



Wheatland Industries Ltd.

**Decision on Threshold Issue
Application for Review of Decision 26395-D01-2021
Kirkcaldy Solar Energy Centre**

May 5, 2023

Alberta Utilities Commission

Decision 28015-D01-2023

Wheatland Industries Ltd.

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Proceeding 28015

Application 28015-A001

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Eau Claire Tower

1400, 600 Third Avenue S.W.

Calgary, Alberta T2P 0G5

Telephone: 310-4AUC (310-4282) in Alberta

1-833-511-4AUC (1-833-511-4282) outside Alberta

Email: info@auc.ab.ca

Website: www.auc.ab.ca

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Wheatland Industries Ltd.
Decision on Threshold Issue

Application for Review of Decision 26395-D01-2021
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Proceeding 28015

1 Decision summary

1. In this decision, the Alberta Utilities Commission has determined the threshold issue and denies leave to Wheatland Industries Ltd. to proceed with its application to review and vary Commission Decision 26395-D01-2021.¹

2 Background

2. In Decision 26395-D01-2021 (the Decision), issued on November 12, 2021, the Commission approved the construction and operation of the Kirkcaldy Solar Energy Centre, a 350-megawatt solar power plant, and the Kirkcaldy 1009S Substation (collectively, the Kirkcaldy Solar Project). Wheatland Industries Ltd. did not participate in that proceeding.

3. In emails to the AUC dated December 19, 2022 and January 3, 2023, (the correspondence) and in an application under Section 17 of the *Code of Conduct Regulation* registered on January 12, 2023, Wheatland Industries expressed concerns regarding the Kirkcaldy Solar Project, the AUC's process to consider that project, and a related, but as of yet unfiled, transmission application to connect the project to the Alberta Interconnected Electric System (AIES).

4. On January 13, 2023, JP Mousseau, General Counsel for the AUC, issued a letter in response to the correspondence and the application.² The letter explained that, in circumstances like those outlined in Wheatland Industries' communications, it has the option of asking the Commission to review and vary its approval of the Kirkcaldy Solar Project under Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The letter detailed the information required from Wheatland Industries if it intended to pursue a review application and outlined the Commission's review process.

5. The letter also advised Wheatland Industries that Commission decisions may also be appealed to the Alberta Court of Appeal, that there is a 30-day time limit after a decision is issued for asking the Court for permission to appeal, and that the Court has the authority to extend that time upon the request of an applicant.

6. On February 10, 2023, Wheatland Industries filed an application seeking review of the Decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016 (the review application). The Commission designated the review application as Proceeding 28015.

¹ Decision 26395-D01-2021: Kirkcaldy Solar Energy Centre, Proceeding 26395, November 12, 2021.

² Exhibit 28015-X0005, AUC letter – Application 27947-A001 and concerns related to the Kirkcaldy Solar Project, January 13, 2023, PDF pages 1-2.

The Commission determined that it required no additional information to reach a decision on the review application and confirmed in a ruling that it considered the record to be closed on March 8, 2023.³

7. The Commission notes that Wheatland Industries is listed as the applicant in the application form⁴ and is registered as a party in Proceeding 28015, while the application⁵ is described as being made by “Stakeholders Collective, Vulcan County, Division 3”. No other members of the Stakeholders Collective are identified. Based on the record, the Commission finds that there is one applicant, Wheatland Industries Ltd., with John Sands identified as its primary contact.

8. In this decision, the applicant is referred to as “Wheatland Industries” or “the review applicant.” The Commission panel who authored the Decision is referred to as the “hearing panel,” and the Commission panel considering the review application is referred to as the “review panel.”

9. In reaching its determinations, the review panel has reviewed the pertinent portions of the Decision and relevant materials comprising the record of this proceeding and of Proceeding 26395. Lack of reference to any matter addressed in the proceeding records does not mean that it was not considered.

3 The Commission’s review process

10. The Commission’s authority to review its own decisions is discretionary and is found in Section 10 of the *Alberta Utilities Commission Act*. Rule 016 sets out the process for considering an application for review.

11. 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 the decision within 30 days of the issuance of the decision. Section 3(3) provides that the Commission may authorize that an application for review of a decision be filed outside of the 30-day period.⁶ Section 3(2) states that a person who was not a party to the proceeding that gave rise to the decision must obtain leave (permission) of the Commission before filing an application for review. If the threshold requirements of Section 3 are met, the Commission will proceed with considering the merits of the review application.⁷

12. Wheatland Industries was not a party to Proceeding 26395 and its application for review was filed approximately 15 months after the issuance of the Decision. It did not request leave to file its application for review, nor did it seek the Commission’s authorization to file its

³ Exhibit 28015-X0011, Ruling on request to reverse proceeding restructuring and application closure letter, paragraph 15.

⁴ Exhibit 28015-X0001, Application form.

⁵ Exhibit 28015-X0003, AUC Review Proceeding 26395.

⁶ Section 23(2) of the *Alberta Utilities Commission Act* also provides the Commission the discretion to authorize a filing deadline outside of the 30-day period.

⁷ If a review application is accepted, 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 the current circumstances, the review application has not advanced to the first stage.

application outside of the 30-day period. Nevertheless, as a threshold issue, the review panel must determine whether it will grant Wheatland Industries leave to proceed with its application.

13. In this decision, the review panel has determined that threshold issue. The review panel denies Wheatland Industries leave to proceed with its application on the basis that it has not demonstrated that it is directly and adversely affected by the Decision. For that reason, the review panel did not advance to considering the merits of the review application, or whether to grant an exception to the 30-day time limit.

14. As described below, the review panel also considered whether to review the Decision on its own motion, notwithstanding the finding that Wheatland Industries does not have leave to proceed with its review application. The review panel has concluded that no extraordinary circumstances exist that would warrant this exercise of discretion.

4 Commission findings

4.1 Section 3(1) of Rule 016: Review of Commission Decisions – standing

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(2) of the *Alberta Utilities Commission Act*. Section 9(2) directs the Commission to hold a hearing on an application when it appears to the Commission 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. The meaning of the phrase, “directly and adversely affected”, 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 application of a two-part test. The first part of the test is legal: a person must assert a right that is recognized by law. This could include a property right, constitutional right or other legally recognized right, claim or interest. The second part of the test is factual: a person must provide enough information to show that a decision has the potential to directly and adversely affect the person’s right, claim or interest.⁸

17. For a right to be “directly” affected, there must be some degree of location or connection between the subject of the Commission’s decision and the right asserted.⁹ Persons seeking standing must demonstrate the degree of connection between the rights asserted and the identified effects.¹⁰ When considering the location or connection, the Commission looks at factors such as residence and the frequency and duration of the applicant’s use of the area near

⁸ *Cheyne v Alberta (Utilities Commission)*, 2009 ABCA 94; *Dene Tha’ First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [*Dene Tha’*].

⁹ *Dene Tha’*.

¹⁰ 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.

the proposed site.¹¹ Further, the effects associated with a decision of the Commission must be personal rather than general and must have harmful or unfavourable consequences.¹²

18. 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.

19. If a person did not participate in the original proceeding, the review panel must determine in the review proceeding whether that person has demonstrated that they are directly and adversely affected by the decision. If so, the Commission may grant leave to allow the person to proceed with a review application, notwithstanding that they did not participate in the original proceeding. If, however, the person fails to demonstrate a direct and adverse effect arising from the original decision, they are not entitled to proceed with a review application.

20. Wheatland Industries did not seek to participate in the original proceeding and therefore no determination was made on its standing. In its application for review, Wheatland Industries asserts that its affected rights are (i) “the right to reject unprofessional and deceitful manipulation of the public trust anywhere and at anytime [*sic*] it becomes apparent” and (ii) the “right to a fully disclosed, public proceeding”. Wheatland Industries further describes that the latter asserted right was directly and adversely affected because (i) of “unacceptable deviation and omission of obligatory process” in the original proceeding, (ii) the original proceeding “in no way offered candid disclosure of critical project knowledge nor revealed or adequately portrayed the horrendous adverse consequences of the upsizing of the project”, and (iii) the original proceeding “was not executed in good faith”.¹³

21. Wheatland Industries has not asserted a right recognized by law within the meaning of Section 9(2) of the *Alberta Utilities Commission Act* such that the right, claim or interest is directly and adversely affected by the Decision. The rights asserted by Wheatland Industries are procedural in nature. Pursuant to Section 9(2) of the *Alberta Utilities Commission Act*, procedural rights are only triggered if a person has a substantive right that is directly and adversely affected by the Decision. Wheatland Industries has asserted no such substantive right. Therefore, the review panel has determined that the review applicant has not demonstrated that it meets the test for standing in Section 3(1) of Rule 016.

22. The review panel therefore finds that Wheatland Industries is not entitled to proceed with its review application and denies leave in accordance with Section 3(2) of Rule 016.

4.2 Section 2 of Rule 016: Review of Commission Decisions – Commission review of a decision on its own motion

23. Notwithstanding the finding that Wheatland Industries does not have leave to bring a review application, Section 2 of Rule 016 provides that “the Commission may review a decision, in whole or in part, on its own motion at any time for any reason”. In determining whether to exercise its discretion under Section 2, the Commission maintains the previously stated view

¹¹ *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297.

¹² 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.

¹³ Exhibit 28015-X0003, AUC Review Proceeding 26395, Procedural filing – motion, February 10, 2023.

that, given the important principle of finality in administrative decision-making, it should only exercise that discretion in exceptional or extraordinary circumstances.¹⁴

24. In this case, the Decision was to approve the construction and operation of the Kirkcaldy Solar Project, which consists of a 350-megawatt solar power plant, and the Kirkcaldy 1009S Substation. There was no application for a transmission line to connect the Kirkcaldy Solar Project to the AIES before the hearing panel in Proceeding 26395 and therefore such a transmission line was neither considered nor approved in the Decision.

25. The review panel has considered whether Wheatland Industries has identified any basis that constitutes the exceptional or extraordinary circumstances necessary to justify the Commission's exercise of discretion under Section 2 of Rule 016 to review the Decision on its own motion. The review panel has determined that, particularly in the absence of any asserted adverse effects that are specific to the construction and operation of the power plant and substation, Wheatland Industries has not done so.

5 Decision

26. For the reasons set out above, the review panel has determined that Wheatland Industries does not meet the test for standing in Rule 016 and denies Wheatland Industries leave to proceed with its application to review and vary Decision 26395-D01-2021.

6 Final comments

27. While not considered in the determination of this decision, the review panel notes that Wheatland Industries expresses concerns regarding the AUC's process to consider the Kirkcaldy Solar Project. Assertions of procedural unfairness or lack of due process constitute questions of law,¹⁵ which are not subject to review under Rule 016. An appeal from a decision of the Commission on a question of law properly lies with the Court of Appeal.¹⁶

¹⁴ See e.g. Decision 27922-D01-2023: EPCOR Distribution & Transmission Inc., Decision on Preliminary Question, Application for Review of Decision 27653-D01-2022, Proceeding 27922, February 23, 2023, paragraph 20 citing Decision 23479-D01-2018: ENMAX Power Corporation, Request for Leave to File an Application for Review of Decision 20414-D01-2016 (Errata), Proceeding 23479, June 20, 2018, paragraph 30.

¹⁵ See e.g. *ENMAX Power Corporation v Alberta Utilities Commission*, 2021 ABCA 347, paragraph 22; *Milner Power Inc v Alberta Utilities Commission*, 2019 ABCA 127, paragraph 16.

¹⁶ *Alberta Utilities Commission Act*, SA 2007, chapter A-37.2, Section 29(1).

28. While similarly not considered in the determination of this decision, the review panel further notes that Wheatland Industries expresses concerns regarding the as of yet unfiled transmission line application to connect the Kirkcaldy Solar Project to the AIES. Should a transmission line application be filed in the future, the Commission will initiate a proceeding to conduct detailed review of the proposed transmission line. Wheatland Industries may file a statement of intent to participate expressing concerns about the transmission line at that time.

Dated on May 5, 2023.

Alberta Utilities Commission

(original signed by)

Kristi Sebalj
Vice-Chair