



Members of the Concerned Cypress County Owners Group

**Decision on Preliminary Question
Application for Review of Decision 27240-D01-2023
Buffalo Trail Wind Power Project**

April 21, 2023

Alberta Utilities Commission

Decision 28057-D01-2023

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Proceeding 28057

Application 28057-A001

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1 Decision

1. In this decision, the Alberta Utilities Commission denies an application by certain members of the Concerned Cypress County Owners group to review and vary Commission Decision 27240-D01-2023.

2 Introduction and background

2. Decision 27240-D01-2023 (the Decision)¹ related to applications from ENGIE Development Canada GP Inc. to construct and operate a 400-megawatt wind power plant designated as the Buffalo Trail Wind Power Project, the Buffalo Trail North 453S Substation and the Buffalo Trail South Substation. The Commission approved the applications with conditions.

3. There were three submissions from groups of review applicants. These groups included members of the Concerned Cypress County Owners group (CCCOG), an intervener group in the original proceeding that opposed the application. The submissions were:

- Exhibit 28057-X0003, submitted by a group that will be referred to as the Hollstein Review Applicants.
- Exhibit 28057-X0004, submitted by a group that will be referred to as the Dirk Review Applicants.
- Exhibit 28057-X0005, submitted by Paul and Twyla von Huene.

4. The Commission designated the review application as Proceeding 28057. ENGIE filed a statement of intent to participate, in which it outlined its opposition to the review and variance application, and proposed further process. The Commission determined that it required no additional information to reach a decision, and that it considered the record to be closed.

5. In this decision, the members of the Commission panel who authored the original decision will be referred to as the “hearing panel,” and the members of the Commission panel considering the review application will be referred to as the “review panel.” The proceeding the hearing panel adjudicated will be referred to as the “original proceeding” and the proceeding the review panel adjudicated will be referred to as the “review proceeding.” The review panel has

¹ Decision 27240-D01-2023: ENGIE Development Canada GP Inc. Buffalo Trail Wind Power Project, Proceeding 27240, February 8, 2023.

reviewed the Decision and relevant materials comprising the record of this proceeding and of Proceeding 27240.

3 The Commission's review process

6. In this section of the decision, the Commission summarizes the principles applicable to a review application. Section 10 of the *Alberta Utilities Commission Act* authorizes the Commission to review its decisions, and to confirm, rescind, or vary the decision after a review. Section 10 also provides the Commission may make rules respecting these reviews, which it had done through Rule 016: *Review of Commission Decisions*.

7. The review process has two stages. In the first stage, a review panel decides if there are grounds to review the original decision (the preliminary question). If the review panel decides to review the decision, it moves to the second stage where it decides whether to confirm, vary, or rescind the original decision (the variance question). In this decision, the review panel has decided the preliminary question.

8. Section 3 of Rule 016 provides that a person who is directly and adversely affected by a decision may file an application for review of that decision. Section 3 also states that a person who was not a party in the original proceeding must get leave (permission) from the Commission to file an application for review.

9. Section 4 of Rule 016 sets out the requirements of an application for review. Among other requirements, the review applicants must: describe how the review applicant's rights are, or may be directly and adversely affected by the decision, and set out the grounds for the review application, as described in Section 5 of Rule 016.

10. The Commission may grant an application for a review of a decision, if it determines a review applicant has demonstrated one of the grounds set out in Section 5 of Rule 016 is met.

11. The Commission has previously considered the proper role of a review panel, and concluded it should apply the following principles to its consideration of the review applications before it:

- First, decisions of the Commission are intended to be final; the Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
- Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
- Third, the 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 to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable

deference, absent an obvious or palpable error.²

12. These principles have been endorsed by the Commission in subsequent decisions and have been applied by the review panel in its consideration of the relevant evidence and argument.

4 Review panel findings

13. In this section the Commission has addressed the submissions of the parties and set out its findings regarding the same. For the reasons set out in this section, the Commission has determined that the review applicants have not met the requirements set out in Rule 016 for a review of the Decision. Specifically, the Commission has determined:

- (a) T. and P. von Huene require leave to file an application for a review of the Decision, and leave is denied in this case.
- (b) Some of the submissions of the other review applicants improperly ask the review panel to reweigh evidence, or do not identify an error in respect of the Decision.
- (c) Some of the submissions of the other review applicants do not demonstrate that an error of fact, or mixed fact and law occurred.
- (d) Some of the submissions of the review applicants appear to allege the existence of previously unavailable facts material to the Decision, but fail to demonstrate the review applicants, exercising reasonable diligence, could not have discovered these facts prior to the Decision.

4.1 Leave to file a review application

14. Because T. and P. von Huene were not parties in the original proceeding, they require leave from the Commission to file an application for review. For the reasons set out below the Commission denies that permission.

15. The Commission limits participation in review proceedings to persons who are directly and adversely affected by the decision that is the subject of the review application. This approach is consistent with the Commission's test for participation in an original proceeding and is based on Section 9 of the *Alberta Utilities Commission Act*. Section 9 directs the Commission to hold a hearing on an application when it appears to it that its decision may directly and adversely affect the rights of a person. A person who satisfies this test is said to have "standing."

16. If the Commission has previously decided that a person had standing in the original proceeding, that person will generally meet the test to file a related review application. However, when deciding whether to allow a person that did not participate in the original proceeding to file a review application, the Commission first considers if the person has demonstrated that he or she is directly and adversely affected by the decision. If a review applicant demonstrates a direct

² Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Decision on Request for Review and Variance of Decision 2011-436 Heartland Transmission Project, Proceeding 1592, Applications 1607924-1, 1607942-1, 1607994-1, 1608030-1, 1608033-1, May 14, 2012, paragraph 31.

and adverse effect arising from the original decision, the Commission will then consider if it should exercise its discretion to allow the person to proceed with a review application. If a review applicant fails to demonstrate a direct and adverse effect arising from the original decision, the Commission will deny leave.

17. Neither T. nor P. von Huene were granted standing in the original proceeding. T. von Huene asked for standing but was denied; P. von Huene did not ask for standing.³ Further, T. and P. von Huene did not otherwise indicate how their rights are, or may be, directly and adversely affected by the Decision in their review application materials. Because T. and P. von Huene have not demonstrated that they are directly and adversely affected by the decision, the review panel denies their request for leave to file a review application. As only T. and P. von Huene signed the review application in Exhibit 28057-X0005, the review panel did not consider the information in this document after applying the leave test.

4.2 The weighing of evidence, and issues that do not allege an error

18. As explained above, decisions of the Commission are intended to be final. The Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.⁴ In substance, Rule 016 requires the review applicants to identify a specific error in the original decision, and does not allow a review applicant to reargue an issue decided in the original decision unless a specific error is identified. The review panel finds that some of the submissions or grounds in the review applications are out of scope of Section 5 of Rule 016, because they do not demonstrate a specific error occurred.

19. First, the review applicants alleged that the hearing panel improperly weighed evidence.⁵ The Commission has consistently held that a 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 to various pieces of evidence.⁶ Accordingly, the review applicants' requests for the review panel to review certain of the hearing panel's findings on the basis that the hearing panel improperly weighed evidence is denied.

20. Second, some of the review applicant submissions did not identify an error regarding the Commission's decision, and instead express a disagreement with the outcome. For example, several of the review applicants take issue with the fact that none of the turbine locations that were objected to by landowners, were modified in the decision. The Hollstein Review Applicants suggest the mitigations proposed may not be complied with. The Hollstein Review Applicants

³ Exhibit 27240-X0077, AUC ruling on standing, paragraphs 5-9.

⁴ Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc. Decision on Request for Review and Variance of AUC Decision 2011-436 Heartland Transmission Project, Proceeding 1592, May 14, 2012, paragraph 31.

⁵ For example, the review applicants state "we are in disagreement with the decision," "we disagree with the decision...primarily because of the negative environmental impact," "health issues were ...not given enough weight," "there has been a lack of regard for the effects [of turbines] on nearby landowners", "cumulative effects need to be more adequately addressed" and "It is because of our deep concern for the environment we respectfully ask that you reconsider your decision to allow further construction of additional wind turbines in such a condensed area."

⁶ See, for example, Decision 26757-D01-2021: FortisAlberta Inc., Decision on Application for Review and Variance of Decision 25916-D01-2021 2022 Phase II Distribution Tariff Application, Proceeding 26757, December 9, 2021, paragraph 24.

also submit they should be provided guarantees that there will be no significant damage to water. The Dirk Review Applicants submit the Commission should impose different decommissioning conditions. The scope of a review application does not include rearguing outcomes such as this, unless the review applicants demonstrate an error occurred in the reasoning of the hearing panel. For this reason, the review applicants' request for the review panel to revisit these issues is denied.

4.3 Section 5(1)(a) grounds – error of fact, or mixed fact and law where the legal principle is not readily extricable

21. The review applicants did not identify a specific section of Section 5 of Rule 016 as grounds for review. However, based on their submissions, the review panel understands that the review applicants are relying on Section 5(1)(a) of Rule 016. That section states that the Commission may grant an application, in whole or in part, where it determines that the review applicant has demonstrated “[t]he Commission made an error of fact, or mixed fact and law where the legal principle is not readily extricable, which is material to the decision and exists on a balance of probabilities.”

22. The Commission does not consider errors of law in review applications. If a person thinks the Commission made an error of law in a decision, the person may be able to obtain permission to appeal that decision from the Alberta Court of Appeal.⁷

23. The Commission has previously found that the onus of demonstrating an issue is an error of fact, or mixed fact and law, rests with the review applicant.⁸

24. For this reason, in this section of the decision the Commission first addresses issues raised by the review applicants that allege errors of law outside of the scope of this proceeding, and subsequently addresses the issues raised by the review applicants that allege errors of fact, or mixed fact and law.

4.3.1 Errors of law

25. Errors of law relate to legal standards. Errors of fact relate to factual findings and inferences drawn based on the evidence. Errors of mixed fact and law relate to the application of a legal standard to a set of facts, and exist on a spectrum.⁹

26. The Dirk Review Applicants submit that “allowing further construction of these massive turbines seems in conflict with many points listed in the purpose section of Alberta’s existing *Environmental Protection and Enhancement Act*.”¹⁰ This submission raises a question of law, as it raises an issue regarding the interpretation and applicability of a legislative provision. As noted above, no review is available on errors of law under Rule 016. Accordingly, the review panel finds this issue is outside the scope of Section 5 of Rule 016.

⁷ *Alberta Utilities Commission Act*, Section 29.

⁸ Decision 26757-D01-2021: FortisAlberta Inc., Decision on Application for Review and Variance of Decision 25916-D01-2021 2022 Phase II Distribution Tariff Application, Proceeding 26757, December 9, 2021, paragraph 12.

⁹ *Housen v Nikolaisen*, 2002 SCC 33 at paragraphs 22-25, 36.

¹⁰ Exhibit 28057-X0004, Request for review.

4.3.2 Errors of fact, or mixed fact and law

27. The remainder of the issues raised by the review applicants related to alleged errors of fact, or mixed fact and law. However, for the reasons explained in this section, the Commission is not satisfied the review applicants have met their onus of demonstrating that an error of fact, or mixed fact and law, occurred on a balance of probabilities.

28. The Hollstein Review Applicants submitted health issues were not given enough weight, “just because an expert was not available to validate the nonparticipating land owners concerns.” As explained above, the role of the review panel is not to reweight evidence. However, the review panel understands the Hollstein Review Applicants are taking issue with the Commission’s application of the legal principles of expert evidence to the evidence before the hearing panel.

29. Similar to a court, the evidence considered by the Commission in its proceedings can be broadly divided into two categories, ordinary evidence and expert evidence. Ordinary evidence is testimony given by a witness about facts: for example, what a witness saw, heard, smelled or touched. Expert evidence is opinion evidence on a scientific or technical matter provided by a person with specialized knowledge, experience or training in that field. Where the nature of an issue is of a scientific or technical nature, the Commission cannot accept opinion evidence from witnesses who are not experts in that field.

30. Expert witnesses are allowed to provide opinion evidence on issues or matters within their area of expertise. A person may become an expert in a subject matter through education, training, experience or a combination thereof. In *R. v. Howard*, the Supreme Court of Canada explained the role of an expert witness as follows: “Experts assist the trier of fact in reaching a conclusion by applying a particular scientific skill not shared by the judge or the jury to a set of facts and then by expressing an opinion as to what conclusions may be drawn as a result.”¹¹

31. In the original proceeding, members of the CCCOG expressed concerns about health impacts to themselves, their families, and their animals but filed no expert evidence in support of those concerns.¹² ENGIE, on the other hand filed expert evidence that the project was unlikely to produce adverse health effects. In the Decision, the hearing panel accepted that expert evidence. Accordingly, while the review panel appreciates the health concerns raised by the review applicants, the hearing panel found there was insufficient evidence of health impacts, based on the expert evidence before it. The review panel finds the Hollstein Review Applicants have not discharged their onus of demonstrating an error in this regard.

32. The Hollstein Review Applicants also submitted the Commission erred in relation to its assessment of the impacts of the project to birds, and that the mitigations proposed are inadequate. For example, the Hollstein Review Applicants submitted further bird surveys should be conducted during the summer when young birds may be vulnerable. The hearing panel considered the competing expert evidence regarding the impacts to birds in the Decision, and

¹¹ *R. v Howard*, [1989] 1 SCR 1337.

¹² Decision 27240-D01-2023: ENGIE Development Canada GP Inc. Buffalo Trail Wind Power Project, Proceeding 27240, February 8, 2023, paragraphs 105-113.

concluded the bird surveys conducted were consistent with best management practices, and that further bird surveys were not necessary as annual post-construction monitoring survey reports were required.¹³ The Decision was consistent with the evidence before the hearing panel, including the applicable environmental guidelines. The review panel is not satisfied the Hollstein Review Applicants have met their onus of demonstrating an error occurred in this regard.

33. The Hollstein Review Applicants also submitted that the hearing panel erred by failing to consider the distinction between property value impacts to properties hosting turbines, and those that were not hosting turbines. The hearing panel considered the competing expert evidence in the Decision on the topic of property value impacts, including the report filed by Brian Gettel on behalf of CCCOG, that directly opined on the impact of the project to the review applicants' property value.¹⁴ The review panel is not satisfied that the expert retained by the Hollstein Review Applicants was unaware of this distinction. The review panel is therefore not satisfied the Hollstein Review Applicants have met their onus of demonstrating an error occurred in this regard.

34. Finally, the Hollstein Review Applicants submitted that the Commission erred in finding that viewsapes would not be impacted. The hearing panel found that visual impacts would occur, but that in light of the mitigations proposed by ENGIE, "the negative effects resulting from visual impacts of the project are outweighed by the positive effects of the project as a whole."¹⁵ Thus, the hearing panel did not find there was no impact, but that the project was in the public interest, despite these impacts. Like the hearing panel, the review panel appreciates the legitimate concerns of the review applicants.¹⁶ However, the hearing panel engaged in a balancing exercise, and found the project was in the public interest despite these impacts, and the review panel is not satisfied the hearing panel erred in reaching this decision.

4.4 Section 5(1)(b) grounds

35. Finally, the review applicants raise several new issues that were not raised before the hearing panel. Specifically, the Hollstein Review Applicants submitted that wind turbine construction will negatively impact insurance costs, that the specific model of turbines to be constructed has a history of malfunctions, and that the Commission should consider impacts to what is described as the Central Alberta Flyway.

36. Section 5(1)(b) provides the Commission may grant a review of a decision, where it determines the review applicant has demonstrated:

- (a) There are previously unavailable facts material to the decision, which:

¹³ Decision 27240-D01-2023: ENGIE Development Canada GP Inc. Buffalo Trail Wind Power Project, Proceeding 27240, February 8, 2023, paragraphs 197, 200.

¹⁴ Decision 27240-D01-2023: ENGIE Development Canada GP Inc. Buffalo Trail Wind Power Project, Proceeding 27240, February 8, 2023, paragraphs 78-92.

¹⁵ Decision 27240-D01-2023: ENGIE Development Canada GP Inc. Buffalo Trail Wind Power Project, Proceeding 27240, February 8, 2023, paragraph 129.

¹⁶ Decision 27240-D01-2023: ENGIE Development Canada GP Inc. Buffalo Trail Wind Power Project, Proceeding 27240, February 8, 2023, paragraphs 127-129.

- (i) existed before the decision was issued,
- (ii) were not placed in evidence or identified in the original proceeding, and
- (iii) the review applicant, exercising reasonable diligence, could not have discovered at the time

37. The Commission finds that the Hollstein Review Applicants have not demonstrated that these are facts that could not have been discovered by the review applicants prior to the hearing through the exercise of reasonable diligence.

5 Decision

38. For the foregoing reasons, the Commission finds that the criteria for granting a review of the Decision under Section 5 of Rule 016 have not been met in this case. The application for review is dismissed.

Dated on April 21, 2023.

Alberta Utilities Commission

(original signed by)

Carolyn Dahl Rees
Chair

(original signed by)

Douglas A. Larder, KC
Vice-Chair