

March 5, 2021

To: Parties currently registered in Proceeding 26171

AltaLink Management Ltd.
Provost to Edgerton Transmission Development
Proceeding 26171
Applications 26171-A001 to 26171-A005

Ruling on the standing of Métis Nation of Alberta Regions 2 and 3
Ruling on information requests made by Métis Nation of Alberta Regions 2 and 3

1. In this ruling, the Alberta Utilities Commission makes a preliminary determination on the standing of the Métis Nation of Alberta Region 2 (Region 2) and the Métis Nation of Alberta Region 3 (Region 3) to participate in a public hearing in which the Commission will consider applications by AltaLink Management Ltd. for approval to construct and operate the Provost to Edgerton Transmission Development.
2. The Commission also makes a ruling on the information requests made by Region 2 and Region 3 to AltaLink, in light of the Commission's preliminary standing ruling.
3. The Commission has authorized me to communicate its rulings and directions.

Statements of intent to participate

4. Region 2's representative initially filed a statement of intent to participate¹ for which the Commission requested clarification as to what rights and potential impacts were being claimed by whom. In a subsequent filing² that used the Commission's form of statement of intent to participate for Indigenous groups, the representative clarified that Region 2 was filing on behalf of its citizens (i.e., members) who are actively exercising rights recognized and affirmed under Section 35 of the *Constitution Act, 1982* in the area of the proposed project. Region 2 indicated that these rights include the rights to hunt, fish, trap, harvest natural resources for food, and to use the land for social, economic, spiritual and cultural purposes. Region 2 stated that valuable Crown land and areas of habitat available for the exercise of Section 35 rights will be lost if the project proceeds.
5. Region 2 stated that the project is located in the Métis Nation of Alberta (MNA)'s harvesting area 'D,' within which 4,879 of its members were registered and approved to harvest. It indicated that at least 83 of its members who are approved to harvest in area 'D' reside within 100 kilometres of the project area and would be affected. Region 2 also stated that the Crown has failed to meaningfully discharge its consultation obligations in relation to the project.

¹ Exhibit 26171-X0050, System generated PDF.

² Exhibit 26171-X0064, MNA Region 2 additional SIP.

6. In response to the question on the Commission's form of statement of intent to participate for Indigenous groups that asks the filer to identify its land interests within the consultation and/or notification radius identified in Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*, Region 2 listed 52 quarter-sections by legal land description. It stated that all of the parcels were within 1,500 metres of the project area but it did not indicate how any particular parcel was being occupied, accessed or otherwise used by a MNA member.

7. Region 3 also filed a statement of intent to participate³ that used the Commission's form of statement of intent to participate for Indigenous groups. The information it provided was nearly identical to the information filed by Region 2, with the following differences:

- Region 3 stated that at least 10 of its members registered to harvest in area 'D' reside within 100 kilometres of the project, instead of the 83 members identified by Region 2; and
- Region 3 listed 36 quarter sections of land in which it stated that its members have an interest. Generally speaking, these parcels are to the south of the parcels identified in Region 2's statement of intent to participate: in townships 39 to 42, instead of the 52 parcels in townships 42 to 44 that were identified by Region 2.

How the Commission determines standing

8. Persons (including individuals and corporations) who have demonstrated that they have rights that may be directly and adversely affected by the Commission's decision on the applications are legally entitled to participate in the hearing. This permission to participate is referred to as standing.

9. 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]

10. 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 part is legal: a person must demonstrate that the right being asserted is

³ Exhibit 26171-X0063, MNA Region 3 additional SIP.

recognized by law. This could include property rights, constitutional rights or other legally recognized rights, claims or interests. The second part 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.⁴

11. The Court of Appeal of Alberta has stated that for the purposes of the first, legal part of the standing test, a constitutional, legal or an equitable interest is sufficient.⁵

12. The Court of Appeal of Alberta has stated that for the purposes of the second, factual part of the standing test, reliable information must be provided that makes a causal connection between the development or work proposed for the Commission's approval and the legal rights asserted by the person seeking standing. Specifically in relation to the standing of Section 35 rights-holders or traditional land users, the court has established a number of principles.

13. First, the Commission is not required to grant standing when a person merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed for the Commission's approval and the right asserted is necessary. "Hard information" about locations where Section 35 rights-holders are active and are hunting or trapping (if that is the assertion) must be provided to the Commission; "vague and adroitly-worded assertions of rights" is not sufficient.⁶

14. Second, the mere fact that a project is situated within the traditional lands of a rights-bearing group is not sufficient to meet the standing test. The group must provide specific information that shows how the development or work proposed could affect its members' rights.⁷

Ruling on standing of Region 2 and Region 3

15. The Commission is satisfied that the MNA is authorized to represent the interests of its members for the purpose of asserting and defending the collectively held rights of the historical and contemporary Métis communities to which its members belong. To the extent that Region 2 or Region 3 can demonstrate that it has members actively exercising Section 35 rights in the project area, the first, legal part of the standing test would be met.

16. The Commission is not, however, satisfied that the information provided by Region 2 or Region 3 meets the second, factual part of the standing test. Neither of those groups has provided "hard information" that demonstrates how its members' Section 35 rights may be directly and adversely affected. For the test to be met, the Commission must be able to conclude that the exercise of a particular right or rights at a certain location or locations within or near to the project lands (or on other lands to which the project lands provide a right of access) could be adversely affected if the project proceeds.

⁴ *Cheyne v Alberta (Utilities Commission)*, [2009 ABCA 94](#); *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, [2005 ABCA 68](#) [*Dene Tha'*].

⁵ *Dene Tha'*, paragraph 11.

⁶ *Dene Tha'*.

⁷ *O'Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348 [*O'Chiese*].

17. The MNA's submissions do not identify a specific location where particular rights are being exercised; instead, the Commission is left to conclude, or is invited to conclude that all Section 35 rights are being exercised throughout all of the lands listed by the MNA at all times, and that the project may have an impact on all of that activity. The Commission considers that the lack of location-specific details is akin to the situation described in the *O'Chiese* decision, wherein the First Nation provided no specific information about where or how its rights might be affected but instead asserted that any project within its traditional territory would adversely affect its rights.

18. The Commission is therefore not prepared to grant Region 2 and Region 3 standing in this proceeding at this time. The Commission will, however, permit Region 2 and Region 3 to supplement their respective statements of intent to participate with any additional information that constitutes "hard information" about what Section 35 rights are being actively exercised by its members in a certain location or locations within or near to the project lands, and how that activity may be affected by the proposed transmission development.

19. Any additional information to be filed pursuant to the foregoing ruling must be filed with the Commission by **March 19, 2021**. If additional information is filed, the Commission will review the information and, if necessary, reconsider its ruling on the standing of Region 2 or Region 3. If either Region 2 or Region 3 does not file additional information, the Commission will not reconsider its standing ruling and the preliminary ruling herein will become final.

Region 2 and Region 3 information requests to AltaLink

20. The Commission has reviewed the information requests made to AltaLink by Region 2 and Region 3. The Commission considers that the information requested is detailed in nature and would require AltaLink to devote considerable resources to the task of developing and filing correspondingly detailed responses. The Commission notes that the information requested by Region 2 and Region 3 includes details of the methodology AltaLink used to assess impacts on MNA members and their rights, and about AltaLink's assessment of those impacts, with additional questions about Crown consultation.

21. Having regard for the Commission's finding that Region 2 and Region 3 have not met the factual part of the standing test, the Commission is concerned that the MNA's information requests ask AltaLink to explain how it assessed impacts on MNA members when the MNA itself has not provided basic information about locations where its members are exercising Section 35 rights or conducting traditional land activities that might assist AltaLink to respond. The Commission considers that this kind of inquiry does not serve to promote an efficient process. As discussed in the standing ruling above, it is the burden of Region 2 and Region 3, respectively, to provide "hard information" about what Section 35 rights are being actively exercised by its members in a certain location or locations within or near to the project lands, and how that activity may be affected by the proposed transmission development.

22. The Commission has therefore determined that AltaLink is not required to respond at this time to the information requests made to it by Region 2 and Region 3. If either Region 2 or Region 3 files additional information that results in the Commission reconsidering that group's

standing in this proceeding, the Commission will also reconsider the matter of whether AltaLink will be required to respond to that group's information requests.

23. 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