



Anita Jenkins

**Decision on Preliminary Question
Application for Review of Decision 27561-D01-2023
Forty Mile Wind Power Project Amendments**

August 14, 2023

Alberta Utilities Commission

Decision 28311-D01-2023

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1 Decision summary

1. In this decision, the Alberta Utilities Commission denies an application by Anita Jenkins to review and vary Commission Decision 27561-D01-2023 (the Decision).¹

2 Background

2. The Decision related to applications from RES Forty Mile Wind GP Corp. (RES) to amend, construct and operate a wind power plant designated as the Forty Mile Wind Power Project and the Forty Mile 516S Substation, located in the Bow Island area (the project). The applications proposed amendments in relation to the approvals granted in Decision 22966-D01-2018,² (the Original Decision). An oral hearing for the applications took place from February 13 to 16, 2023. The Commission partially approved the applications with conditions, and directed further process.

3. Anita Jenkins was an intervener in that proceeding. A. Jenkins filed her application to review and vary the Decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The Commission designated the review application as Proceeding 28311.

4. In her review application, A. Jenkins asserted that new information has arisen and become available, and that this new information changed circumstances material to the decision. Specifically, A. Jenkins raises two sources of information:

(a) Decision 27486-D01-2023, issued on April 20, 2023.³

(b) Impacts to bats and a Committee on the Status of Endangered Wildlife in Canada (COSEWIC) report, dated May 10, 2023, (COSEWIC report).

5. A. Jenkins further alleged that the project did not adhere to regulatory requirements as RES did not provide an updated Alberta Environment and Protected Areas (AEPA)⁴ renewable energy referral report with respect to the amendment applications.

¹ Decision 27561-D01-2023: RES Forty Mile Wind GP Corp., Forty Mile Wind Power Project Amendments, Proceeding 27561, June 9, 2023.

² Decision 22966-D01-2018: BHEC-RES AB Renewables GP Corp., Forty Mile Wind Power Project, Proceeding 22966, April 30, 2018.

³ Decision 27486-D01-2023: Foothills Solar GP Inc., Foothills Solar Project, Proceeding 27486, April 20, 2023.

⁴ On October 24, 2022, the Ministry of Environment and Parks (AEP) was renamed the Ministry of Environment and Protected Areas.

6. The Commission issued a filing announcement for the review application and, by letter dated July 14, 2023, established a process schedule for the proceeding. On July 21, 2023, RES filed a statement of intent to participate, and a response. On July 27, 2023, A. Jenkins filed a reply to RES's response. The Commission considers the record for this proceeding to have closed on July 27, 2023.

7. In this decision, the members of the Commission panel who authored the 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."

8. In reaching its determinations, the review panel has reviewed the pertinent portions of the Decision, and the Original Decision, and relevant materials comprising the record of this proceeding and of proceedings 27561 and 22966.

3 The Commission's review process

9. 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.

10. 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.

11. 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. In her review application, A. Jenkins relied on subsection 5(1)(c), that there are changed circumstances material to the Decision which occurred since its issuance. A. Jenkins also cited an alleged failure of the project to adhere to regulatory requirements as a ground for review.

12. The Commission has previously considered the proper role of a review panel, and concluded it should apply the following principles to its consideration of 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.⁵

13. 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

14. For the reasons explained below, the review panel has determined that A. Jenkins has not demonstrated that any of the grounds for review set out in subsection 5(1) have been met.

Specifically:

- (a) the issuance of an unrelated Commission decision does not provide a ground for review of the Decision
- (b) as described in the Decision, RES was not required to submit an updated AEPA renewable energy referral report, and the absence of an updated renewable energy referral report does not support a ground for review of the Decision
- (c) the COSEWIC report does not form the basis of a ground for review of the Decision

4.1 Precedential value of Decision 27486-D01-2023

15. A. Jenkins submitted that Decision 27486-D01-2023 changed circumstances material to the Decision as it set a precedent and is relevant to the Decision.

16. The Commission is not bound by its previous decisions and should consider each application on its own unique facts; a decision in a prior proceeding does not create an entitlement to the same result in subsequent proceedings.⁶ The issuance of Decision 27486-D01-2023 does not set a precedent, is not material to the Decision, and does not provide a ground for review of the Decision.

17. Further, the review panel notes that the circumstances in Decision 27486-D01-2023 can be distinguished from those of the Decision. In Decision 27486-D01-2023 the Commission denied applications to construct and operate a solar power plant, and a substation. The Commission found that approval of the applications was not in the public interest, based on the specific evidence and circumstances before it – evidence and circumstances that are very different from those that were before the hearing panel in the Decision.

⁵ 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, May 14, 2012, paragraph 31.

⁶ Decision 25380-D01-2020: ATCO Gas and Pipelines Ltd., Decision on Preliminary Question Application for Review of Decision 24333-D01-2019 2017 Capital Tracker True-Up Compliance Filing to Decision 23789-D01-2019, Proceeding 25380, June 29, 2020, paragraph 50. See also *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at paragraph 16; *TransAlta Corporation v Alberta (Utilities Commission)*, 2022 ABCA 37 at paragraph 46.

4.2 Requirement to provide an updated Alberta Environment and Protected Areas renewable energy referral report

18. A. Jenkins also submitted that RES failed to adhere to a requirement to provide an updated AEPA renewable energy referral report in respect of the amendment applications. A. Jenkins further submitted that this failure rendered the hearing panel's overall consideration of the amendment applications inadequate.

19. RES filed an AEPA renewable energy referral report as part of the applications that were approved in the Original Decision. As explained in the Decision, RES provided AEPA a memorandum outlining the nature of the amendments, and AEPA confirmed its view that the original renewable energy referral report remained valid for the purposes of the Decision.⁷ AEPA also confirmed the Commission could require amendments to the report as part of the application process.⁸ The hearing panel chose not to do so. The hearing panel ultimately determined that the project amendments created an overall decrease in environmental impacts.⁹

20. The issue of whether RES was required to provide an updated AEPA renewable energy referral report was discussed in the Decision. AEPA advised that RES was not required to do so, and the hearing panel agreed. A. Jenkins disagrees with the hearing panel's finding. A. Jenkins did not, however, allege or identify any related ground for review as described in subsection 5(1) of Rule 016. The Commission is satisfied that A. Jenkins has not demonstrated that any such ground exists.

4.3 Information related to impacts to bats

21. A. Jenkins submitted that the COSEWIC report changed circumstances material to the Decision as it relates to three species of bats that are present in the project area. In support of this asserted ground for review, A. Jenkins also discussed several other documents related to impacts to bats. Neither the COSEWIC report nor any other document discussed by A. Jenkins in relation to the project's potential impacts to bats was published after the issuance of the Decision on June 9, 2023. Subsection 5(1)(c) is clear that it applies only in relation to changes in circumstances that occurred after the Decision was issued. The review panel therefore finds that the requirements of subsection 5(1)(c) of Rule 016 are not met.

22. Notwithstanding, the review panel has considered whether the COSEWIC report or any of the other documents discussed by A. Jenkins meet the requirements of subsection 5(1)(b) of Rule 016. Subsection 5(1)(b) provides that the review applicant must demonstrate that there are previously unavailable facts material to the decision, which existed before the decision was issued, were not in evidence in the original proceeding, and could not have been discovered at the time of the proceeding with reasonable diligence. As described below, the review panel has determined that the requirements of subsection 5(1)(b) are also not met.

23. This section first discusses whether the COSEWIC report provides the basis for a ground of review described in subsection 5(1)(b), then whether the other documents discussed by

⁷ Decision 27561-D01-2023, paragraphs 6, 78.

⁸ Exhibit 27561-X0027.01, PDF page 10.

⁹ Decision, 27561-D01-2023, paragraph 97.

A. Jenkins do so. Lastly, the review panel comments on the issue of impacts to bats more generally.

4.3.1 Impacts to bats and the May 10, 2023, Committee on the Status of Endangered Wildlife in Canada report

24. A. Jenkins submitted that the COSEWIC report released on May 10, 2023, listed the following bats as endangered:

- (a) Silver-haired Bats.
- (b) Hoary Bats.
- (c) Eastern Red Bats.

25. RES acknowledged that these species were recently assessed by COSEWIC as endangered, and were expected to be formally protected under the *Species at Risk Act* once they have been added to Schedule 1 by an Order in Council. However, RES submitted that these three migratory bat species have been provincially ranked as sensitive in Alberta since 2005, and that the impacts to such bats were well understood at the time of the issuance of both the Original Decision and the Decision. RES further submitted that this fact was not material, as the Commission carefully considered the impacts to bats, and imposed specific mitigation measures to reduce potential impacts to bats, including the requirement to consult with AEPA to implement operational mitigation to reduce fatalities in the event of high bat mortality.

26. The Commission agrees with RES and is not satisfied that A. Jenkins has demonstrated the listing of these three species in the COSEWIC report could lead the Commission to materially vary the findings in the Decision regarding impacts to bats. Therefore, the review panel finds that the information in the COSEWIC report does not give rise to a ground of review.

4.3.2 Other documents related to impacts to bats

27. A. Jenkins referred to a Federal Government Emergency Listing Order for the Little Brown Myotis, Northern Myotis, and Tri-Colour bats. The *Species at Risk Act* lists the following relevant species as endangered:

- (a) Bat, Tri-coloured (*Perimyotis subflavus*).
- (b) Myotis, Little Brown (*Myotis lucifugus*).
- (c) Myotis, Northern (*Myotis septentrionalis*).¹⁰

28. The Commission understands these are the species referred to by A. Jenkins. As noted by RES, these species were listed as endangered in 2014, and the Commission carefully considered the impacts to such species in the Original Decision and the Decision. Further, the Commission expressly referred to species (b) and (c) in the Original Decision.¹¹

¹⁰ *Species at Risk Act*, Schedule 1, Part 2, Endangered Species.

¹¹ Decision 22966-D01-2018, paragraph 151.

29. A. Jenkins also referred to a report from AEPA to the Commission dated April 5, 2018. This report was a response to the Commission’s request for information on the potential cumulative environmental impacts of three wind energy projects in the Forty Mile area. This report was considered in detail in the Original Decision, and the Commission imposed several conditions related to it.¹² These conditions were continued in the Decision, in addition to new post-construction monitoring conditions in furtherance of Rule 033: *Post-approval Monitoring Requirements for Wind and Solar Power Plants*, effective July 21, 2019.¹³ This AEPA report was explicitly considered by the Commission in the Original Decision, in which A. Jenkins was an intervener.

30. A. Jenkins further referred to the Post-Construction Monitoring Annual Report, Whitla Wind Project, Phase 1 - December 21, 2021. This report was uploaded to the public record of Proceeding 25909 on December 22, 2021 – over a year before the hearing for the proceeding at issue in this application. This document was publicly available through the Commission, well in advance of the hearing in Proceeding 27561.

31. The Commission is satisfied that A. Jenkins has not demonstrated that any of the above documents include previously unavailable facts material to the decision, which were not placed in evidence or identified in the original proceeding, that A. Jenkins, exercising reasonable diligence, could not have discovered at the time in relation to these species. Therefore, the review panel finds that the information in these documents do not give rise to any ground for review.

4.3.3 Impacts to bats generally

32. As discussed above, none of the information related to impacts to bats cited by A. Jenkins in her application provides the basis for a ground of review described in subsection 5(1) of Rule 016. Instead of requesting a review based on those grounds, A. Jenkins is asking the review panel to reweigh the evidence before the hearing panel.

33. In her submissions, A. Jenkins noted that the project was classified as a potentially “high risk” site for bat fatalities in the renewable energy referral report, and expressed broad concerns that potential impacts to bats were not adequately addressed in the Decision.

34. As noted by RES, impacts to bats were carefully considered in the Original Decision.¹⁴ The Commission chose to take a precautionary approach and imposed a series of conditions related to mitigating potential impacts to bats.¹⁵ Impacts to bats were also considered in the Decision, and the environmental conditions imposed in the Original Decision were transferred to the amended project with some modifications.¹⁶

35. The review panel notes A. Jenkins’s concerns about the project’s potential impacts to bats, but agrees with RES’s comments that the issue was carefully considered in both the

¹² Decision 22966-D01-2018, paragraphs 107-157.

¹³ Decision 22966-D01-2018, paragraphs 153-157; Decision 27561-D01-2023, paragraphs 88-92.

¹⁴ Decision 22966-D01-2018, paragraphs 89-90, 142-147.

¹⁵ Decision 22966-D01-2018, paragraphs 153-157.

¹⁶ Decision 27561-D01-2023, paragraphs 88-92.

Original Decision and the Decision, and that, in both decisions, the Commission imposed conditions related to monitoring and mitigating impacts to bats.

5 Decision

36. 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 August 14, 2023.

Alberta Utilities Commission

(original signed by)

Douglas A. Larder, KC
Vice-Chair

(original signed by)

Matthew Oliver, CD
Commission Member