

October 31, 2022

To: Parties currently registered in Proceeding 27589

**Nova Solar G.P. Inc.
Nova Solar Power Plant and Nova 1005S Substation
Proceeding 27589
Applications 27589-A001 and 27589-A002**

Ruling on standing

1. In this ruling, the Alberta Utilities Commission decides whether to hold a public hearing to consider applications by Nova Solar G.P. Inc. (the applicant) for the construction and operation of the Nova Solar Power Plant and associated Nova 1005S Substation (collectively, the project) in Wheatland County, Alberta.

2. The Commission must hold a hearing if persons who have filed a statement of intent to participate (SIP) in Proceeding 27589 have demonstrated that they have rights that may be “directly and adversely affected” by the Commission’s decision. Such persons may participate fully in the hearing, including giving evidence, questioning of witnesses, and providing argument. This permission to participate is referred to as standing.

3. The Commission issued a notice of applications for the project on August 31, 2022. The Commission received SIPs from the following stakeholders:

- Nora Maidman
- Carol Keer (represented by McLennan Ross LLP)
- Ronnie and Carla Ostrom (represented by McLennan Ross LLP)
- Michael Janzen, RAM Cattle Feeders Ltd. and Route 24 Truck Stop Ltd. (represented by Walsh LLP)
- Wheatland County
- PrairieSky Royalty Ltd.

4. The Commission has instructed me to communicate its decision on standing.

How the Commission determines standing

5. 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]

6. 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 application of a two-part test. The first test is legal: a person must demonstrate that the right being asserted is recognized by law. This could include property rights, constitutional rights or other legally recognized rights, claims or interests. The second test 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.¹

7. To determine if a right is “directly” affected, the court has said that “[s]ome degree of location or connection between the work proposed and the right asserted is reasonable.”² 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 the proposed site.³

8. The Commission summarized court decisions relating to the meaning of the phrase “directly and adversely affected” in a decision issued in 2015 and concluded that to pass the test for standing, “the potential effects associated with a decision of the Commission must be personal rather than general and must have harmful or unfavourable consequences.” The Commission further commented that the court decisions “highlight the need for persons seeking standing to demonstrate the degree of connection between the rights asserted and potential effects identified.”⁴

9. The Commission assesses the potential for a “direct and adverse effect” on a case-by-case basis. It considers the specific circumstances of each proposed project application and each SIP that it receives. In the past, the Commission has decided that general or broad concerns about a proposed project will generally be insufficient to establish standing, unless a more specific link or connection to the demonstrated or anticipated characteristics of a proposed project is established.

Landowners

10. The Commission is satisfied that N. Maidman, C. Keer, R. Ostrom, C. Ostrom, M. Janzen, RAM Cattle Feeders Ltd., and Route 24 Truck Stop Ltd. have each demonstrated that they have legal rights that may be directly and adversely affected by the Commission’s decision

¹ *Cheyne v Alberta (Utilities Commission)*, [2009 ABCA 94](#); *Dene Tha’ First Nation v Alberta (Energy and Utilities Board)*, [2005 ABCA 68](#) [*Dene Tha’*].

² *Dene Tha’*.

³ *Sawyer v Alberta (Energy and Utilities Board)*, [2007 ABCA 297](#).

⁴ 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.

on the application. Each of these individuals and corporations is granted standing to participate in this proceeding.

11. Each of the above parties owns, occupies, or resides on land in close proximity (i.e., within 800 metres) to the proposed project, and these parties have explained how the Commission's decision on the applications has the potential to result in a direct and adverse effect on them. The site specific concerns described by the above parties include:

- weed control
- pest control
- agricultural impacts
- solar glare
- visual impact
- noise impacts
- health and safety
- emergency response and risk of fire
- concerns about property value
- inability to develop or sell the land
- access to their property and business
- conservation and reclamation
- impacts on agricultural and farming operations (including the impacts on irrigation and water flows, storm water runoff, weeds and pest proliferation)
- whether the project complies with the South Saskatchewan Regional Plan as well as a local broadband project called the Goldfinch Industrial Corridor
- sufficiency of stakeholder engagement

12. In a letter dated October 14, 2022, the applicant requested that the Commission publish a list of issues based on the contents of the SIPs of the landowners, as early as possible in the hearing process. While the Commission agrees with the applicant that doing so may promote regulatory efficiency, it could also have the effect of depriving rights holders of the ability to advance legitimate issues that have the potential to adversely and directly affect them. The Commission is not prepared to create an issue list at this time and therefore denies the applicant's request to create an issue list based on the contents of the SIPs as filed.

Wheatland County

13. In its SIP, Wheatland County (the County) submitted that it would like to ensure the Commission gives appropriate consideration to matters concerning the construction and operation of the project, which would be within the County's boundaries.⁵ The County indicated

⁵ Exhibit 27589-X0029, Statement of intent to participate from Wheatland County. Exhibit 27589-X0030, Additional letter from Wheatland County.

that the following documents would be requested from the applicant at the development permit stage:

- construction management plan
- stormwater management plan
- screening plan for adjacent residents
- conceptual traffic impact assessment
- a map illustrating the setback distances from residential dwellings and property boundaries to the solar panels

14. The County has not demonstrated through its submissions that it has a legal right capable of being directly and adversely affected in relation to the project, and therefore it does not meet the test for standing. For that reason, the Commission denies the County's request for standing.

15. The Commission, however, has the statutory authority to control its own processes, and within that authority it has the discretion to allow a party to participate in a proceeding even if that party is not entitled to standing. In this case, the Commission has decided to grant the County a right to participate; that is, the County may participate to the extent indicated in its letter of September 29, 2022,⁶ or as otherwise permitted by the Commission in this proceeding. The Commission considers that matters surrounding the applicant's compliance with the County's municipal requirements is a relevant consideration that may assist the Commission in considering whether the project is in the public interest.

PrairieSky Royalty Ltd.

16. In its SIP, PrairieSky stated that it is a mineral rights owner for the entirety of the land within the project area. PrairieSky submitted that the project will impact its mineral rights and core business "by ensuring [its] mineral title is sterilized, resulting in a de facto expropriation of [its] core assets." PrairieSky indicated that the applicant has made little to no effort to engage with PrairieSky in addressing its concerns. PrairieSky stated that it would continue to work with Nova Solar in an effort to reach a commercially viable solution that is acceptable to both parties, and should PrairieSky's concerns be addressed directly with the applicant, PrairieSky would withdraw its SIP.⁷

17. The applicant responded to PrairieSky's SIP in its letter of October 14, 2022. The applicant requested that the Commission decline PrairieSky's request for standing because PrairieSky has no legally recognized surface rights and because it has not demonstrated that the proceeding may directly and adversely affect its rights. The applicant indicated that PrairieSky's primary concern with the project is commercial, in the sense that it seeks compensation from the applicant, which it says is not within the jurisdiction of the Commission. Further, the applicant noted that PrairieSky had no specific plans to develop its mineral interests, adding that

⁶ Exhibit 27589-X0030, Additional letter from Wheatland County.

⁷ Exhibit 27589-X0024, Statement of intent to participate from PrairieSky.

PrairieSky's assertions are speculative and insufficient for the Commissions to determine any potential for direct and adverse impacts.

18. In its reply to the applicant of October 21, 2022, PrairieSky asserted it meets the test for standing by virtue of its fee simple title to mines and minerals, which specifically includes “the right to work” the mines and minerals “within, upon, or under” the lands in its certificates of title. In PrairieSky's submission, the project will directly and adversely affect PrairieSky's present and future right to recover the mineral associated with its title and the value of its mineral rights. PrairieSky did not disagree with the applicant that its primary concern with the project is “commercial”, given that its commercial interests are inexorably linked to its legal ownership of mineral rights.

19. The Commissions has determined that PrairieSky has met the test for standing because it has a legal right (by virtue of its fee simple ownership of mines and minerals in the subject lands) that may be directly and adversely affected by the project. With respect to the first part of the standing test, PrairieSky's legal right associated with the project lands is not undermined by the fact that it does not as yet have surface rights or any necessary approvals required in order to work the mines and minerals. PrairieSky's fee simple title to the mines and minerals satisfies the first part of the standing test under Section 9 of the *Alberta Utilities Commission Act*.

20. To the extent the absence of regulatory approvals or surface rights may factor into the second part of the standing test (directly and adversely affected), the Commission does not agree with the applicant that this necessarily results in the conclusion that PrairieSky's claim to standing is too speculative or otherwise insufficient. One of the reasons for this is that an ownership right to mines and minerals implies a right to work the same: see decisions such as *Alberta Energy Co v Goodwell Petroleum Corp*, 2003 ABA 277 at paragraphs 61-64, *Anderson v Amoco Canada Oil & Gas*, 2004 SCC 49 at paragraphs 24-25, and *Borys v Canadian Pacific Railway*, [1953] 2 DLR 65 (Alberta P.C).⁸ Further, the Commission's view is that cases referred to by the applicant where standing was denied to a mineral rights holder are arguably distinguishable from this case, where the applicant's project would cover a large portion of the surface of the lands for years into the future.⁹ In the Commission's view, PrairieSky has provided enough information at this preliminary stage of the proceeding to support that its right to work mines and minerals on the lands as well as the value of the mineral rights *may* be directly and adversely affected by the project.¹⁰

⁸ The Commission notes that at common law, upon severance of the title to the minerals from the title to the surface, a right of entry to the surface lands arose by necessary implication (*Cabre Exploration Ltd v Arndt*, [1986] 4 WWR 529 (ABQB) at paras. 15). While that right was modified by the *Surface Rights Act*, RSA 2000, c S-24 to provide an orderly exercise of the rights of the landowner and operator and to provide a right to the landowner to received compensation (*Cabre* at para. 23), it would not appear to have fundamentally changed the nature of the underlying right.

⁹ See AUC Decision 2009-088, Suncor Energy Inc. Decision on Preliminary Question Review and Variance Application of Alberta Utilities Commission Permit and Licence No. U2009-56 (16 June 2009); and AER letter decision re Suncor Energy Inc., Applications No. 1857270, 1857274, 1890348, and 075-94, Statement of Concern No. 30302 (October, 25 2017)

¹⁰ PrairieSky indicated that it intends to submit evidence in this proceeding on the latter issue.

Other factors considered

21. The Commission has taken note of concerns raised by counsel for the applicant in its letter of October 14, 2022, including issues that the applicant says are beyond the scope of this proceeding.¹¹ All parties are reminded that settlement discussions with the applicant are protected by settlement privilege, and should not be raised before the Commission.

Costs eligibility

22. N. Maidman, C. Keer, R. and C. Ostrom, M. Janzen, RAM Cattle Feeders Ltd. and Route 24 Truck Stop Ltd. fall within the definition of “local intervener” in Section 22 of the *Alberta Utilities Commission Act* and are therefore eligible to file a costs claim seeking recovery of the costs of their participation in this proceeding, in accordance with the Commission’s Rule 009: *Rules on Local Intervener Costs*. Rule 009 specifies that eligible costs include professional fees, including legal fees, consultant, analyst and expert fees, and fees for support staff, in accordance with the scale of costs appended to Rule 009.

23. The Commission emphasizes that eligibility to claim costs does not guarantee full recovery of those costs. Claims for costs must be filed after this proceeding is concluded, in accordance with Rule 009, and cost recovery is subject to the Commission assessing the value of a party’s contribution to the proceeding. The Commission encourages parties with similar interests and positions to work together to ensure that any expenditures are minimized and costs are not duplicated.

24. Wheatland County, having not been granted standing in this proceeding, does not fall within the definition of “local intervener” under Section 22 of the *Alberta Utilities Commission Act* and is therefore is not eligible for cost recovery in this proceeding.

25. It remains to be determined whether the Commission will exercise its discretion to award costs to PrairieSky, given the purely commercial interest attaching to its mineral rights in this case.¹²

26. As a final point, the Commission notes that most of the parties who have submitted SIPs have retained counsel. N. Maidman is strongly encouraged to retain counsel, or to consider joining a group of other landowners who have retained counsel. Counsel who are acting for landowners should ensure that they cooperate and reduce duplication, and ensure that they focus on areas within the Commission’s jurisdiction. It is assumed that counsel are familiar with the requirements of Rule 009, and in particular Section 7 of that rule.

¹¹ Exhibit 27589-X0042, Nova Solar G.P. Inc. - Response to SIPs, PDF pages 6 and 7, paragraphs 22-24.

¹² See the following decisions with respect to discretion relating to costs: *Wood Buffalo (Regional Municipality) v Alberta (Energy and Utilities Board)*, 2007 ABCA 192 at paragraphs 8-9; *Lavesta Area Group v Alberta (Energy and Utilities Board)*, 2009 ABCA 155 at paragraph 22; Decision 21715-D01-2016, South and West of Edmonton Area Transmission Development Cooking Lake, Saunders Lake, Wabamun and Leduc Developments, Costs Award, paragraphs 80-86; and Decision 2011-489, Heartland Transmission Project Local Intervener Costs Claim, December 14, 2011, paragraphs 14-26.

27. Should you have any questions about the matters addressed in this ruling, please contact the undersigned at Andrew.Culos@auc.ab.ca or 403-592-4456.

Yours truly,

Andrew Culos
Commission Counsel