacts to the Stoney Nakoda's treaty and aboriginal rights and traditional uses.

Views of Capital Power

13. Capital Power stated that the project lands are privately-owned, cultivated lands that are visibly occupied and that members of the Stoney Nakoda would require a right of access in order to access the project lands to practice aboriginal or treaty rights. Capital Power noted that the project is an expansion of two previously approved projects in the same area, and stated:

Throughout our consultation over the years with respect to all phases of the Whitla Wind Project, no landowners have ever advised Capital Power of SNN members accessing or requesting access to their lands, nor has SNN previously brought up land access concerns. Therefore, since reviewing SNN's SIP and amended SIP, Capital Power's land management representative asked the majority of our nine participating Phase 3 landowners about their knowledge of Indigenous peoples and communities accessing the land in and around the project area. The landowners contacted are unaware of any Indigenous groups accessing their land for traditional or Aboriginal purposes.³

14. Capital Power provided a summary of its consultation history with the Stoney Nakoda and a copy of the minutes of the meeting it had with the Stoney Nakoda on December 4, 2020.

Commission findings

Standing of Stoney Nakoda

15. The Commission finds that the Stoney Nakoda's general statements that its members are exercising aboriginal and treaty rights throughout southern Alberta, including on the project lands, is not supported by information that demonstrates that Stoney Nakoda members are present and active in the project area. The Stoney Nakoda did not provide any information that identified specific land parcels in or near to the project lands on which its members were exercising rights or were accessing other lands on which they were exercising rights. Capital Power stated that none of the owners of the project lands it contacted indicated that they were aware of Indigenous people or communities accessing land in and around the project area.

16. The Stoney Nakoda's initial statement of intent to participate on December 15, 2020, included the attached map. The map provides an outline of the Stoney Nakoda's traditional lands. The map indicates that the eastern limit of the Stoney Nakoda's traditional lands in

³ Exhibit 25909-X0042, Capital Power reply to Stoney Nakoda Nations SIP, page 2.

Township 8 is approximately 20 townships (i.e., about 194 kilometres) from the most westerly parcel of the project lands in Section 36, Township 8, Range 11, west of the Fourth Meridian.

17. The Court of Appeal of Alberta stated in *Dene Tha'* that specific information that establishes a causal connection between a project and its negative effects on asserted aboriginal or treaty rights is needed to meet the factual part of the standing test. The Commission finds that no such information has been provided in this proceeding, and in fact the Stoney Nakoda's own mapping indicates that the project is far removed from the Stoney Nakoda's traditional lands. The Commission finds that the Stoney Nakoda have not demonstrated that their aboriginal and treaty rights may be directly and adversely affected by the Commission's decision on the project applications. The Commission therefore denies the Stoney Nakoda standing in this proceeding.

Rule 007 consultation with Stoney Nakoda and their request for a further extension

18. The Stoney Nakoda stated that the consultation process for the project was insufficient, and they requested additional consultation and a hearing to better assess the project's impacts on their rights.

19. The Commission has reviewed Capital Power's summary of its consultation efforts with the Stoney Nakoda. That summary indicates that project information mailed to the Stoney Nakoda in June 2020 was acknowledged to have been received in July, and that additional project-related information was emailed to the Stoney Nakoda in July, August and September 2020. A virtual meeting between the parties occurred on December 4, 2020.

20. Specifically in relation to the need for information about project-related impacts on the Stoney Nakoda, the Commission's Indigenous Consultation Lead emailed the Stoney Nakoda's representatives on November 5 and 16, 2020, with information about how the Stoney Nakoda could file a statement of intent to participate that described their concerns about the project. She reiterated this information in a letter to the Stoney Nakoda's representatives dated December 8, 2020. The Stoney Nakoda filed their initial statement of intent to participate on December 15, 2020.

21. The Commission issued a letter to the Stoney Nakoda on December 17, 2020, requesting further information from the Stoney Nakoda about their statement of intent to participate. The Commission asked for information about the specific impacts that the project may have on the Stoney Nakoda, and for them to identify the specific sections of land that its members access to exercise their rights and to describe how they may be affected by the project. The Commission requested that the Stoney Nakoda provide a response by January 11, 2021.

22. On December 23, 2020, the Stoney Nakoda requested that the January 11, 2021 deadline be extended to January 15, 2021, so that they could better review their records and complete their response. The Stoney Nakoda indicated that their consultation office was dealing with office closures and on-site staffing shortages with people working from home as a result of the mandatory, province-wide restrictions. They also stated that the restrictions directly affected their efficiency and ability to research and review their records. The Commission approved the time extension to January 15, 2021. The Stoney Nakoda filed their revised statement of intent to participate on January 15, 2021. The revised statement of intent to participate did not provide the

information requested by the Commission: the specific sections of land that the Stoney Nakoda's members access to exercise their rights and a description of how they may be affected by the project.

23. Considering the foregoing, including the Commission's findings relating to the Stoney Nakoda's standing in this proceeding, the Commission is satisfied that its Rule 007 consultation requirements have been met in relation to the Stoney Nakoda. The Commission is also satisfied that the Stoney Nakoda have had a reasonable opportunity to obtain information about the project that would allow them to determine if they have members actively exercising rights on or near the project lands, even taking into consideration pandemic restrictions. The Commission will therefore not grant the Stoney Nakoda's request for further consultation and a hearing.

24. Notwithstanding the foregoing, the Commission believes that the standing decision in this ruling will help inform the Stoney Nakoda about the kind of information that is relevant to the factual part of the standing test. In light of the COVID-19 pandemic restrictions and the Stoney Nakoda's local state of emergency, the Commission will allow the Stoney Nakoda until **February 17, 2021**, to supplement their statement of intent to participate with any reliable information it discovers about the project lands being used by its members and how those uses may be directly and adversely affected by the Commission's decision on the project application. If such information is filed, the Commission may reconsider its standing decision based on the new information.

25. Because there are no other outstanding concerns regarding the project, the Commission may proceed to a decision on the application if the Stoney Nakoda chooses not to provide additional information or is unable to provide that information by February 17, 2021.

26. Should you have any questions, please contact the undersigned at 403-592-3280 or by email at gary.perkins@auc.ab.ca.

Yours truly,

Gary Perkins
Commission Counsel

Attachment

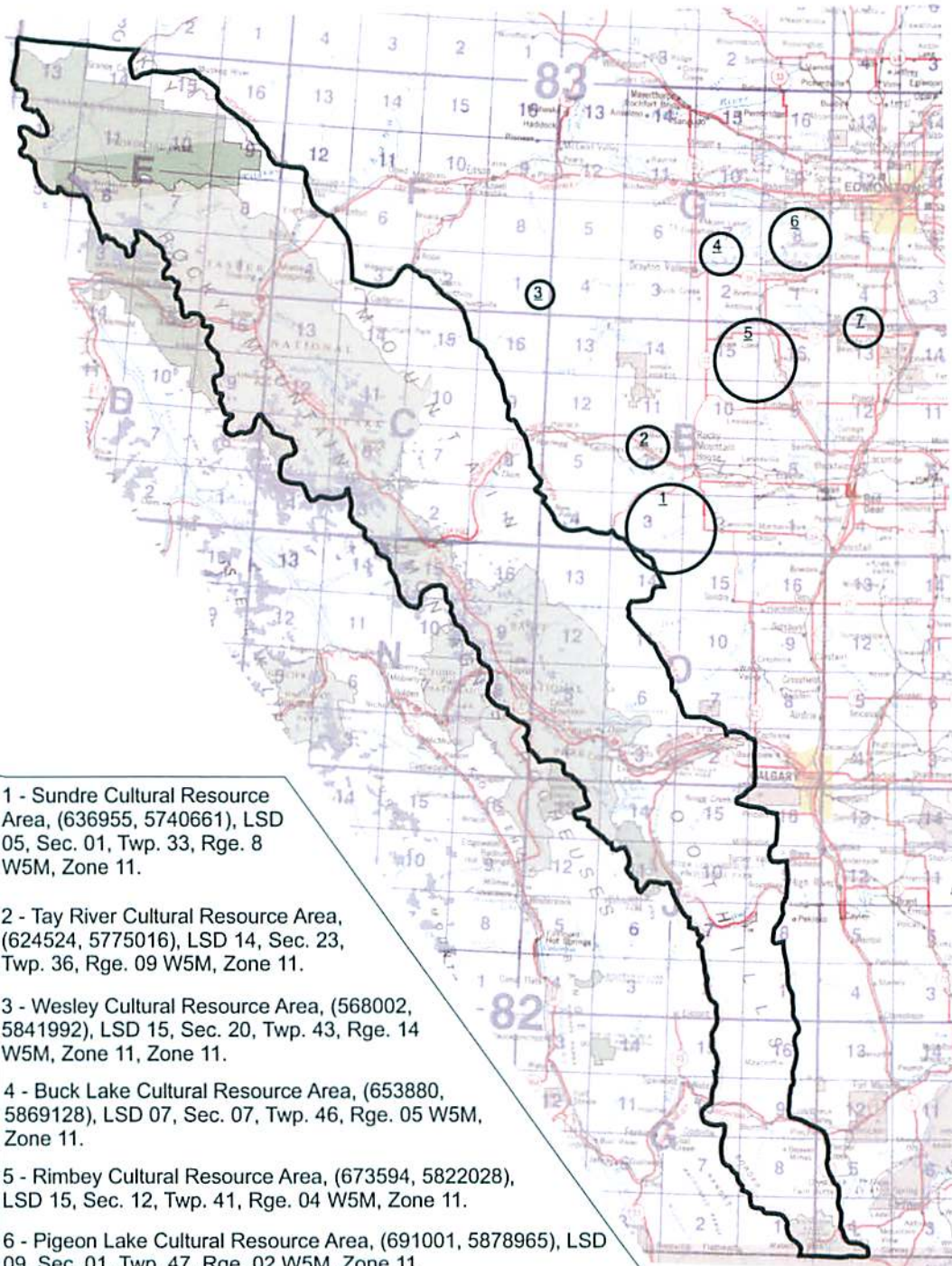
SCHEDULE C



Title: Stoney Nakoda Nations, Aboriginal Title
Location: Central and Southern Alberta

Scale: 1: 1,000,000

Date: March 2013



1 - Sunde Cultural Resource Area, (636955, 5740661), LSD 05, Sec. 01, Twp. 33, Rge. 8 W5M, Zone 11.

2 - Tay River Cultural Resource Area, (624524, 5775016), LSD 14, Sec. 23, Twp. 36, Rge. 09 W5M, Zone 11.

3 - Wesley Cultural Resource Area, (568002, 5841992), LSD 15, Sec. 20, Twp. 43, Rge. 14 W5M, Zone 11, Zone 11.

4 - Buck Lake Cultural Resource Area, (653880, 5869128), LSD 07, Sec. 07, Twp. 46, Rge. 05 W5M, Zone 11.

5 - Rimbey Cultural Resource Area, (673594, 5822028), LSD 15, Sec. 12, Twp. 41, Rge. 04 W5M, Zone 11.

6 - Pigeon Lake Cultural Resource Area, (691001, 5878965), LSD 09, Sec. 01, Twp. 47, Rge. 02 W5M, Zone 11.

7 - Sharphead Cultural Resource Area, (317553, 5835048), LSD 13, Sec. 21, Twp. 42, Rge. 26 W5M, Zone 12.

Note: All points are NAD 27 Datum.

— = Stoney Nakoda Traditional Lands