



Aura Power Renewables Ltd.

**Decision on Preliminary Question
Application for Review of Decision 27488-D01-2023
Burdett Solar Project**

October 6, 2023

Alberta Utilities Commission

Decision 28409-D01-2023

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1 Decision summary

1. In this decision, the Alberta Utilities Commission denies an application by Aura Power Renewables Ltd. (Aura) to review and vary Commission Decision 27488-D01-2023¹ (the Decision). Aura’s submissions failed to persuade the Commission that there are grounds to review the Decision, as required under Section 5(1) of Rule 016: *Review of Commission Decisions*.

2 Background

2. The Decision concerns an application from Aura to construct and operate the 17.5 megawatt Burdett Solar Project, to connect the project to the FortisAlberta Inc. distribution system, and to change the ownership of the project. On July 20, 2023, the Commission denied Aura’s application in Decision 27488-D01-2023. Aura filed its application to review and vary the Decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016. The Commission designated the review application as Proceeding 28409.

3. The Commission issued a filing announcement for the review application and, by letter dated September 8, 2023, established a process schedule for the proceeding. The Commission considers the record for this proceeding to have closed on September 8, 2023.

4. In this decision, 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.”

5. 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 27488. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission’s reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the several records with respect to the matter.

¹ Decision 27488-D01-2023: Aura Power Renewables Ltd. Burdett Solar Project, Proceeding 27488, July 20, 2023.

3 The Commission's review process

6. 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.

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).

8. In this decision, the review panel has decided the preliminary question.

9. Section 5(1) of Rule 016 describes the circumstances in which the Commission may grant a review as follows:

- (a) The 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.
- (b) There are previously unavailable facts material to the decision, which:
 - (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.
- (c) There are changed circumstances material to the decision, which occurred since its issuance.
- (d) For a decision on an application for a hydro project, power plant, transmission line or gas utility pipeline, that the decision on the initial application may directly and adversely affect the review applicant's rights, and:
 - (i) the decision was made without a hearing or other proceeding, or
 - (ii) a hearing was held and notice was not given to the person.

10. In its review application, Aura is relying on sections 5(1)(a), 5(1)(b), and 5(1)(d) of Rule 016.

4 Review panel findings

4.1 Section 5(1)(b) – There are new facts material to the Decision; specifically, additional post-construction bird fatality data for BluEarth Renewables Inc.'s Burdett Solar Project, which is immediately adjacent to the project site

11. Aura explained that on July 28, 2023, it became aware of a 2022 post-construction bird fatality monitoring report for BluEarth Renewables Inc.'s Burdett Solar Project (2022 BluEarth

Report), located adjacent to Aura's proposed project. Aura submitted that the 2022 BluEarth Report was erroneously filed in the AUC proceeding page for the BluEarth Yellow Lake Solar Project (Proceeding 25668) instead of the proceeding page for the relevant BluEarth project (Proceeding 25658) and accordingly was not discoverable by Aura exercising reasonable diligence.

12. Aura argued that the 2022 BluEarth Report was material to the Decision because it provides actual evidence of the effect of a solar project on wildlife mortality in the immediate vicinity of their proposed project. Aura submitted that the discussion of potential impacts to wildlife and wildlife habitat contained in their project's wildlife assessment report and in Alberta Environment and Protected Areas' (AEPA)² Referral Report were inherently of lesser value because they were estimates made before construction as opposed to observations following construction such as those contained in the 2022 BluEarth Report.

13. Aura submitted that both the 2021 BluEarth Report and 2022 BluEarth Report confirmed a minimal impact on migratory birds for two fall seasons, supporting Aura's assertion that there was low migratory bird activity at its proposed project site.

14. The review panel finds that the 2022 BluEarth Report could have been discovered during Proceeding 27488 through the exercise of reasonable diligence as required by Section 5(1)(b) of Rule 016. Aura could have requested the 2022 BluEarth Report from AEPA or BluEarth Renewables during the proceeding.

15. Further, while the review panel acknowledges that the 2022 BluEarth Report is information that existed before the decision was issued and was not placed in evidence or identified in the original proceeding, the new facts identified by Aura are not material to the Decision. Although the 2022 BluEarth Report provides additional information with respect to bird mortality, the report does not change the fact that Aura sited its project within 1,000 metres of a named lake which is inconsistent with AEPA's *Wildlife Directive for Alberta Solar Energy Projects* (the Directive) and that this has the potential to create unacceptably high risks to migratory birds and water birds in particular. The review panel also notes that the information provided by the 2022 BluEarth Report is consistent with the information provided by the 2021 BluEarth Report and AEPA Referral Report, which the hearing panel considered in its decision, further evidencing that the additional information in the 2022 BluEarth Report is not material to the Decision.

16. The review process is not intended to provide opportunities for parties to bolster the submissions that were made, or could have been made, in the original proceeding.³ With respect to previously unavailable facts, the review panel finds that Aura has not demonstrated that any of the purported facts are material and could not have been discovered at the time through the exercise of reasonable diligence as required by Section 5(1)(b) of Rule 016. Aura's request for a review on this ground is accordingly denied.

² On October 24, 2022, the Alberta Environment and Parks (AEP) was renamed the Ministry of Environment and Protected Areas (AEPA). Any references to AEP in Rule 033: *Post-approval monitoring requirements for wind and solar power plants* and elsewhere that relate to AEP should be read as AEPA.

³ Decision 26660-D02-2021: Kalina Distributed Power Limited, Campus Energy Partners LP, Lionstooth Energy Inc., Signalta Resources Limited, BluEarth Renewables Inc., and Elemental Energy Renewables Inc., Decision on Preliminary Question, Proceeding 26660, October 14, 2021, paragraph 86.

4.2 Section 5(1)(a) – The Commission made an error of fact, or mixed fact and law

4.2.1 The Commission failed to properly apply the public interest test

17. Aura submitted that with respect to the public interest test under Section 17 of the *Alberta Utilities Commission Act*, the Decision’s reasons do not demonstrate any balancing of the adverse effects of the project against the public benefits, despite the hearing panel’s acknowledgement of its statutory obligation to do so.

18. Further, Aura stated that the Decision focused primarily on potential adverse effects and failed to address the actual evidence regarding adverse effects, as provided in the 2021 BluEarth Report. Aura stated that the 2021 and 2022 BluEarth reports provide actual evidence of the minimal adverse effects from a solar photovoltaic project in an immediately adjacent location, supporting Aura’s position that significant adverse effects to wildlife were not likely to occur.

19. Aura submitted that failure to consider relevant evidence on a material issue that the law requires a decision-maker to consider is an error of law vulnerable to review. Aura further submitted that the failure to consider the public benefits and to incorporate an analysis of actual evidence relevant to the likelihood of adverse environmental effects in the Decision were errors of law constituting a valid ground for review and variance of the Decision.

20. Aura relies on Section 5(1)(a) of Rule 016 for this ground. Section 5(1)(a) of Rule 016 states that the Commission may grant an application for review of a decision, in whole or in part, where it determines that the review applicant has demonstrated that the 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.

21. Although Aura relies on Section 5(1)(a) of Rule 016 for this ground, Aura primarily characterizes this error as an error of law. AUC Rule 016 does not provide for review of errors of law.⁴ Aura’s request for a review on this ground is denied.

22. Further, Aura failed to demonstrate that the hearing panel incorrectly applied the public interest test or failed to appropriately weigh the relevant evidence. The hearing panel’s assessment that the potential impacts of the project on the environment are unacceptable and the project is not in the public interest was reasonable based on the record of the original proceeding and does not amount to an error of fact or mixed fact and law which is material to the Decision and exists on a balance of probabilities.

4.2.2 The Commission’s assessment of the potential adverse environmental effects of the project was unreasonable

23. Aura argued that the hearing panel attributed excessive weight to certain minor misalignments with the Directive and that the Decision contained a major gap with respect to site-specific data and AEPA’s conclusion about Aura’s proposed mitigation strategy. Aura stated that decisions that contain such fundamental gaps or that contain an unreasonable chain of analysis are not reasonable and therefore constitute an error of mixed fact and law. Aura submitted that decisions that contain such fundamental gaps or that contain an unreasonable

⁴ Decision 26757-D01-2021: FortisAlberta Inc., Decision on Application for Review and Variance of Decision 25916-D01-2021, Proceeding 26757, December 9, 2021, paragraphs 9, 14 & 18.

chain of analysis are unreasonable and therefore constitute a valid ground for review and variance.

24. Aura stated that it remained willing to engage with AEPA and commit to additional mitigation strategies, including potentially switching to tracking panels to adjust the tilt angle during critical migratory windows and adding the use of strike diverters. The review panel notes that the potential for tracking panels is a new mitigation put forward by Aura and was not put in evidence in Proceeding 27488.

25. Under Rule 016, the review panel's role is not to second guess conclusions made in the Decision.⁵ To paraphrase Rule 016, the review panel's role is to assess an application to determine if a review applicant has met its burden and demonstrated that the hearing panel erred in fact or mixed fact and law in reaching its decision. The review panel does not consider the review applicant to have met this burden. The applicant's submissions under this ground do not relate to error in fact or mixed fact and law but rather outline its view that the hearing panel's decision attributed excessive weight to certain pieces of evidence while disregarding other pieces of evidence. 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 This is a restriction on the general language of Section 5(1)(a).⁷

26. The review panel is satisfied that the hearing panel's assessment of the evidence did not amount to an error of fact or mixed fact and law. In *Foothills Solar*, the Commission stated that standards such as Standard 100.1.8 of the Directive applicable to the Decision are interpreted as "parties cannot conduct a harmful practice"⁸ and that if applicants propose deviations from standards, these deviations should be appropriately justified, mitigated, and minimized as much as reasonably practicable.⁹ It is clear to the review panel that the hearing panel reviewed the applicant's evidence and was not satisfied that a deviation from Standard 100.1.8 of the Directive was justified. Absent an error of fact or mixed fact and law underlying the hearing panel's assessment, it is not for the review panel to second guess that assessment.¹⁰

27. Further, the review process is not intended to provide a second opportunity for parties to reargue the issues in a proceeding.¹¹ Decisions of the Commission are intended to be final; the

⁵ Decision 27692-D01-2022: Consumers' Coalition of Alberta, Decision on Preliminary Question Application for Review of Decision 27500-D01-2022 ATCO Gas Apex Utilities Inc. 2023 Cost-of-Service Review Costs Award, Proceeding 27692, November 24, 2022, paragraph 12.

⁶ See, for example, Decision 26757-D01-2021, paragraph 24.

⁷ 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.

⁸ Decision 27486-D01-2023: Foothills Solar GP Inc., Foothills Solar Project, Proceeding 27486, April 20, 2023, paragraph 56.

⁹ Decision 27486-D01-2023, paragraph 56.

¹⁰ Decision 27692-D01-2022, paragraph 13; Decision 26757-D01-2021, paragraph 24 and Decision 26660-D02-2021, paragraph 14, in relation to the proposition that 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. An application to review certain of the hearing panel's findings on the basis that the hearing panel improperly weighed evidence will be denied.

¹¹ Decision 22166-D01-2016: Request for Review and Variance of Decision 21515-D01-2016, ATCO Pipelines' 2015-2016 Revenue Requirements Compliance Filing to Decision 3577-D01-2016, Proceeding 22166, April 5, 2017.

Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.¹²

28. Accordingly, Aura's request for a review on this ground is denied.

4.2.3 The Decision is a marked departure from the Commission's past precedent

29. Aura acknowledged that administrative decision makers are not bound by their past precedent, however it submitted that decisions that depart from longstanding practices or internal authority must be appropriately justified.¹³ Aura submitted that contrary to past precedent, the hearing panel attributed excessive weight to the AEPRA Referral Report's identification of avian mortality risk associated with the project and to recommended setback infringements, and failed to weigh such adverse effects against the positive effects of the project. Aura argued that this was an unjustified departure from past precedent.

30. It is unclear to the review panel how Aura's allegations regarding departure from a past precedent constitute an error of fact, or mixed fact and law. In the review panel's view the error alleged is an error of law for which no review is available under Rule 016.

31. While this finding is sufficient to dispose of this ground, the review panel observes that previous AUC decisions approving power plants with setback infringements are fact specific findings based on project location, mitigation and a number of other factors. The review panel acknowledges that the Commission has approved projects that it has determined had adequate mitigation strategies despite setback infringements. However, in a recent decision, *Foothills Solar*,¹⁴ the Commission denied the a solar project application based on setback infringements. These decisions reflect the Commission's assessment of the public interest for each particular project and, given their site/project specific nature of such decisions cannot be regarded as precedent.

32. As discussed in the previous section, the hearing panel was not satisfied that Aura appropriately justified or could mitigate the impacts of siting its project in contravention of the Directive and denied the project. It is not for the review panel to second guess the hearing panel's assessment in this regard absent an error of fact or mixed fact and law underlying the hearing panel's assessment. In the review panel's view, no such error has been identified in association with this ground.

33. Aura's request for a review on this ground is denied.

4.3 Section 5(1)(d) grounds – decision made without hearing or notice

34. Aura argued that the Decision was made without a hearing and that a review should be permitted on this basis.

35. Section 5(1)(d)(i) refers to a decision made without "a hearing **or other proceeding**". While the hearing panel did cancel the written hearing process for the application when the

¹² Decision 28057-D01-2023: 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, Proceeding 28057, April 21, 2023, paragraph 11.

¹³ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 131.

¹⁴ Decision 27486-D01-2023: Foothills Solar GP Inc., Foothills Solar Project.

St. Mary Irrigation District withdrew its statement of intent to participate, the hearing panel did conduct a proceeding to consider Aura's application. That proceeding included three rounds of information requests, including the final round that occurred after the written hearing had been cancelled. Following this third round, the hearing panel deemed the application complete as of April 26, 2023 indicating that a decision would be issued by July 25, 2023.¹⁵ While the hearing panel did not solicit argument from Aura, this process is consistent with the Commission's practice generally in facilities proceedings where there are no objections or an objection has been withdrawn.

36. The jurisprudence is clear that an administrative tribunal such as the Commission is the master of its own process.¹⁶ The review panel considers that the proceeding established to consider Aura's application was fair and reasonable, was clearly communicated to Aura, and was consistent with assertive case management principles articulated in the Yates Report.¹⁷ Had Aura considered that a departure from the hearing panel's established proceeding process was necessary or that additional evidence was required to support its application, it could have made such a request prior to the hearing panel issuing its decision.

37. Aura's request for a review on this ground is denied.

5 Decision

38. In answering the preliminary question, the review panel finds that Aura has not met the requirements for a review of Decision 27488-D01-2023 and the application for review is dismissed.

Dated on October 6, 2023.

Alberta Utilities Commission

(original signed by)

Douglas A. Larder, KC
Vice-Chair

(original signed by)

Renee Marx
Commission Member

¹⁵ Exhibit 27488-X0060, AUC letter – Application Deemed Complete.

¹⁶ *Prasad v. Canada (Minister of Employment and Immigration)* [1989] 1 S.C.R. 560, at pages 568-69, [1989] 1 S.C.J. No. 25, paragraph 16 (S.C.C.)(Q.L.).

¹⁷ *Report of the AUC Procedures and Processes Review Committee*, August 14, 2020, C.K Yates, D. Mullen &, R. Harrison.