AUC
Alberta Utilities Commission

# AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc.

## Decision on Request for Review and Variance of AUC Decision 2011-436 Heartland Transmission Project

**May 14, 2012**

**The Alberta Utilities Commission**
Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc.
Decision on Request for Review and Variance of AUC Decision 2011-436
Application No. 1607924, 1607942, 1607994, 1608030, 1608033
Proceeding ID No.1592

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The Alberta Utilities Commission
Fifth Avenue Place, Fourth Floor, 425 First Street SW
Calgary, Alberta
T2P 3L8

Telephone: (403) 592-8845
Fax: (403) 592-4406

Web site: www.auc.ab.ca

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## 1 Introduction

1. On September 26, 2010, AltaLink Management Ltd. and EPCOR Transmission and Distribution Inc. (the Heartland applicants) filed an application to construct and operate a double-circuit 500 kilovolt transmission line to connect the existing 500 kilovolt system on the south side of the City of Edmonton to a new substation to be located in the Gibbons-Redwater area. The Heartland application included a preferred route and an alternate route. The Heartland application also included an option in which the first 20 kilometres of the preferred route would be installed underground.

2. The preferred route was approved on November 1, 2011, in AUC Decision 2011-436 (the Heartland decision). The hearing panel rejected the underground option because it found that "the health and safety, property value and environmental impacts individually or together do not justify the additional cost of placing the line underground".[1]

3. Six parties asked the Commission to review and vary the Heartland decision: Strathcona County (the County), Responsible Electricity Transmission for Albertans (RETA), James and Michelle Prins, William, Kenton and Trevor Prins, Aspen Valley Farms, and the FIRST group.

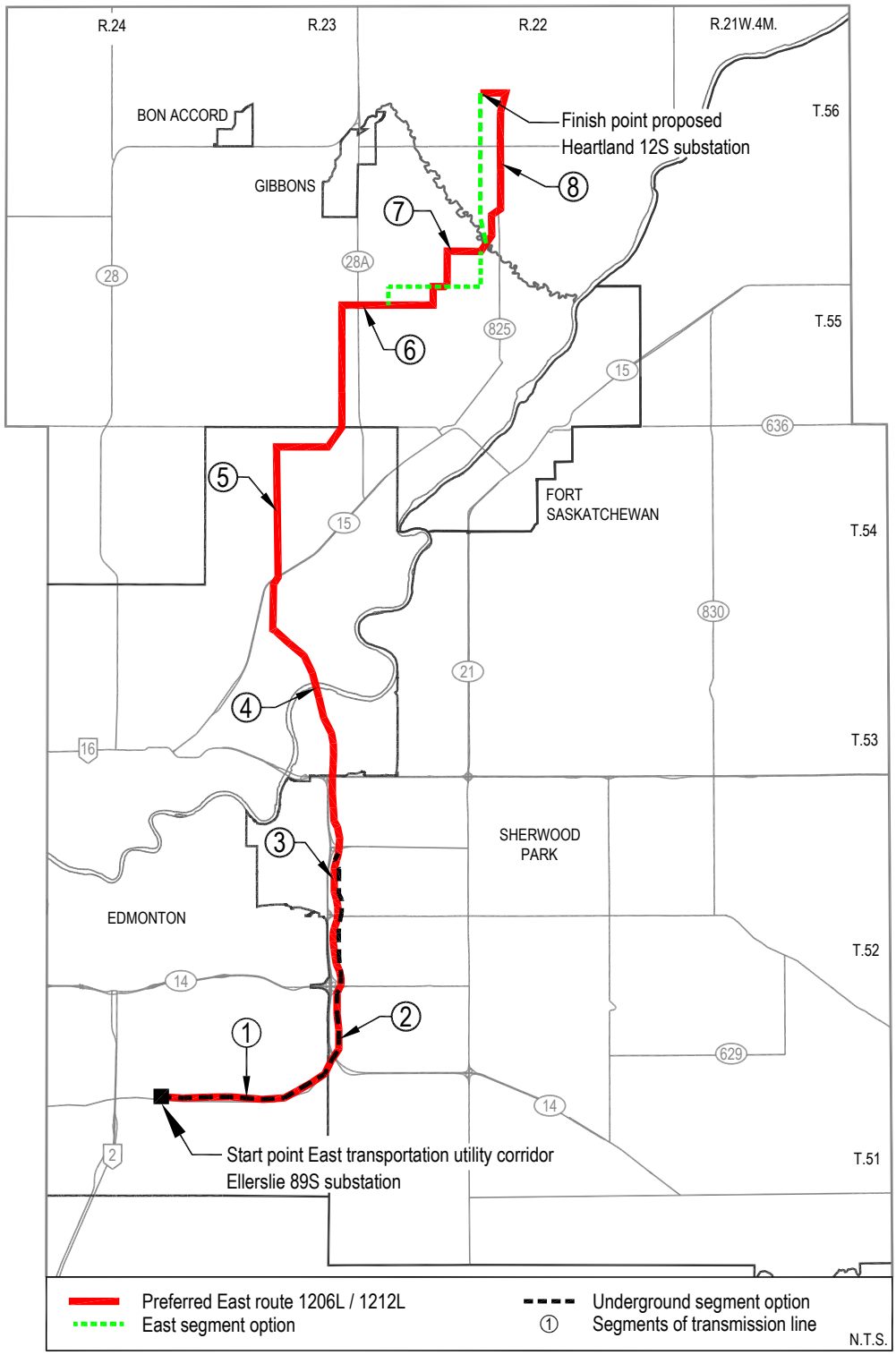
4. In this decision the Commission panel that ruled on the Heartland application is referred to as the "hearing panel" and the Commission panel that considered the review applications is referred to as the "review panel".

5. The review applications of Strathcona County and RETA focused on the decision to reject the underground option. The review applications by the two Prins groups focused on the approval of route segment 6-3, which is immediately adjacent to their respective lands. The review application by Aspen Valley Farms focused on the approval of segment 8 of the preferred route which crosses Aspen Valley Farms. The review panel dismissed the FIRST group's application in a ruling dated January 24, 2012 (Appendix 1).

6. The following map shows the preferred route (divided into eight numbered segments) that was approved by the panel and the location of the underground option.

[1] Decision 2011-436, paragraph 1084

**Figure 1. Map of approved, preferred east route with underground option**



7. The review applications were opposed by the Heartland applicants, the Alberta Electric System Operator (AESO), ATCO Electric (ATCO) and the Blue Route Utility Elimination Group (BRUTE).

8. The issues raised by the review applications are:

a. Did the hearing panel make an error (or errors) of law, fact or jurisdiction in its assessment of the route alternatives and its decision to reject the underground option and approve the aboveground preferred route that, either individually or collectively, give rise to a substantial doubt as to the correctness of the Heartland decision;

b. Are there new facts, a change in circumstances, or facts not previously placed in evidence because the facts were not known at the time of the hearing, that relate to the underground option that raise a reasonable possibility that the Commission could materially vary or rescind the Heartland decision?

c. Did the hearing panel make an error (or errors) of law, fact or jurisdiction when it approved route segment 6-3 and segment 8 of the preferred route and, if so, do those errors raise a substantial doubt as to the correctness of the Heartland Decision?

d. Are there new facts, a change in circumstances, or facts not previously placed in evidence as the facts were not known at the time of the hearing, that could lead the Commission to materially vary its decision to approve route segment 6-3 or route segment 8?

9. This decision is organized into nine sections, including this introduction. Section two is a brief review of the background to this proceeding. Section three is a description of the legislative framework for review and variance applications and the role of a review panel. In section four the review panel addresses the issue of the standing of the review applicants. In section five the review panel considers the grounds for review raised by the County and RETA that are based on alleged errors of law, fact or jurisdiction. In section six, the review panel considers the grounds for review raised by the County and RETA that are based on new facts, change in circumstances or facts not previously placed in evidence. In section seven the review panel addresses the review applications of James and Michelle Prins and William, Kenton and Trevor Prins. In section eight, the review panel addresses the review application of Aspen Valley Farms. Section nine of the decision provides the review panel's conclusion on the review applications.

## 2 Background

10. The Heartland decision was issued on November 1, 2011. On November 25, 2011, Strathcona County filed an application to review and vary the Heartland decision and a motion to suspend the operation of that decision pending the outcome of its review and variance application. James and Michelle Prins filed their request for review and variance of the Heartland decision on November 30, 2011.

11. On December 8, 2011, the review panel wrote to interested parties and set a schedule and process for consideration of the two review applications it had received and for any additional review applications filed in accordance with the time limits specified in *AUC Rule 016: Review and Variance of Commission Decisions* (Rule 016).

12. On December 15, 2011, the chair of the review panel, Vice-Chair Carolyn Dahl Rees, heard submissions from Strathcona County and other interested parties on the County's motion to suspend the operation of the Heartland decision. On December 19, 2011, the County's motion was dismissed in a written ruling (Appendix 2).

13. William Prins, Kenton Prins and Trevor Prins filed their application to review and vary the Heartland decision on December 19, 2011. RETA and Aspen Valley Farms both filed their review and variance applications on January 2, 2012. The Colchester Parents Association filed a letter of support for the RETA application on January 16, 2011.

14. The Heartland applicants, the AESO, ATCO and the Blue Route Utility Transmission Elimination group (BRUTE) filed submissions opposing the review and variance applications.

15. The review panel held a hearing to consider oral submissions from interested parties in Edmonton, Alberta on January 25, 2012. Following the hearing, the review panel received additional submissions from Aspen Valley Farms. The review panel established a schedule for further comments on the new submissions by Aspen Valley Farms with the final date for submissions being February 17, 2012. The review panel considers February 17, 2012 to be the date upon which the record for the Heartland review and variance proceeding (Proceeding ID No. 1592) closed.

## 3 The Commission's review and variance process

### 3.1 Legislative framework

16. The Commission's authority to review, vary, rescind or confirm its own decisions is found in Section 10 of the *Alberta Utilities Commission Act*. Section 10 states that the Commission may make rules respecting the review of its own decisions. The Commission has made rules governing its review of its own decisions and those rules are found in Rule 016.

17. The review and variance process has two stages. In the first stage, the Commission decides whether there are grounds to review its own decision; this is referred to as the "preliminary question". If the Commission decides that there are grounds to review the decision, it moves to the second stage of the review process where it holds a hearing to decide whether to confirm, vary, or rescind the original decision.

18. Section 3 of Rule 016 provides that the Commission may review one of its decisions on the basis of an error of fact, law or jurisdiction. This section states that such an application may only be made by a party to the decision within 60 days of the issuance of the decision. In accordance with Section 12 (a)(i) of Rule 016, the Commission must grant a review under this section if it is of the opinion that the applicant has raised a substantial doubt as to the correctness of the decision.

19. Section 4(1) of Rule 016 states that the Commission may review one of its decisions if a party that may be directly and adversely affected by the Commission's decision did not receive notice of the hearing. In accordance with Section 12(b) of Rule 016 the Commission must grant an application for review if, in its opinion, the review applicant has shown that the Commission's

decision on the original application may directly and adversely affect his or her rights. An application for review on this ground must be filed within 30 days of the date upon which the Commission issued its decision.

20. Section 4(2) of Rule 016 provides that the Commission may review one of its decisions on the basis of new facts, a change in circumstances, or facts not previously placed in evidence as the facts were not known to the applicant at the time of the hearing. The section states that such an application may only be made by a person directly and adversely affected by the decision within 60 days of the issuance of the decision. In accordance with Section 12(a)(ii) of Rule 016, the Commission must grant a review if it is of the opinion that the applicant has raised a reasonable possibility that the new facts, change in circumstances etc. could lead the Commission to materially vary or rescind its decision.

### 3.2 The role of the review panel

21. One of the issues addressed by parties to the review proceeding was the role of a review panel.

22. Both RETA and the Heartland applicants cited the decision of Mr. Justice O'Brien of the Alberta Court of Appeal in *AltaGas Utilities Inc. v. Alberta Energy and Utilities Board*. [2] One of the issues before the Court in that decision was the Board's decision not to consider new evidence in a review application because it found that the evidence in question contained facts or evidence that could have been placed on the record in the original proceeding. The Court found as follows:

> [39] While the *Rules of Practice* do not specifically exclude such evidence, the practice of the Board in that regard was earlier set out in its Decision 2000-25, on an application for review and variance by *Canadian Western Natural Gas Company Limited and by the Federation of Alberta Gas Co-ops Ltd. and Gas Alberta Inc.*, at pages 1-2:
>
> > While the legislation setting out review provisions provides the Board with wide discretion, the case law has established restrictive guidelines for use by tribunals when considering whether to review and vary their decision. The reasons for these guidelines, or criteria, are to ensure and preserve the integrity of decision of a tribunal. A decision of a tribunal should be final, subject to decision or appeal. If a tribunal could review and change its decisions at will, the certainty of the decision of the tribunal would be in jeopardy.
> >
> > Therefore, in considering whether a review is warranted, the Board must address whether or not the FGA has established substantial doubt as to the correctness of the Decisions. This determination will be based on the following established criteria:

[2] *AltaGas Utilities Inc. v. Alberta Energy and Utilities Board*, (2008) ABCA 46

- Where new evidence, which was not known or not available at the time evidence was adduced and which may have been a determining factor in the decision, became known after the decision was made.
- Where a decision is based on an error in law or in fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision.
- Where correction of a clerical error or clarification of an ambiguity is required.
- Where other criteria, particular to a given case, are shown to be valid.

> [44] The practice of the Board in this regard is analogous to the well-known rule in R. v. Palmer, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, relative to the admission of fresh evidence after trial. In my view, this matter encompasses a practice or procedure within the jurisdiction of the Board. I am not satisfied that any issue of law or of jurisdiction is involved such as to meet the test for granting leave.[3]

23. A portion of the above passage from EUB Decision 2000-25 was also included in a more recent decision of the Alberta Court of Appeal, *Talisman Energy Inc. v. Energy Resources Conservation Board*[4]. In that decision the Court of Appeal considered a decision of the Energy Resources Conservation Board to deny a review and variance application brought by Talisman Energy Inc.[5] One of the issues raised by Talisman was whether the ERCB applied the wrong standard of review in its review decision and gave undue deference to the initial hearing panel. Justice MacDonald found that decisions of the Board were entitled to a high degree of deference and cited Justice O'Brien's comments, above, including the excerpt from EUB Decision 2000-25. Justice McDonald concluded that the Board acted within its jurisdiction in according the hearing panel the deference it did and denied the application for leave to appeal.

24. On the basis of Justice O'Brien's comments, RETA argued that the test for an error of law or fact is whether the error is obvious or whether the error is shown on a balance of probabilities. The Heartland applicants disagreed and argued that when an error of fact is alleged, the applicant must demonstrate that the finding of fact, or inference of fact, is based on no evidence and amounts to a palpable and overriding error. In support of this proposition, the Heartland applicants relied upon the Energy Resources Conservation Board's decision to dismiss an application to review ERCB Decision 2009-050 by Talisman Energy Inc.[6], which was the decision that the Court of Appeal affirmed in *Talisman Energy Inc. v. Energy Resources Conservation Board*.

25. The review panel has considered the decisions of the Court of Appeal, the Energy and Utilities Board and the Energy Resources Conservation Board cited by the parties regarding the role of a review panel. In addition, the review panel also considered two other decisions: *Housen*

[3] Supra, paragraphs 39 to 40
[4] *Talisman Energy Inc. v. Energy Resources Conservation Board*, [2010] ABCA 258
[5] The ERCB's test for review and variance, is identical to the test employed by the AUC
[6] ERCB Review Application No. 1626260, Decision, Dated June 23, 2010, (exhibit 0041.03, Proceeding 1592)

*v. Nikolaisen*[7], a decision of the Supreme Court of Canada, and *Imperial Oil Resources Limited v. Ball*[8], a decision of the Alberta Court of Appeal. The review panel also had regard for Section 30 of the *Alberta Utilities Commission Act* which emphasizes the principle that decisions of the Commission are intended to be final.

26. In *Housen v. Nikolaisen* the Supreme Court of Canada ruled on the role played by appeal courts when reviewing the decisions of lower courts. It found that the role of an appeal court is not to retry the case, and stated that appeal courts must not substitute their views for that of the trial judge based on their own interpretation of the evidence before the trial judge. The Court noted that this approach is based in part upon the principle that finality is an important goal of litigation.

27. The Supreme Court reviewed the appropriate standard of appellate review for errors of law and fact. The Court found that errors of law are to be reviewed on a standard of correctness. However, it found that findings of fact and inferences of fact made by a trial judge should not be disturbed unless there is a palpable and overriding error. The Court defined a palpable error as an error that is "plainly seen".[9] The Court stated as follows with respect to inferences of fact:

> ... Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts...[10]

28. The Alberta Court of appeal subsequently examined the role of a reviewing court in *Imperial Oil Resources Limited v. Ball.*[11] In addition to referencing the above passage from *Hausen v. Nikolaisen* it also commented on errors of law arising from the judge's consideration of evidence. It noted that an error of law will occur if a judge comes to a conclusion on the basis

[7] *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33
[8] *Ball v. Imperial Oil Resources Limited*, 2010 ABCA 111
[9] *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33 at paragraph 6
[10] *Supra,* at paragraphs 22 and 23
[11] *Ball v. Imperial Oil Resources Limited*, 2010 ABCA 111

of no evidence, if he or she fails to consider relevant evidence, or if he or she relies upon non-existent evidence.[12] The Court also stated as follows:

> However, where the weight assigned to the evidence is at issue, a trial judge's decision will be given deference, absent palpable and overriding error: Housen v. Nikolaisen, 2002 SCC 33 (CanLII), 2002 SCC 33, [2002] 2 S.C.R. 235. Similarly, the palpable and overriding standard will apply when an appellant is challenging a finding of fact, or the drawing of an inference of fact: Housen, para. 18.

29. Having considered the above cases, the review panel notes that EUB Decision 2000-25, which described the Board's process for assessing applications for review and variance, was issued two years before *Housen v. Nikolaisen* and before the Board adopted formal rules for the consideration of such applications. The review panel also observes that the issue in *AltaGas v. Alberta (Energy and Utilities Board)* was not whether the Board used the correct test for assessing errors of errors of law or fact. Rather the issue in that decision related to whether the Board used the right test for granting a review on the basis of new evidence. While Mr. Justice O'Brien found that the Board adopted the correct test for the consideration of new evidence on a review; the test for assessing errors of law or fact was not an issue squarely before him. Similarly, in *Talisman v. Alberta (Energy Resources Conservation Board)* the issue the Court was considering was whether the ERCB review panel afforded the hearing panel too much deference. The question of the correct test for assessing errors of fact or inferences of fact was not specifically considered in that decision.

30. The review panel concludes that findings of fact or inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error. In the Commission's view, this approach is consistent with that prescribed by the Supreme Court in *Housen v. Nikolaisen* and by the Court of Appeal in *Ball v. Imperial Oil*. It is also consistent with the general principle that the trier of fact is better situated than a subsequent review authority to make factual findings or draw inferences of fact given the trier of fact's exposure to the evidence and familiarity with the case as a whole. Accordingly, the review panel finds that assessing errors of fact and inferences of fact on a balance of probabilities, as proposed by RETA, would be inconsistent with the deference that the courts have stated must be accorded to the original decision-maker.

31. Having regard to the foregoing, the review panel concludes that it should apply the following principles to its consideration of the review applications:

- 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 Heartland application based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing

[12] *Supra*, at paragraph 28

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.

## 4 Standing of the review applicants

32. Strathcona County and RETA are parties to the Heartland decision and each is directly affected by that decision. Accordingly, the County and RETA have standing to bring a review and variance application under sections 3 and 4(2) of Rule 016.

33. James and Michelle Prins and Aspen Valley Farms were registered participants in the Heartland proceeding. They are parties to the decision and are directly and adversely affected by the decision. Accordingly, James and Michelle Prins and Aspen Valley Farms have standing to bring a review and variance application under sections 3 and 4(2) of Rule 016.

34. William, Trevor and Kenton Prins were not registered participants in the Heartland hearing. In accordance with the plain wording of Section 3 of Rule 016 they do not have standing to bring an application for review and variance based upon an error of law, fact or jurisdiction because they are not parties to the Heartland decision. However, the Commission finds that these individuals are directly and adversely affected by the Heartland decision and have standing to bring a review application on the basis of new facts, or a change in circumstances or facts not previously placed in evidence, namely that they have new evidence regarding the effects of approving route segment 6-3 on adjacent landowners.

## 5 Errors of law, fact or jurisdiction

35. Strathcona County submitted that the hearing panel made two distinct errors in the Heartland decision. The County alleged that the hearing panel made an error of fact and law by mistakenly attributing evidence from the Heartland applicants about their views on the underground option to RETA. The County alleges that the hearing panel also made an error of fact or law in its assessment of the visual impacts of the Heartland project and in the weight attributed by the hearing panel to the costs of the underground option. The County argued that these two errors, either individually or collectively, create a substantial doubt about the correctness of the hearing panel's decision to reject the underground option.

36. RETA also contended that the hearing panel committed two errors in the Heartland decision. RETA alleged that it made an error of fact and law when it found that "using a 500 kilovolt underground cable system for the Heartland project remains a high risk proposition for reliability, especially during winter, ,...".[13] RETA also alleged that the hearing panel erred in law and fact by relying upon magnetic field calculations prepared by the Heartland applicants in response to a request by Commission Counsel. Specifically, RETA argued that it had no notice that this evidence had been filed and no opportunity to respond to it.

37. The Heartland applicants and the AESO refuted each of the grounds for review raised by the County and RETA premised on errors of fact, law or jurisdiction. ATCO submitted that neither the County nor RETA have alleged errors of law, fact or jurisdiction that raise a substantial doubt as to the correctness of the Heartland decision. ATCO asserted that the record

[13] Decision 2011-436, paragraph 504

for the proceeding was substantial and that the matters raised by RETA and the County were considered in depth by the Commission. BRUTE's submissions were similar to ATCO's; it submitted that the review applicants failed to raise or demonstrate an error of law, fact or jurisdiction in the Heartland decision. Even if the errors alleged were proven, BRUTE contended that those errors would not result in a variance of Decision 2011-436.

38. In the following sections the Commission specifically considers each of the grounds raised by the RETA and the County under this category of review.

### 5.1 Strathcona ground one: misapprehension of the applicants' underground evidence

39. The first error alleged by Strathcona County (the County) relates to paragraph 477 of the Heartland decision which states:

> With respect to the proposed underground cable system, RETA pointed out that there is no disagreement among the participants in the hearing about whether the underground option would be technically feasible. RETA submitted that even the applicants would prefer the underground option, except for the additional costs and the perceived risk and complexity associated with being the first 500-kilovolt underground cable of this kind in Alberta. RETA argued that there are many cases of underground transmission line deployment, particularly in Europe, and implied that this should give the Commission some comfort that underground transmission would be feasible for the Edmonton area.

40. The County asserted that this was not simply an argument advanced by RETA but rather an admission by the Heartland team's policy witness, Mr. Watson, as reflected in the following passage from the transcripts in which the Heartland applicants were being examined by Commission counsel:

> Q. So I want to take us back to the specifics here. And so if you had a choice between asking for the Commission to approve the preferred route aboveground or underground and costs were the same, which one would you be requesting the Commission to approve?
>
> A. MR. WATSON: So if we were able to make the costs the same and, you know, I don't see it a technology risk. We've convinced ourselves that we can build and operate either. Then I would say we would be recommending underground.

41. Strathcona County stated that it was not clear in the Heartland decision that the hearing panel was aware that the above was the evidence of the Heartland applicants and not simply an assertion of RETA. The County observed that this was extremely significant evidence and questioned why the only reference to it was in relation to the RETA argument. It also stated that the hearing panel added a qualification to the statement that was not made by Mr. Watson and not found in the RETA materials. Specifically, the County stated that Mr. Watson had not expressed any reservations with respect to the risks associated with the underground option. The County argued that, if the hearing panel properly apprehended this evidence and applied the weight it was due, it could have reasonably led the hearing panel to find that approval of the underground option was in the public interest.

The Heartland Applicants

42. The Heartland applicants argued that there is nothing in Decision 2011-436 that suggests the hearing panel did not consider the evidence in question. However, they observed that because this evidence was based on a hypothetical set of circumstances, i.e., that the costs of the overhead and underground options were the same, it was not surprising that it played no role in the hearing panel's decision.

43. The Heartland applicants argued that there is no support for the County's allegation that the hearing panel did not properly apprehend this evidence. They noted that the evidence in question was referenced in the County's argument and reply argument. They argued that just because the hearing panel's conclusion on this issue does not accord with that of the County does not suggest or otherwise demonstrate that the Commission failed to apprehend this evidence. They concluded that this issue does not give rise to any doubt as to the correctness of the Heartland decision.

The AESO

44. The AESO stated that the error alleged by the County is unclear. It stated that paragraph 477 is simply a summary of one of the party's views and is not a finding of fact or determination made by the hearing panel. The AESO observed that the hearing panel's analysis of the underground option is found in paragraphs 489-504 of the decision. It argued that this analysis was extensive and included a consideration of the practical application of a cable of this size in the operating conditions for the Edmonton area. The AESO submitted that neither the decision nor the evidence on the record support the County's conclusion that the hearing panel misapprehended this evidence. The AESO concluded that this ground had no merit.

### 5.1.1 Review panel findings

45. The County asserted that this ground includes two separate but related errors. The first error alleged is that the hearing panel either mistakenly characterized the evidence of Mr. Watson as an argument of RETA or it failed to apprehend or give the correct weight to this evidence. The second error alleged is that the reference to this evidence includes qualifications that are not reflected in the evidence of Mr. Watson. The County asserts that this evidence was significant and, had the hearing panel not made the above errors, it could reasonably have led it to find that approval of the underground option was in the public interest.

46. Regarding the first alleged error, the review panel finds no support for the contention that the hearing panel failed to distinguish between the evidence of Mr. Watson and the position of RETA. The context of the impugned passage is important. Paragraph 477 is found in the views of RETA in the section of the decision that addresses the technical feasibility of the underground option. RETA argued that the underground option was technically feasible and relied on the evidence of the Heartland applicants in support of that position. The fact that the hearing panel referenced this evidence here and not elsewhere is not demonstrative of an error of law or fact.

47. As to the weight accorded this evidence, the review panel's job is not to retry or reweigh the evidence considered by the hearing panel. Rather, the review panel must consider whether the hearing panel made an obvious or palpable error in according the evidence the weight it did.

In the review panel's view, there is nothing on the record or in Decision 2011-436 to suggest that the hearing panel made such an error when weighing the evidence on the feasibility of the underground option

48. With respect to the second alleged error the review panel agrees that in the passage referred to by the County, Mr. Watson did not qualify his endorsement of the underground option on the basis of the perceived risk of being the first 500 kilovolt underground cable in Alberta. However, the review panel observes that Mr. Watson's response followed a series of questions in which the Heartland applicants were asked to compare the overhead and underground options from a number of perspectives. Earlier in the same line of questioning, another witness for the Heartland applicants, Mr. George Bowden, AltaLink's chief engineer who was responsible for the undergrounding and technical aspects of the Heartland application, stated that that the only other 500 kV cable installations that are similar to the one proposed in the Heartland application are in China and Japan. He also noted that those installations were in tunnels and not in a duct bank, as was proposed for the Heartland underground option. [14]

49. Mr. Bowden acknowledged that the proposed cold weather testing would mark the first time that 500 kilovolt underground cable would be tested at minus 15 degree Celsius. He stated that previous cold weather tests had only been done on 400 kilovolt cable to a temperature of minus five degrees.[15] He stated that the reason that the Heartland applicants were going ahead with the cold weather testing is that they were not 100 per cent sure that the cables would pass the test.[16]

50. In that same line of questioning Mr. Bowden also commented on the following statement from their reply evidence:

> The applicants are confident that an underground system can be built but emphasize that this would become only the third application of 500 kV underground cable system in the world of this scale, and as such it is not devoid of future risk.[17]

51. The witness compared the reliability of the underground and overhead options. He noted that the biggest difference between the two related to the time duration of forced outages: 4.9 hours is the mean duration for a 500 kilovolt overhead line outage whereas approximately 29 days is the mean duration for a 500 kilovolt underground cable outage. He then stated "But when we look at the forced outage, the serious outage, the consequences on the underground are much more severe in terms of duration for repair than the overhead."[18]

52. The review panel finds that the there was credible and consistent evidence on the record from the Heartland applicants that the underground option was the first project of its kind proposed in Alberta and that it was not without risk. In the review panel's opinion, the hearing panel's decision to summarize or paraphrase the applicants' evidence from this line of questioning was reasonable in the circumstances and does not amount to an error of law or fact.

[14] Exhibit 838.02, Applicants' reply evidence, paragraph 248, Transcript Volume 14, page 3169 (Proceeding 457)
[15] Transcript Volume 14, page 3173 (Proceeding 457)
[16] Transcript Volume 14, Page 3174 (Proceeding 457)
[17] Transcript Volume 14, Page 3176 (Proceeding 457)
[18] Transcript Volume 14, pages 3178 to 3179 (Proceeding 457)

53. While the review panel has concluded that the County has not demonstrated that the hearing panel made an error of fact or law with respect to this ground, it is of the view that even if the alleged error had occurred, that error does not raise a substantial doubt as to the correctness of the Heartland decision. Two factors are important here. First, notwithstanding Mr. Watson's evidence on the same-cost hypothetical, the Heartland applicants' position in argument was that the underground option was significantly more expensive than the overhead options and that those extra costs were not justified on the basis of health, property value, environmental, safety or visual impacts.[19]

54. Second, the hearing panel did not reject the underground option on the basis of the reliability risk it identified. To the contrary, the hearing panel found that the underground option was technically feasible. The hearing panel rejected the underground option on the basis that the additional costs associated with it ($323 million for stage 1, $549 million for stages 1 and 2), were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.[20] Given the basis for the hearing panel's decision to reject the underground option, the review panel concludes that even if it was of the opinion that the hearing panel had made the alleged error (which it was not), the error would not create a substantial doubt as to the correctness of the decision.

### 5.2 Strathcona ground two: improper assessment of visual impacts and weighing of costs

55. The County argued that the hearing panel's assessment of visual impacts and its reliance upon cost as the primary factor for rejecting the underground option were inconsistent with the hearing panel's ruling on the Commission's public interest mandate. The County focused on the following passages from the Heartland decision:

> In the Commission's view, assessment of the public interest requires it to balance the benefits associated with upgrades to the transmission system with the associated impacts, having regard to the legislative framework for transmission development in Alberta. This exercise necessarily requires the Commission to weigh impacts that will be experienced on a provincial basis, such as improved system performance, reliability, and access, with specific routing impacts upon those individuals or families that reside or own land along a proposed transmission route as well as other users of the land that may be affected.[21]
>
> The Commission emphasizes that the public interest does not require approval of the least-cost alternative. However, if the local impacts associated with the alternatives being considered are similar, then the cost of the project will play an important role in the Commission's approval of a specific route.[22]

56. The County argued that, in accordance with the above passages, the cost of the project should only play a significant role in the hearing panel's assessment of alternatives when the local impacts of the alternatives are similar. It submitted that, because the visual impacts of the underground option were so much less than the all-overhead preferred east route, the hearing

[19] Exhibit 1240.01, Applicants' argument, paragraph 108 (Proceeding 457)
[20] Decision 2011-436, paragraphs 1080-1086
[21] Decision 2011-436, paragraph 116 (excerpted from AUC Decision 2009-028)
[22] Decision 2011-436, paragraph 101

panel must have placed undue weight on the cost of the underground option when it determined that approval of the preferred east route and the rejection of the underground option were in the public interest.

57. The County also asserted that the hearing panel made two errors in its assessment of the visual impacts of the project. First, it mistakenly found that the availability of the transportation and utility corridor (TUC) somehow mitigated the effects of the proposed line on nearby residents. Second, the hearing panel erred by examining which route had the greatest incremental impact rather than considering all relevant factors such as the number of people impacted. The County argued that the Commission appeared to disregard the number of persons impacted when assessing which route was preferred from a visual impacts perspective. Specifically, it asserted that the Commission did not acknowledge that the preferred east route would impact approximately 15 times more residences and persons than the west route would from a visual impacts perspective.

58. The County argued that these errors, either individually or collectively, raise a substantial doubt as to the correctness of the hearing panel's decision to reject the underground option and approve the preferred route.

The Heartland applicants

59. The Heartland applicants argued that this ground is premised upon a mischaracterization of the Commission's public interest test and the hearing panel's interpretation of that test. They also stated that this ground ignores the fact that the hearing panel did not approve the least cost option.

60. The Heartland applicants argued that the hearing panel did not state in the Heartland decision that where local impacts differ costs cannot play a role. Rather the hearing panel stated that where the impacts of two alternatives are similar, costs will play an important role in deciding on an alternative. In their view the essence of the County's argument is that, because the impacts of the overhead and underground options differ, the hearing panel should have ignored the cost differences between the two options. The Heartland applicants argued that such an approach would clearly be contrary to the Commission's public interest mandate.

61. The Heartland applicants submitted that the hearing panel weighed the social, economic and environmental effects of the alternatives applied for, including a comparison of the impacts of the overhead and underground options. They observed that the hearing panel found that the visual impacts of the underground option would be less than the overhead alternatives but ultimately concluded that those impacts did not justify the increased costs for the underground option. The Heartland applicants stated that the Commission applied the correct public interest test. They argued that the hearing panel's application of this test is an exercise of discretion and thus a review of such findings should not be granted lightly.

62. The Heartland applicants observed that the hearing panel's consideration of the social, economic and environmental effects of the project spans 157 pages and included a consideration of health and safety, property impacts, environmental issues, electrical issues and costs. They argued that it is clear that the hearing panel considered its public interest mandate in making the

Heartland decision and submitted that the fact that its determination differed from that of the County is not indicative of an error of fact, law or jurisdiction.

63. The Heartland applicants also disagreed with the County's assertion that the hearing panel found that the existence of the TUC mitigated the visual impacts of the Heartland project. They stated that the only mitigation referenced in this regard was a statement by the hearing panel that no new significant visual impacts will result in that portion of the TUC where the preferred route parallels two existing 240 kilovolt lines.

64. The Heartland applicants stated that the hearing panel expressly acknowledged the visual impacts of the aboveground option in the TUC, and noted that the greatest number of residences and schools will be affected along the portion of the transportation and utility corridor from Highway 14 to Baseline Road. They argued that, in response to this impact, the hearing panel reasonably ordered the use of monopoles along this part of the route to mitigate the visual impacts of the project.

65. The Heartland applicants concluded that the County's allegations with respect to the hearing panel's application of the public interest test have raised no errors of fact, law or jurisdiction that create a substantial doubt as to the correctness of the Heartland decision.

The AESO

66. The AESO argued that the County's public interest argument appears to be premised upon the notion that the hearing panel ought to have made the issue of visual impact paramount to all other considerations when deciding whether approval of the preferred route is in the public interest. The AESO argued that it would be improper to isolate and elevate visual impacts from the other factors considered by the hearing panel. It also argued that such an approach artificially tilts the analysis.

67. The AESO submitted that the hearing panel did not reject the underground option solely on the basis of costs. It noted that the hearing panel concluded that, while technically feasible, the underground option posed some risk in light of outstanding data on cold weather performance and the potential for outages of extended duration.

68. The AESO argued that the County's allegations that the hearing panel concluded that visual impacts of the project would be less for residents adjacent to the transportation and utility corridor is unfounded because the hearing panel made no such finding.

### 5.2.1 Review panel findings

69. The review panel understands that there are three alleged errors subsumed under this ground of review advanced by the County. First, the hearing panel erred by misapplying its own test for assessing the public interest by placing undue weight on the cost of the underground option. Second, the hearing panel erred when it found that the use of the transportation and utility corridor mitigated the visual impacts of the line on adjacent residents. Third, the hearing panel erred by considering the incremental effects of adding another transmission line to the TUC rather than considering all relevant factors including the number of people impacted visually by approval of the line.

70. Regarding the first alleged error, the review panel finds that the County has not demonstrated that the hearing panel committed an error of fact or law by considering the incremental cost of the underground option when deciding whether its approval was in the public interest. While the hearing panel did state in paragraph 101 of the Heartland decision that the cost of various alternatives will play an important role when the impacts of alternatives are similar, it does not follow that the Commission should not have regard for the costs associated with alternatives when the impacts of those alternatives differ. As demonstrated in the table below, the cost of the underground option was far greater than overhead options and that was a factor that the hearing panel was obliged to consider.

**Table 1. Route cost comparison**[23]

| | Total cost ($ million) | Incremental cost ($ million) |
|---|---|---|
| Preferred east route | 582.7 | -- |
| Alternate west route | 670.3 | 87.6 |
| Preferred east route with the underground option (20 km) | 906.0 | 323.3 |
| Preferred east route with underground option, incl. stage 2 (20 km) | 1132.0 | 549.3 |
| Preferred east route with the monopole option (20 km) | 657.0 | 74.3 |
| Preferred east route with the monopole option (6.5 km) | 604.2 | 21.5 |
| Preferred east route with the monopole option (6.5 km + 3.0 km) | 609.3 | 26.6 |
| Preferred east route with the monopole option (6.5 km + 4.5 km) | 612.5 | 29.8 |
| Preferred east route with the monopole option (6.5 km + 6.0 km) | 617.3 | 34.9 |

71. Section 17 of the *Alberta Utilities Commission Act* requires the hearing panel to consider the social, economic and environmental impacts of approving a proposed project. A review of the decision discloses that the hearing panel undertook a detailed analysis of those effects. The hearing panel concluded that the economic impact of the underground option (i.e. the incremental cost) was not justified by the extent to which the underground option might mitigate other site specific impacts of the project. The hearing panel's weighing of these impacts and the related evidence is entitled to deference. In the review panel's opinion, the County has not demonstrated that the hearing panel made an error of fact or law in the manner in which it assessed the impacts of the alternatives described in the Heartland application or in its conclusion.

72. The remaining two errors alleged by the County under this ground go to the hearing panel's finding of fact that the east preferred route was favoured over the west alternate route from the perspective of visual impacts. The hearing panel made this finding based upon the evidence before it and provided its reasons in paragraphs 774-779, 1060 and 1061of the decision. Those reasons include:

- the alternate west route was 18 kilometres longer than the preferred east route;
- the alternate west route is located predominantly on rural and agricultural lands;
- the first 20 kilometres of the preferred east route is in the transportation and utility corridor; and

[23] Decision 2011-436, paragraph 138

- a portion of the transportation and utility corridor already contains two high voltage transmission lines and also passes through an industrial area.

73. In making this decision the hearing panel specifically noted that the greatest number of residences and schools will be impacted on the portion of the east preferred route between Highway 14 and Baseline Road. In recognition of those visual impacts, the hearing panel directed the use of monopoles rather than lattice towers in this area as a mitigation measure. The hearing panel's determination that the east preferred route was favoured over the west alternate route from the perspective of visual impacts was based on facts and inferences from facts in the evidence before it. The hearing panel's findings of fact and inferences of fact are entitled to deference and, in the review panel's opinion, the County has not demonstrated that the hearing panel committed an error in law or fact in coming to this determination.

74. Having regard to the foregoing reasons, the review panel finds that a review of the Heartland decision is not warranted on the County's second ground.

### 5.3 RETA ground one: improper assessment of the risks of the underground option

75. RETA asserted that the hearing panel made an error of fact and law when it found that the underground option "remains a high risk proposition for reliability, especially during the winter."[24] RETA argued that this conclusion was not reflective of the evidence filed, including the evidence of the AESO's experts, Cable Consulting Inc. (CCI), and the applicants that the underground option was technically feasible.

76. In support of this position, RETA observed that it was the applicants' evidence that they favoured the preferred east route over the west alternate route, regardless of the technology used on the preferred east route. RETA also noted that the outstanding cold weather testing for the selected underground cables and joints should now be complete. It argued that any misgivings that the Commission may have had could now be resolved by reference to the test results.

The Heartland applicants

77. The Heartland applicants argued that the hearing panel had evidence upon which to base its conclusion on the reliability of the underground option. They argued that RETA has not demonstrated that the hearing panel made a palpable or overriding error in making this finding of fact. The Heartland applicants observed that the hearing panel found that the underground option was technically feasible subject to cold weather testing. They noted that the hearing panel's concern about the reliability of the underground option was based upon the evidence before it, including evidence from the AESO and their experts, CCI. The Heartland applicants pointed out that the AESO had concerns with the underground option given that the technology was relatively new and there was limited operating experience.

78. The Heartland applicants observed that the hearing panel thoroughly reviewed all of its concerns with the underground option in the Heartland decision. They stated that the concerns identified included scheduling issues and operational issues. They also noted that the hearing panel took into account many other factors when it decided to reject the underground option and

[24] Decision 2011-436, at paragraph 504

noted that the Commission described this assessment in paragraphs 1081 to 1086 of the decision. In these paragraphs, they noted, the hearing panel considered the costs of the underground option in relation to its potential benefits from the perspectives of heath and safety, visual impacts, property impacts and environmental impacts.

The AESO

79. The AESO argued that RETA's submission depends upon only one paragraph of the CCI study and ignores the rest of CCI's evidence which discussed the remaining risks associated with an underground option. The AESO also argued that RETA has confused the issue of feasibility with the issue of reliability. It notes that the hearing panel considered the number of faults per year for an underground and overhead system in this respect – a factor that goes to reliability and not feasibility. The AESO pointed out that while it certified that the technical aspects of the underground option would meet the requirements of its long term plan it also encouraged the hearing panel to keep in mind the technical risks which included limited operating experience, the need to complete cold weather testing, and greater repair time. The AESO concluded that this ground does not raise a substantial doubt as to the correctness of the decision.

### 5.3.1 Review panel findings

80. The hearing panel conducted a detailed analysis of the technical feasibility of the underground option. The hearing panel considered the evidence of the interveners, CCI and the Heartland applicants on the underground option with respect to the issues of feasibility, reliability, transmission losses, project scheduling, project uncertainties, construction methods, etc. The hearing panel made the following findings of fact in respect of the underground option:

- The Heartland project would be the largest duct bank deployment of a 500-kilovolt transmission underground cable in the world;
- The operational reliability of the 500 kilovolt underground cables and joints had not been demonstrated for winter operating conditions in Edmonton however, cold weather testing was scheduled for the proposed cables;
- The predicted outage rate for the underground option is slightly higher than an overhead line;
- The predicted outage duration for the underground option is much higher than for an overhead line. The mean duration of a 500-kilovolt overhead line outage is 4.9 hours. The average recorded repair time for the underground option was estimated to be 29 days.

81. The hearing panel ultimately concluded that the proposed underground option was technically feasible. However, it found that the underground option remained a "high risk proposition for reliability, especially during winter, and provides no advantages over the all-overhead line configuration in terms of power losses or reliability."[25] In the review panel's view this conclusion was based on findings of fact and inferences of fact based on the evidence. As noted previously, the hearing panel's findings of fact and inferences of fact are entitled to deference; the review panel's role is not to reinterpret or reweigh the evidence that was before

[25] Supra note 8

the hearing panel, absent an obvious or palpable error. Having considered the positions of the parties and the record, the review panel can discern no such error on behalf of the hearing panel when it made this finding.

82. While the review panel has concluded that RETA has not demonstrated that the hearing panel made an error of fact or law with respect to this ground, it is of the view that even if the alleged error had occurred, it does not raise a substantial doubt as to the correctness of the Heartland decision. As noted earlier, the hearing panel found that the underground option was technically feasible and did not reject the underground option on the basis of the reliability risks it identified. The hearing panel rejected the underground option on the basis that the additional costs associated with it ($323 million for stage 1, $549 million for stages 1 and 2), were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.[26] Given the basis for the hearing panel's decision to reject the underground option, the review panel concludes that even if it was of the opinion that the hearing panel had made the error alleged (which it was not), the error would not have created a substantial doubt as to the correctness of the Heartland decision.

83. Having regard to the foregoing, the review panel finds that a review of the Heartland decision is not warranted on RETA's first ground.

### 5.4 RETA ground two: incorrect or incomplete magnetic field calculations

84. RETA argued that the hearing panel committed an error of law and fact by improperly relying upon incorrect or incomplete magnetic field estimates provided by the Heartland applicants during the hearing at the request of Commission counsel. The evidence that RETA objected to was a table prepared by the Heartland applicants that showed magnetic field estimates at various schools, daycares and residences along the preferred and alternate routes, and for the underground option (Exhibit 974). RETA stated that this evidence was filed late in the proceeding and asserted that the process in which it was filed did not properly allow interveners and their experts to review or present evidence on these estimates.

85. RETA asserted that it was not clear whether the modelling that produced the estimates in Exhibit 974 was done on the basis of transmission of electricity at a frequency of 60 Hz. It also noted that the evidence did not estimate magnetic fields based on peak or heavy loads, nor did it address the effects of high frequency electrical pollution.

<u>The Heartland applicants</u>

86. The Heartland applicants stated that they filed accurate electric and magnetic field evidence throughout the proceeding. They noted that modeling evidence on electric and magnetic fields was filed with their application and that the Commission, RETA and others asked information requests on that modeling evidence. The Heartland applicants stated that the tool they used for electric and magnetic field modeling was tested against real world measurements, and observed that the differences between the estimates and measurements were small.

[26] Decision 2011-436, paragraphs 1080-1086

87. The Heartland applicants stated that Exhibit 974 was provided as supplementary electric and magnetic field information to that already filed with the Commission. They stated that the magnetic field values were based on data included in the Heartland application that was filed in September 2010. They stated that the 1000 MVA (post 2027) magnetic field levels and the 3000 MVA contingency levels were included in their responses to the Commission's information requests. They also noted that the fact that alternating current on transmission lines changes directions 60 times per second was explained on the first page of appendix K-3 of the Heartland application.

88. The Heartland applicants stated that their counsel entered Exhibit 974 orally on the record at the hearing and uploaded it to the Commission's electronic proceeding system which gives notice to all registered parties that the document had been filed. They also noted that RETA had an opportunity to cross-examine the Heartland applicants after Exhibit 974 had been filed but did not do so, nor did RETA address this evidence in its own direct evidence.

89. The Heartland applicants stated that RETA was incorrect when it stated that Exhibit 974 did not provide information about peak loads. They noted that they included loading at three different levels, including peak contingency loading at 3000 MVA. The Heartland applicants also observed that RETA's expert, Dr. Blank, testified that the field levels in the exhibit were consistent with what he expected based upon his knowledge of figures produced by the Bonneville Power Administration.

The Heartland applicants noted that the electric and magnetic field estimates that RETA is now objecting to were generated using an algorithm that the hearing panel found to be well known and accepted. They argue that the evidence on electric and magnetic fields contained in the disputed table was uncontroverted by any party. The Heartland applicants concluded that RETA had not demonstrated that the hearing panel had committed an error of law or fact in its request for, or consideration of, this evidence.

### 5.4.1 Review panel findings

90. RETA argued that the hearing panel made an error of law by allowing Exhibit 974 to be filed during the course of the proceeding and by relying upon that evidence when making its decision. The essence of RETA's argument on this ground is that it did not have a fair opportunity to meet the case against it with respect to this evidence. For the reasons that follow, the review panel finds that RETA has not demonstrated that the hearing panel made an error of law by allowing this evidence to be filed or by relying on this evidence when making the Heartland decision.

91. The Heartland applicants filed magnetic field estimates at various distances from the proposed lines and for various locations along the applied-for routes in their application, and in their answers to information requests from the Commission and an intervener group (HALO). The magnetic field estimates provided to the Commission were provided for different locations, under different operating conditions and for different transmission structures (lattice towers and monopole towers) than the magnetic field estimates provided to HALO.

92. During the course of the hearing, the Heartland applicants applied to amend their application by moving the preferred route within the transportation and utility corridor. The effect of the amendment was that some of the locations for which magnetic field estimates had been provided by the Heartland applicants were now further away from the source of the magnetic field. Commission counsel requested the Heartland applicants to consolidate their magnetic field estimates into a single table under three operating conditions so that the estimates were based upon consistent locations and operating conditions and reflected the recent route amendment.[27]

93. The evidence in question was requested by Commission counsel in a letter to the Heartland applicants dated April 27, 2011 (Exhibit 960.01). That letter was posted to the Commission's electronic proceeding system and notice of the filing of the letter was sent to all registered participants, including RETA, on April 28, 2011. The Heartland applicants filed their response to this request (Exhibit 974.01) in the electronic proceeding system on April 29, 2011. As a registered participant, RETA would have received notice, through the electronic proceeding system, that the Heartland applicants had filed a document described as "response to the AUC - examination requests of April 27". Counsel for the applicants also stated on the record that they were filing a response to a request from Commission counsel seeking "additional information from the applicants to assist the Commission's examination of the applicants' witness panel".[28]

94. Exhibit 974 was filed on April 29, 2011, while the Heartland applicants' witness panel was still testifying. RETA cross-examined the Heartland panel on May 3, 2011, but asked no questions about Exhibit 974. Commission counsel examined the Heartland applicants' witnesses on Exhibit 974 on May 4, 2011, and RETA's own witness, Dr. Dennis, on May 5, 2011. On May 12, 2011, Commission counsel also examined Dr. Blank, an expert witness on the health effects of magnetic fields that was shared by RETA, the County and the City of Edmonton. Dr. Blank reviewed the magnetic field estimates in Exhibit 974 and concluded that they were consistent with estimates published by the Bonneville Power Administration and they were what he would expect.[29]

95. Section 42.3 of *AUC Rule 001: Rules of Practice* provides that Commission staff may examine witnesses. The review panel finds that the questions posed by Commission counsel to the Heartland applicants were questions that Commission counsel was entitled to ask in accordance with Section 42.3 of Rule 001. In the review panel's view, the goal of the questions was to provide an up-to-date table of consistent and comparable magnetic field estimates for various locations along the applied-for routes. The review panel finds that the fact that these questions were asked in a letter prior to Commission counsel's examination of the Heartland applicants rather than during his examination of the witnesses does not make the questions less valid or improper. The review panel finds that RETA has not demonstrated that the hearing panel committed an error of law by allowing Commission counsel to ask these questions prior to his examination of their witnesses.

96. The review panel finds that RETA had effective notice, through the electronic proceeding system, of Commission counsel's request for the magnetic field information and of the filing of that information by the Heartland applicants on April 28 and 29 respectively. Even if the review

[27] Exhibit 960.01, April 27, 2011 letter from Commission Counsel to the Heartland applicants (proceeding 457)
[28] Transcript Volume 12, page 2654 (Proceeding 457)
[29] Decision 2011-436, paragraph 569

panel did not consider the electronic proceeding system notifications to be effective notice, it finds that RETA should have been aware of this evidence as of May 4, 2011, when Commission counsel examined the Heartland applicants' witness panel on Exhibit 974. RETA must have been aware of this evidence by May 5, 2011, when Commission counsel examined RETA's witness, Dr. Dennis, on Exhibit 974.

97. RETA was represented by counsel throughout the proceeding. Had it been concerned about the contents of Exhibit 974, or the way in which it was put on the record, it had at least three procedural options: it could have applied to have Exhibit 974 excluded, it could have cross-examined the Heartland applicants on Exhibit 974, and/or it could have asked for an opportunity to file additional evidence in response to Exhibit 974. RETA could also have requested an adjournment to allow it to pursue any or all of these options. RETA could have made such a request when the evidence was filed or after Commission counsel's examination of the Heartland witnesses or Dr. Dennis. RETA took no such steps at any time during the proceeding.

98. RETA stated that it suspected that it knew what the answer to a request to file additional information would have been (i.e. negative), based on an exchange between the chair of the hearing panel and the president of RETA, who was also a RETA witness. However, the Commission notes that this exchange took place on May 11, 2011, many days after Exhibit 974 was entered into evidence and some time after Commission counsel examined RETA's expert, Dr. Dennis, on this exhibit.

99. In the review panel's view, RETA has not established that the Commission made an error of law by allowing this evidence to be filed or by relying upon this evidence when making its decision on the Heartland application. The request for the information by Commission counsel was proper and consistent with the Commission's rules of practice. The opportunity existed for RETA to request a range of relief from the hearing panel to address this evidence in the hearing but RETA made no such request.

100. Further, the review panel finds that the Heartland applicants described the method and formula they used for estimating the magnetic fields produced by the proposed alternatives in the Heartland application. It is clear that RETA was aware of this evidence because it asked the Heartland applicants a number of information requests on their modeling results.[30] Had RETA been concerned about the modeling approach or assumptions made by the Heartland applicants it could have asked additional information requests on the topic to the Heartland applicants or cross-examined the Heartland applicants on this at the hearing. RETA did not do so.

101. The review panel concludes that the hearing panel's decision to accept the Heartland applicants' evidence about the accuracy of its magnetic field modeling was based on findings of fact based upon uncontroverted evidence. The fact that RETA now wishes to challenge the Heartland applicants' evidence and the hearing panel's conclusion on this evidence does not amount to an error of fact or law on the part of the hearing panel.

102. The review panel therefore finds that a review of the Heartland decision is not warranted on RETA's second ground.

[30] Exhibit 468.01, Applicants responses to RETA IR requests numbers 34, 35 and 36 (Proceeding 457)

## 6 New facts, change in circumstances, evidence not previously available

103. Strathcona County and RETA both submitted that there are new facts, changed circumstances or evidence that was not available to the hearing panel when it made the Heartland decision that could lead the Commission to materially vary the decision to reject the underground option. RETA's grounds for this argument relate to alleged new evidence available with respect to magnetic field health effects, electric and magnetic field shielding and the financial implication of closing the Colchester school. RETA asserted that one or all of these new facts or evidence could lead the Commission to materially vary its decision to reject the underground option.

104. The County also argued that the Government of Alberta's decision to review its approach to two other critical transmission infrastructure projects, the Western Alberta Transmission Line (WATL) and the Eastern Alberta Transmission Line (EATL) was a new fact or change of circumstances. RETA also requested a review of the Heartland decision on this ground.

105. The Heartland applicants responded specifically to each of the grounds raised by the County and RETA. The AESO also responded specifically to the allegation by RETA and the County that the Government's review of the WATL and EATL projects was a new fact or change in circumstance that could lead the Commission to materially vary or rescind the Heartland decision. ATCO responded more generally to these grounds and stated that the review applicants simply express disagreement with a number of determinations made by the Commission and have asked the Commission to reconsider its decision based on the same factual record and law.

106. In the following sections the Commission specifically considers each of the grounds raised by the RETA and the County under this category of review.

### 6.1 RETA ground three: new health study/ shielding evidence/ magnetic field estimates

107. RETA alleged that a new study related to the health effects of magnetic field exposure had been published on August 1, 2011, after the record for the Heartland hearing had closed. The study, which followed up a previous study by the same authors, looked at rates of asthma in children whose mothers were exposed to magnetic fields. RETA reported that the study concluded that there was a more than 3.5 fold increased risk of asthma in offspring if mothers were exposed to magnetic fields levels of more than 2 milligaus. RETA said that it was important to note that the women who took part in this study had their exposure to magnetic fields measured over a 24 hour period with the measurement devices showing maximum dosage.

108. RETA noted that thousands of people, including pregnant women, commute between Strathcona County and Edmonton on the Sherwood Park freeway and the Baseline Road. RETA observed that these commuters will be exposed to a magnetic field of 63 milligaus each time they travel directly under the transmission line. RETA asserted that the new findings it referenced demonstrate that high magnetic field exposures of short duration were associated with increased risk of several adverse health outcomes including miscarriage, poor sperm quality and the risk of asthma in children. RETA submitted that using annual average magnetic field levels when assessing health effects would mask the shorter but much higher magnetic field levels that could be detrimental to health. RETA therefore argued that magnetic field estimates for the maximum,

95th, 90th, 80th, 70th, 60th, and 50th percentiles should be provided when assessing adverse health effects.

109. RETA submitted that the author of the study would be able to provide evidence to the AUC on this health issue. RETA also noted that it is possible to shield or significantly reduce the magnetic fields produced by an underground transmission line. RETA stated that it could provide new expert evidence on how shielding could be done to mitigate magnetic fields emitted from the underground lines where they intersect the Sherwood Park Freeway and Baseline Road. RETA also proposed to introduce new evidence to challenge the completeness and veracity of the table of magnetic field estimates prepared by the Heartland applicants. RETA asserted that the new evidence it proposed to call, either individually or collectively, could lead the Commission to materially vary or rescind the Heartland decision.

The Heartland applicants

110. The Heartland applicants argued that the study referenced by RETA in its review and variance request is not a new fact or circumstance because the study is a follow-up to an earlier study. They noted that the original study was conducted in 2002 and stated that RETA was aware of that study because that study was referenced in RETA's filed materials. The Heartland applicants noted that the study was also discussed in their own expert report, which described it as:

> …a nested case-control study of women who miscarried compared to their late-pregnancy counterparts (Li et al., 2002). Both studies reported that women who miscarried were more likely to have high peak magnetic-field exposures; no differences were reported, however, in the average magnetic-field exposures of women who miscarried, compared to those who did not. The scientific panels that have considered these studies concluded that the possibility of bias precludes making any conclusions about the effect of magnetic fields on miscarriage (NRPB, 2004b; FPTRPC, 2005a; WHO, 2007); the WHO categorized the data as "inadequate." [emphasis added in the Heartland applicants' submission] [31]

111. The Heartland applicants submitted that RETA had mischaracterized the study as the conclusions drawn do not relate to short term exposure, but rather the median electric and magnetic field exposure of pregnant women in a 24 hour period extrapolated to represent a typical day.

112. The Heartland applicants stated that evidence relating to the potential effects of magnetic fields on the health of pregnant women and their children is not new. They noted that both they and RETA referenced studies on the effects of magnetic fields on pregnancy and reproduction.

113. The Heartland applicants argued that even if the study referenced by RETA is considered new, it would not reasonably cause the Commission to vary or rescind the Heartland decision. It submitted that the effect of electric and magnetic fields on health has been closely monitored by national and international health agencies for the past 40 years. It observed that hundreds of

[31] Exhibit 246.02 Exponent Report, Appendix K-3, pages 48 and 49 (Proceeding 457)

studies have been undertaken on the topic and that none of the reviews of this research performed for these health agencies has concluded that electric and magnetic fields pose any likely health effect.

114. The Heartland applicants emphasized that the new study is an epidemiology study. They noted that an important limitation of epidemiology studies is that even if an association is measured it does not tell scientists how the exposure is truly related to the disease. They stated that this limitation was explained in their evidence for the proceeding. They also emphasized that no conclusion about the impact of magnetic fields on human health can be reached by looking at a single study. They argued that if the release of a single epidemiological study satisfied the test to permit a review of the Heartland decision, there would be no regulatory certainty or finality for the application.

115. The Heartland applicants pointed out that there was evidence before the hearing panel that household implements such as hairdryers produce magnetic fields in the hundreds of milligaus. It also observed that other sources of significant magnetic field exposures include distribution lines and household wiring.

116. The Heartland applicants stated that the new evidence RETA intends to introduce on magnetic field shielding is not new. They noted that RETA's president, Mr. Johnson, spoke to the issue of shielding in his evidence and that RETA cross-examined the AESO's CCI witnesses on this topic as well.

117. The Heartland applicants asserted that the electric and magnetic field evidence that RETA seeks to introduce is not a new fact or circumstance or evidence that was previously unavailable to RETA. They submitted that RETA has not identified any exposure produced by transmission lines that has not already been considered. The Heartland applicants stated that RETA had the opportunity in the Heartland hearing to test their evidence on electrical effects or bring its own such evidence and chose not to.

### 6.1.1 Review panel findings

118. The study that RETA relies upon in support of this ground was published in August 2011, after the record for the Heartland proceeding closed. While the report is a follow-up to an earlier study and uses data generated in that earlier study, the review panel accepts that this is new evidence as contemplated by Section 4(2) of AUC Rule 016. The question the review panel must therefore answer is whether there is a reasonable possibility that this new evidence could lead to a material variance or rescission of the Heartland decision, in accordance with Rule 016. For the reasons that follow, the review panel concludes that RETA has not established a reasonable possibility that the new report could lead to a material variance or rescission of the Heartland decision, as required by Section 4(2) of Rule 016 in order to meet the test for a variance.

119. RETA, the Heartland applicants and many other participants filed extensive evidence on the health effects of electric and magnetic fields. The record of the Heartland hearing includes numerous studies and reports on the subject, including the 2007 comprehensive review by the World Health Organization (WHO) of the subject and an update to the WHO report prepared by the Heartland applicants' experts, Exponent. Literally, hundreds of studies on the subject were summarized and or referenced in the materials filed.

120. Two experts on the health effects of magnetic fields appeared at the Heartland hearing; Dr. Bailey on behalf of the Heartland applicants and Dr. Blank on behalf of RETA, Strathcona County and the City of Edmonton. Dr. Bailey and Dr. Blank stressed the importance of looking at all the evidence on an issue and looking carefully at all of the studies before drawing a conclusion on the health effects of magnetic fields. [32]

121. In answers to information requests from the Commission, Dr. Blank cautioned against reliance on epidemiology studies because they can only establish correlation and estimate risk.[33] He noted that epidemiology studies frequently reach different conclusions and that conclusions based on pooled analysis or meta-analysis generally carry more weight.[34] Dr. Blank stated: "epidemiology and animal studies are helpful, but in trying to assess the health implications of EMF exposure, basic science studies are far more reliable and certainly a reasonable basis for precautionary measures."[35]

122. Dr. Bailey also cautioned against reliance upon a single study when drawing conclusions about health risks from magnetic fields. In his report he stated "Statements about health risks that are based on a single study or a select group of studies, on the other hand, should not guide decisions about health risks."[36] Doctor Bailey also noted that an important limitation of epidemiology studies is that "even if an association is measured it does not tell scientists if and how the exposure is truly related to the disease."[37] Doctor Bailey described the weight of evidence approach as follows:

> The evidence used to evaluate any health risk is the cumulative body of research published in the peer-reviewed literature. The individual research studies can be thought of as puzzle pieces. When all of the research is placed together, we have some understanding of possible health effects; however, no conclusions can be reached by looking at only one study, just as no picture can be formed with just one puzzle piece. Each study provides a different piece of information because of its unique strengths and weaknesses–if the study used valid methods and had no obvious sources of bias, it may provide a wealth of information or, if the study was not well done, it may provide little (if any) information.[38]

123. In its 2007 report, the WHO emphasized the need to adopt a weight of evidence approach to assessing the health risks of electric and magnetic fields, and stated as follows:

> All studies, with either positive or negative effects, need to be evaluated and judged on their own merit, and then all together in a weight of evidence approach. It is important to determine how much a set of evidence changes the probability that

[32] Dr. Bailey – Exhibit 246.00, Application, Appendix K-3, pages 6 to 14; Dr. Blank – Transcript, volume 21, pages 5448-5450 (Proceeding 457)
[33] Exhibit 800.01 RETA answers to information requests, AUC-RETA-23 (Proceeding 457)
[34] Exhibit 800.01 RETA answers to information requests, AUC-RETA-24, Transcript, Volume 21, page 5447 and 5448 (Proceeding 457)
[35] Exhibit 800.01 RETA answers to information requests, AUC-RETA-28 (Proceeding 457)
[36] Exhibit 246.00 Application, Appendix K-3. Page 10 (Proceeding 457)
[37] Exhibit 246.00 Application, Appendix K-3. Page 8 (Proceeding 457)
[38] Exhibit 246.00 Application, Appendix K-3. Page 6 and 7 (Proceeding 457)

> exposure causes an outcome. Generally, studies must be replicated or be in agreement with similar studies. The evidence for an effect is further strengthened if the results from different types of studies (epidemiology and laboratory) point to the same conclusion.[39]

124. The hearing panel found as follows with respect to the WHO 2007 report:

> The evidence discloses that the World Health Organization's report was a comprehensive, weight-of-evidence review of peer-reviewed epidemiological, animal and cellular studies related to the health effects associated with magnetic fields. The evidence before the Commission was that the review was performed by a large working group and was subject to independent review. The Commission accepts Dr. Bailey's evidence that that the review methodology for the study was sound and the conclusions and recommendations were reasonable and based upon the best evidence available.[40]

125. The approach described by the WHO above and endorsed by both Dr. Blank and Dr. Bailey is reasonable and practical. The new study relied upon by RETA is a single epidemiological study. There was no evidence before the review panel to suggest that the study has been evaluated or judged by other scientists or scientific bodies, nor that it has been replicated or evaluated as part of a larger weight-of-evidence approach. In the review panel's opinion, the existence of this one new epidemiological study does not raise a reasonable possibility that the Commission would materially vary or rescind the Heartland decision.

126. RETA also proposed to provide new evidence on magnetic fields and other electrical effects associated with the Heartland transmission line and on the shielding of magnetic fields on underground cables. In the review panel's opinion, this additional evidence proposed by RETA does not meet the test provided in AUC Rule 016 because RETA has failed to demonstrate that the additional evidence is new or previously unavailable. The record demonstrates that RETA was aware of the magnetic field estimates and information filed by the applicants in its application because it asked information requests on them. If RETA had concerns about that evidence it could have pursued that by filing its own evidence on the subject or cross-examining the Heartland applicants on their evidence. It chose not to. Further, the record also demonstrates that RETA was cognizant of the issue of underground shielding for magnetic fields as it cross-examined the CCI witnesses on this issue and gave anecdotal evidence on this as well. In the review panel's view, RETA has failed to demonstrate that the new evidence it seeks to introduce on shielding and on electric and magnetic field estimates is new or previously unavailable.

### 6.2 RETA ground four: financial impact of Colchester School closure

127. RETA noted that many of its members expressed concerns about the continued viability of the Colchester school if the underground option was rejected and the preferred east route was approved. It stated that these viability concerns have now been realized as there are plans to move the students of Colchester school to a new school or a refurbished existing school. RETA referenced a December 14, 2011, letter from the Elk Island Public Schools in support of this

[39] Exhibit 1119.01 – Environmental health Criteria 238, Extremely Low Frequency Fields World Health organization Page xiii (Proceeding 457)
[40] Decision 2011-436, paragraph 592

submission. RETA also stated that the cost of such a move was estimated by the Elk Island Public Schools to be in the range of $20 million. RETA argued that the Commission did not include these additional financial costs when considering the Heartland application. It argued that the inclusion of these extra costs when comparing the overhead and underground options could lead the Commission to materially vary or rescind the Heartland decision.

The Heartland applicants

128. The Heartland applicants argued that the December 14, 2011, letter from the Elk Island Public School Board could not reasonably cause the Commission to materially vary or rescind the Heartland decision because it contains no new fact or circumstance for the Commission to consider. They noted that neither the views of the Colchester Parent's Association nor the prospect that the school might close represented new information for the Commission.

129. The Heartland applicants asserted that there is no reason to close the school as a result of the Heartland project. They noted that the Commission concluded that it did not expect that the construction or operation of the project would result in material change to the electric and magnetic fields at the Colchester School yard or within the school itself. They observed that they were ordered by the Commission to conduct post-construction measurement at those locations to confirm this conclusion.

130. The Heartland applicants argued that even if the Commission were to consider the $20 million school relocation costs in its assessment of the project, those costs were greatly outweighed by the $323 million incremental cost for the underground option.

### 6.2.1 Review panel findings

131. The record of the Heartland proceeding shows that the continued viability of the Colchester school was a significant issue considered by the hearing panel in the Heartland hearing.

132. The evidence of the Colchester Parents Association and Elk Island Public Schools was very clear. At the Sherwood Park Community session, Mr. Gabriel Chemello and Ms. Cheryl Przybilla, who represented the Colchester Parents Association, each stated that the parents of Colchester will not allow their children to attend the school if the project was built on overhead lines as proposed by the Heartland applicants.[41] A representative of the Elk Island Public Schools, Mr. Scott McFadyen, also spoke at the Sherwood Park evening session. Mr. McFadyen told the hearing panel that even if a small percentage of families were to withdraw their children it would have a significant impact on the viability of the school.[42]

133. During the formal hearing Ms. Przybilla testified that, in a recent survey of Colchester parents, "95 percent of parents indicated that if the power lines were built above ground beside our school they would not allow their children to go to that school."[43] In its final argument RETA also stated that the viability of Colchester Elementary School is in jeopardy if the project

[41] Transcript, Sherwood Park, April 20, 2011, pages 44 and 48 (Proceeding 457)
[42] Transcript, Sherwood Park, April 20, 2011, pages 72 (Proceeding 457)
[43] Transcript, Volume 22, page 5509 (Proceeding 457)

is built above ground and referenced the survey described by Ms. Przybilla. The hearing panel acknowledged that the viability of the school was an issue in paragraph 1096 of the Heartland decision.

134. Having regard to the foregoing, the review panel is of the opinion that the information provided by RETA about the possible closure of Colchester Elementary School and the relocation of its students is not new evidence or a change of circumstances. The record clearly demonstrates that the Commission considered this issue.

135. While the review panel does not consider this information to be new evidence or a change of circumstances, it is of the view that even if it did meet that test it does not raise a reasonable possibility that the Commission would materially vary or rescind the Heartland decision. The Heartland decision reflects that the hearing panel was aware that the viability of the school was an issue of concern to some individuals and took that into account when deciding to approve the routing of the Heartland project and reject the underground option. As noted previously in this decision, the hearing panel rejected the underground option because it concluded that the additional costs associated with it were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.

136. For the reasons provided above, the review panel finds that a review of the Heartland decision is not warranted based on RETA's fourth ground, namely that the information regarding the possible closure of the Colchester Elementary School is not new and, in any event, that information does not raise a reasonable possibility that the Commission would materially vary or rescind the Heartland decision.

### 6.3 Strathcona ground three/RETA ground five: the Government's review of WATL and EATL

137. Strathcona County noted that the Commission received correspondence from the Minister of Energy on October 21, 2011, stating that the Government of Alberta was reviewing its approach to three critical transmission infrastructure projects, the Heartland project, the WATL project and the EATL project. While the Minister later withdrew his request for the Commission to suspend its consideration of the Heartland project, the County asserted that the ongoing review of the WATL and EATL projects was an important new circumstance. The County argued that, as a result of the review, WATL, EATL or both, may not proceed and that this may have financial implications for the Heartland project.

138. The County argued that the following paragraphs from the Heartland decision demonstrated that the hearing panel took into account the costs associated with the EATL and WATL projects when it decided not to proceed with the underground option:

> 165. In the Heartland hearing, the most controversial evidence from this perspective was the evidence led by the Shaw group. Amongst other things, the witnesses for these interveners provided evidence on the social and economic implications of approving the roster of transmission projects described in the Alberta Electric System Operator's long-term plan, including the Heartland project. This evidence included testimony from various representatives of industrial and commercial operations, farmers, and health care/senior care providers.

> 166. In the Commission's view, this evidence is relevant to the Commission's consideration of the Heartland application to the extent that it helps assess the economic implications of the transmission alternatives described in the Heartland application. One factor that the Commission may take into account when considering the routing and technology alternatives described in the Heartland application is the cost of those alternatives. Accordingly, the Shaw group's evidence regarding the social and economic implications of the Heartland project may influence the Commission to choose the lowest cost alternative. However, the Commission could not, on the basis of this information, decide that approval of the Heartland project is not in the public interest because of the social and economic implications of approving any double-circuit 500-kilovolt transmission line from the Edmonton area to the Redwater-Gibbons area. Such a determination would be contrary to clear wording of the statutory scheme and the intent of the legislature.[44]

139. The County stated that, based on the foregoing, the hearing panel clearly took into account the costs of other projected large transmission projects when it concluded that the underground option was not in the public interest. The County argued that, had the hearing panel been aware during the hearing that EATL and WATL may not proceed, it may not have been as influenced by cost considerations when considering the underground option.

140. The County submitted that the Government's announcement of a review of two of the projects addressed in the Shaw group's evidence is a change in circumstance that could lead the Commission to materially vary or rescind the Heartland decision. Specifically, it suggested that if the costs of the EATL and WATL projects are not taken into account, approval of the underground option becomes a more reasonable prospect.

141. RETA supported the County on this ground but did not materially add to the submissions of the County.

The Heartland applicants

142. The Heartland applicants stated that this ground relies on the assumption that, had the hearing panel known that the Government review of WATL and EATL was going forward, it may have decided the Heartland application differently. They argued that there is no basis for this assertion and no evidence that the hearing panel took into account the costs of the WATL or EATL projects when it made its decision to reject the underground option.

143. The Heartland applicants note that the hearing panel's only discussion of WATL and EATL was in paragraphs 165-166 of the Decision. They argue that the reference here is an acknowledgement of the evidence respecting the impacts of transmission projects generally on ratepayers. They argue that there is no support for the County's suggestion that the hearing panel may have been more inclined to approve an underground option if it was aware that EATL and WATL might not go ahead.

[44] Decision 2011-436, paragraphs 165-166

144. The Heartland applicants note that the need for the project is prescribed by the Alberta Legislature. They argue that the new facts alleged by RETA and the County do not change the determination of need or the basis upon which the Heartland application would have been considered. They concluded that the Government's review of the WATL and EATL projects is not a change in circumstance that could reasonably lead the Commission to materially vary or rescind the Heartland decision.

The AESO

145. The AESO submitted that this ground for review must fail as it is premised upon the false assumption that the hearing panel took into account the costs of EATL and WATL when it decided not to approve the underground option. The AESO stated that the hearing panel only said that it may take these costs into account. The AESO also pointed out that the hearing panel did not pick the lowest cost alternative.

### 6.3.1 Review panel findings

146. The County asserts that the Government of Alberta's review of the EATL and WATL projects are new circumstances that raise a reasonable possibility that the Commission could substantially vary or rescind its decision by approving the underground option. The County asserts that one of the reasons that the Commission may have rejected the underground option was its incremental cost. It argues that if the EATL and WATL projects did not go ahead, the Commission would be more amenable to the incremental costs of the underground option because of the avoided costs of the other two projects.

147. The County argues that support for its proposition is found in paragraphs 165 and 166 of the Heartland decision. The review panel disagrees. The context of these two paragraphs is important. They are located in a section of the decision in which the hearing panel discussed generally the evidence that it could consider when deciding the Heartland application having regard to the legislative framework for applications for critical transmission infrastructure.

148. In paragraph 165, the hearing panel gave a broad description of the evidence presented by the Shaw group. In paragraph 166 the hearing panel stated what use it may make of that evidence. The Commission's conclusion on this matter was simply that the "Shaw group's evidence regarding the social and economic implications of the Heartland project may influence the Commission to choose the lowest cost alternative."[45] The hearing panel did not state in this section of the decision what use it did make of the Shaw group's evidence.

149. The hearing panel's reasons for rejecting the underground option comes much later in the decision and follows a detailed analysis of the impacts of the route alternatives proposed in the application, including the underground option. Those reasons are found in paragraphs 1080 to 1086 and reflect that the Commission did not reject the underground option simply because it considered it to be too expensive. Rather, the Commission found that the additional costs associated with underground option as reflected in Table 1, above,

[45] Decision 2011-436, paragraph 166

were not justified from the perspective of health effects, visual impacts, effects on property values, environmental impacts and safety issues.[46] There is nothing in this section to suggest that the costs associated with the EATL, WATL, or any other anticipated transmission project influenced the hearing panel's decision to reject the underground option.

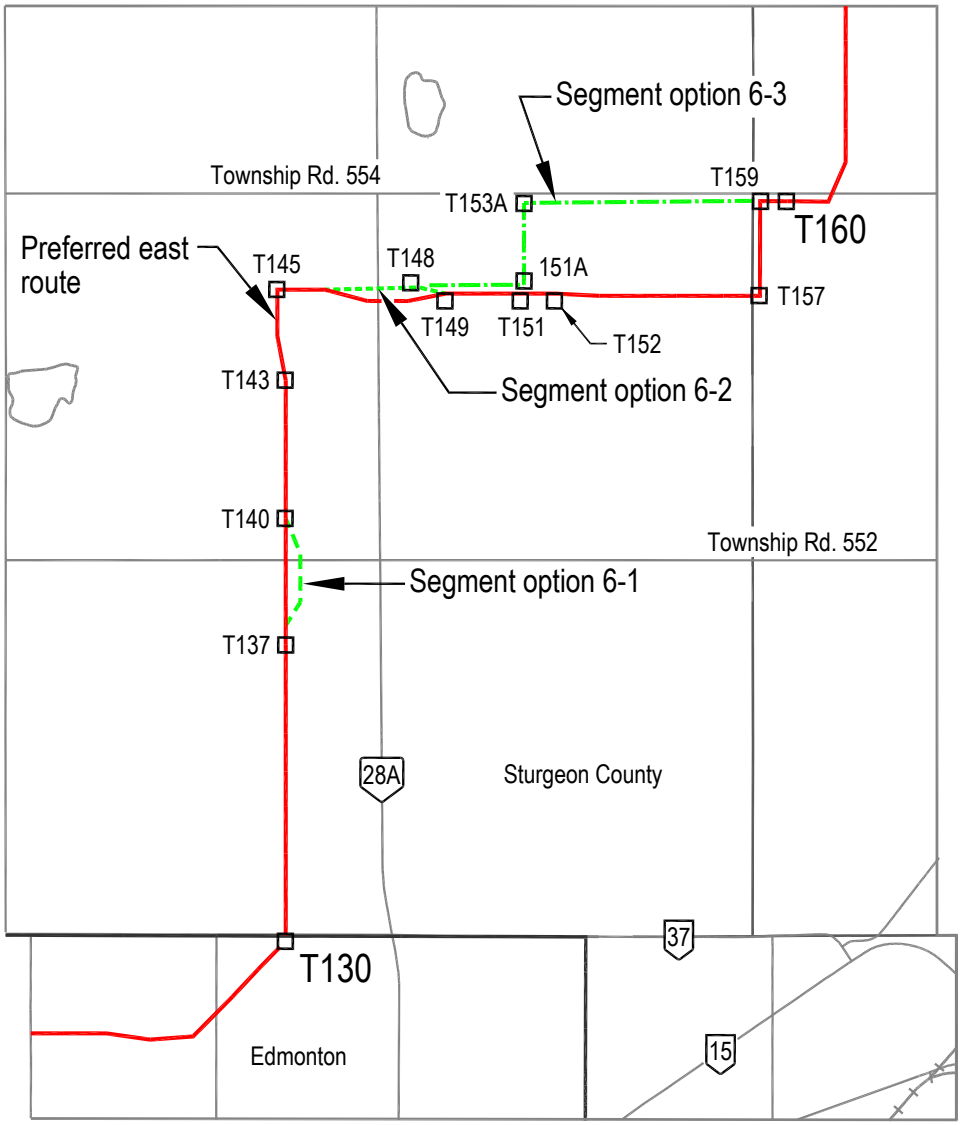
150. The review panel also notes that the hearing panel would have been aware of the Government's intention to review the WATL and EATL projects as the Government's request was received on October 21, 2011, approximately ten days prior to the issuance of the Heartland decision. The review panel presumes that this fact was taken into account when the hearing panel issued its decision in which it rejected the underground option.

151. The review panel finds that the County has failed to demonstrate that the Government's review of the WATL and EATL projects are new circumstances that raise a reasonable possibility that the Commission could materially vary or rescind the Heartland decision and finds that a review of the Heartland decision is not warranted on this ground.

[46] Decision 2011-436, paragraphs 1080-1086

## 7 Route Segment 6-3

**Figure 2 Map of route segment 6 and segment option 6-3**




### 7.1 James and Michelle Prins

152. James and Michelle Prins own and reside upon lands adjacent to route segment 6-3 between towers T 153A and T 159(see map). Route segment 6-3 was a short optional route segment proposed by the Heartland applicants on the preferred route north of the City of Edmonton.

153. The Prins filed a short statement of intention to participate on October 12, 2010, accompanied by a picture showing their residence and proposed subdivision in relation to route segment 6-3 (Exhibits 68.01 and 68.02). The Prins stated that they did not attend the hearing because representatives of the Heartland applicants told them that their attendance would be unnecessary because they were on an alternate route. They stated that the Commission provided three methods of participating in the Heartland proceeding and that they chose to participate by

filing a written submission. They also stated that they were unable to attend the hearing because of work obligations. It was their view that the hearing panel gave more weight to the concerns expressed by persons who attended the hearing and gave direct evidence than it did to their written submission. In this respect they noted that the concerns expressed by persons living on the preferred route were very similar to the concerns they expressed in their written submissions.

154. The Prins questioned the correctness of the hearing panel's decision to approve route segment 6-3 rather than the preferred route in segment 6. They argued that route segment 6-3 is inferior to the Heartland applicants' preferred route as there are more residences within 800 metres of route segment 6-3 and it also has more subdivided but undeveloped acreages.

The Heartland applicants

155. The Heartland applicants argued that this application for review must be dismissed because the grounds raised by James and Michelle Prins do not meet the Commission's test for granting a review. They submit that James and Michelle Prins were registered participants in the Heartland proceeding and received the Notice of Hearing for the proceeding. They observed that the notice indicated that route segment 6-3 was under consideration.

156. The Heartland applicants submitted that the concerns expressed by James and Michelle Prins are the same as those expressed in their statement of intention to participate. They argued that the Commission considered these concerns extensively in its decision. They concluded that the Prins review request should be dismissed because they had identified no error of law, fact or jurisdiction in the Commission's decision.

### 7.1.1 Review panel findings

157. James and Michelle Prins were registered participants in the Heartland proceeding. Mr. Prins confirmed that he was receiving emails from the Commission's electronic proceeding system and that he knew there was a hearing.[47] Mr. Prins explained that they did not attend the hearing because he was working and because he chose to participate by filing a written submission.

158. James and Michelle Prins did not request a review on the basis of new evidence, a change of circumstances or evidence that was previously unavailable. Rather, they challenged the correctness of the Commission's decision on the basis that there are more residences and subdivided acreages within 800 metres of route segment 6-3 than there are on the Applicants' preferred route, which the hearing panel did not select. They also questioned the weight given by the Commission to their submission as compared to the weight given to the submissions of persons who attended the hearing.

159. In the review panel's view, the concerns of James and Michelle Prins are best characterized as allegations of errors of law regarding the Commission's interpretation of the evidence. Read broadly, their review application suggests that the Commission failed to take into account relevant evidence about the number of residences and undeveloped acreages within 800 metres of alternative route segment 6-3. They also suggest that the Commission either ignored

[47] Transcript Volume 2, page 186, (Proceeding 1592)

their written submission or failed to give it the same weight as the oral submissions of those who attended the hearing.

160. The review panel finds that James and Michelle Prins have failed to demonstrate that the hearing panel committed either of the errors alleged in their review application. A review of the Heartland decision discloses that the hearing panel reviewed the route assessment provided in the Heartland application for the preferred route and route segment 6-3 and was aware that route segment 6-3 has more residences within 800 metres than the preferred route. [48] In the review panel's view, there is nothing on the record or in the submissions of James and Michelle Prins to suggest that the Commission misunderstood or misapprehended the evidence regarding the local impacts of choosing route segment 6-3 over the Heartland applicants' preferred route.

161. The review panel also finds that there is nothing on the record of the proceeding or in the submissions of James and Michelle Prins that demonstrates that the hearing panel ignored their written submissions on route segment 6-3. In paragraph 97 of the Heartland decision the hearing panel stated as follows:

> In reaching the determinations set out in this decision, the Commission considered all relevant materials comprising the record of this proceeding, including the evidence and submissions provided by each party. 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 record as it relates to that matter.[49]

162. In Decision 2011-436 the hearing panel stated as follows with respect to segment option 6-3: "The Commission considers that segment option 6-3, as proposed by the Pasnaks and which crosses at the back of their lands, is the better route as it helps to mitigate the concerns of the Pasnaks**."** One of the concerns expressed by Mr. Prins was that the hearing panel gave more weight to oral submissions than it did to the written submission filed by Mr. Prins. The review panel observes that the Pasnak's information regarding segment option 6-3 was also contained in a written submission, albeit one that was read out by their neighbor at the hearing. As stated previously, the weight assigned by the hearing panel to evidence is entitled to considerable deference and, in the review panel's opinion, there is nothing on the record of the proceeding or in the submissions of James and Michelle Prins that indicates the Commission made an error when it found that approval of route segment 6-3 was in the public interest.

163. Having regard to the foregoing, the review panel therefore finds that a review of the Heartland decision is not warranted based upon the grounds advanced by James and Michelle Prins.

### 7.2 William, Kenton and Trevor Prins

164. William, Kenton and Trevor Prins also own land adjacent to route segment 6-3. They asked the Commission to review the Heartland decision on the basis that the Commission's choice of route segment 6-3 represented the path of least resistance. They argued that the

[48] Decision 2011-436, paragraph 1167
[49] Decision 2011-436, paragraph 97

Heartland applicant's preferred route was superior to route segment 6-3 and stated that the Commission failed to have regard for how its choice of route segment 6-3 would affect the landowners across the road from it. William, Trevor and Kenton Prins also expressed frustration about the lack of compensation available to them despite the fact they must bear the burden of having the line so close to their lands.

165. At the review and variance hearing Trevor Prins spoke on behalf of William and Kenton Prins. Trevor Prins stated that they chose not to participate in the Heartland project hearing for two reasons. First, they were under the impression that the preferred route would be chosen. Second, they rent farm land from individuals that live on the preferred route. They were concerned that their opposition to the alternate route segment could affect their business relations with their landlords. They also noted that they had lived in the area for over 45 years and that the people living on the preferred route were their neighbors. They were concerned that the effect of the application was to pit neighbor against neighbor.

166. Trevor Prins stated that if the preferred route was not chosen, a better alternative would be to run the line along the quarter section line so that the owners on both sides of the line could receive compensation for its impacts. He stated that they own land elsewhere along the preferred route where this occurred and he considered it to be a better approach.

The Heartland applicants

167. The Heartland applicants argued that this application for review must be dismissed because the grounds raised by William, Kenton and Trevor Prins do not meet the Commission's test for granting a review. They argue that this application, like that of James and Michelle Prins, merely expresses dissatisfaction with the Commission's decision to approve route segment 6-3. They stated that there is nothing on the record to suggest that these persons were not notified of the proceeding or were denied an opportunity to participate in the proceeding.

168. The Heartland applicants stated that the only issue raised by William, Kenton and Trevor Prins is that of compensation for impacts to property value and future development plans. They submitted that such issues were dealt with extensively by the Commission. They argued that these persons have not alleged that the Commission's findings on these issues are incorrect in fact or law or should be adjusted on the basis of new facts or circumstances. They concluded that the review application of William, Kenton and Trevor Prins should be dismissed.

### 7.2.1 Review panel findings

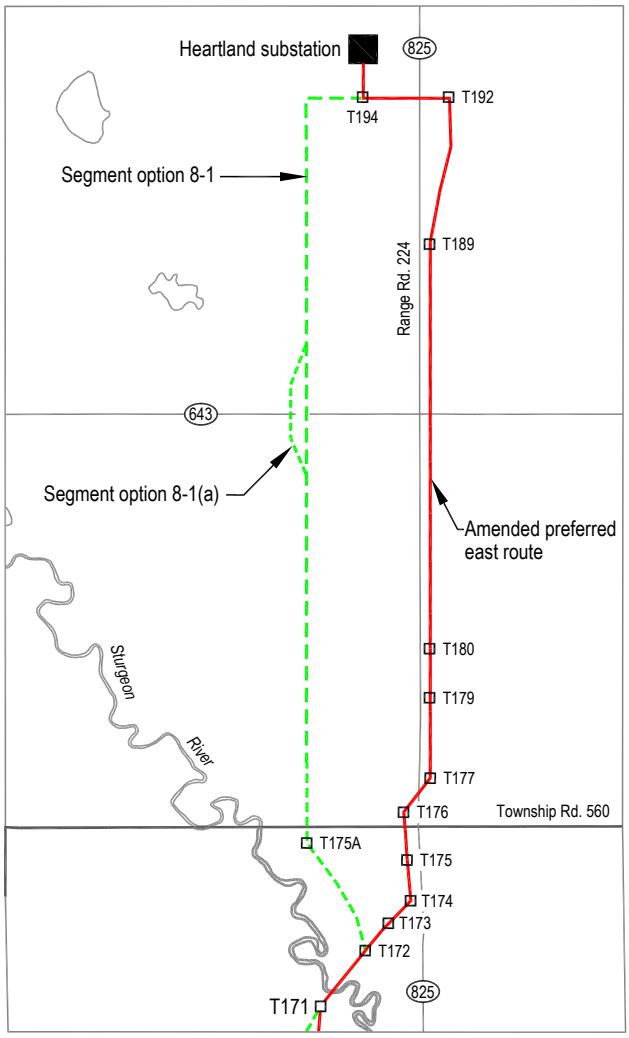
169. The review panel finds that William, Kenton and Trevor Prins were aware that the Commission was going to hold a hearing on the Heartland application and chose not to participate. While the review panel understands that they made this decision in part to maintain good relations with their neighbors and their landlords, it must emphasize that the purpose of the Commission's review process is not to provide a second chance to parties who, for whatever reason, chose not to participate in the first instance.

170. The review panel finds that the concerns raised by Trevor, William and Kenton Prins do not meet the Commission's test for granting a review. These review applicants have not demonstrated that there are new facts, changed circumstances or previously unavailable

evidence. In the review panel's view, the primary concern expressed by these review applicants relates to compensation, a matter over which the Commission has no jurisdiction. The Commission concludes that a review of the Heartland decision is not warranted based upon the grounds advanced by William, Kenton and Trevor Prins.

## 8 Route Segment 8 - Aspen Valley Farms

**Figure 3 Map of Route Segment 8**




171. Aspen Valley Farms is owned by William Procinsky and his wife Beverly Durnin. This farm is located on Segment 8 of the preferred route, on three quarter sections of land that are bisected by the Sturgeon River. Towers T 171 to T 125 are all located on land owned By Aspen Valley Farms. In its review application Aspen Valley Farms stated that a review of the Heartland decision was warranted because the proposed tower placements on its lands will interfere with farming operations. Aspen Valley Farms proposed two alternate routes that would lower the impact of the project upon its farming operations. Aspen Valley Farms also expressed concern that it had initially intended to participate in the proceeding by giving a short submission at a community session in Fort Saskatchewan. It stated that its ability to participate was limited when

the Commission decided not to go ahead with the Fort Saskatchewan session due to lack of registered participants.

172. Aspen Valley Farms provided an extensive review of its history of dealings with the Heartland applicants. It expressed concern with the consultation process between it and the Heartland applicants and reported difficulty in getting answers from the Heartland applicants and their agents and representatives. Aspen Valley Farms submitted that its owners had been "bullied" into signing an agreement with the Heartland applicants which allowed the project to cross its lands.[50]

173. Aspen Valley Farms advised the Commission that it believed it could not participate in the proceeding because a landman acting on behalf of the Heartland applicants stated that, by signing the right-of-way agreement, the owners of the farm were no longer entitled to participate in the proceeding. It stated that the landman that negotiated with them was the same landman who was later fired for inappropriate conduct when dealing with landowners.

174. Aspen Valley Farms noted that a condition of the Heartland approval related to the potential amendment of the location of tower 176 which is immediately adjacent to its lands. It stated that a change to this tower location could impact its lands because tower 175 which is on its lands is currently a tangent tower with a footprint of 13 metres. It stated that depending upon what happens with Tower 176, Tower 175 may have to be converted to an angle tower that has a much larger footprint (25 metres).

175. Aspen Valley Farms submitted that the approved route zigzags across its lands and argued that better routes exist that would limit the impacts to its farming operations.

176. Aspen Valley Farms also expressed frustration with the tower siting process on its land. It stated that it was originally led to believe that the towers on its land would be smaller than they are. Specifically it stated that given the change in tower size it was concerned that it would be unable to get its air-seeder or sprayer between the towers.

177. Aspen Valley Farms stated that it would like to see one of two things happen: (1) be compensated for property devaluation or (2) be bought out under the new buyout policy.

178. Aspen Valley Farms submitted additional information to the Commission in its letter of January 31, 2012. Included in that information were documents that showed the Heartland Applicants' initial written offer of compensation for placing transmission structures on the farm dated August 11, 2010. Aspen Valley Farms explained that after it received the August 11, 2011, offer the Heartland applicants hired a company to do a real estate appraisal of the two sections upon which structures were proposed. Following receipt of that appraisal, the Heartland applicants adjusted their offer. Aspen Valley Farms explained that, after further negotiations, they agreed on the final consideration payable and signed the right of way agreement on April 1, 2011. The following table summarizes the compensation offered and ultimately accepted by Aspen Valley Farms.

[50] Transcript, Volume 2, Page 203, (Proceeding 1592)

| Initial offer (August 11, 2010) | Consideration |
|---|---|
| SE 32-55-22 W4M | 153,500.00 |
| NE 32-55-22 W4M | 159,440.00 |
| **Signed agreement (April 1, 2011)** | |
| SE 32-55-22 W4M | 191,460.00 |
| NE 32-55-22 W4M | 108,650.00 |

179. In addition to the consideration described above, it was Aspen Valley Farms' evidence that it received a $10,000 signing bonus for each quarter. The documents submitted by Aspen Valley Farms indicated that it would also receive annual structure payments of $1,250 per structure on cultivated land and $500 per structure on uncultivated land.

The Heartland applicants

180. The Heartland applicants argued that the review application filed by Aspen Valley Farms raises no particular allegations of error(s) in fact, law or jurisdiction nor does it assert that there are new facts, a change in circumstances or facts not previously placed in evidence. They observed that Aspen Valley Farms was a registered participant in the Heartland proceeding. They also pointed out that while this intervener filed a statement of intention to participate and was granted standing, it ultimately agreed to the routing of the heartland project across its lands.

181. The Heartland applicants argued that the concerns expressed in Aspen Valley Farms' review application were similar to those expressed in its statement of intention to participate and in its submissions to the Commission at the pre-hearing process meeting. They asserted that the concerns raised by Aspen Valley Farms with respect to agricultural impact are based on incorrect information with respect to the size of the tower footprints on the farm.

182. The Heartland applicants noted that the cancellation of the Fort Saskatchewan community session did not preclude Aspen Valley Farms from making submissions to the Commission. It noted that Aspen Valley Farms could have made a presentation at the Sherwood Park community session or in the formal proceeding.

183. The Heartland applicants acknowledged that AltaLink has a right-of-way agreement with Aspen Valley Farms. They stated that the Commission considered the route alternatives for segment 8 and that consideration included agricultural impacts on lands adjacent to those owned by Aspen Valley Farms, and the need to access nearby industrial lands to decrease the overall impact on agricultural lands in the area. They argued that the approved route was the best route in the area, particularly given potential impacts on surrounding agricultural lands, and noted that one of the routes proposed by Aspen Valley Farms required three crossings of the Sturgeon River as compared to one crossing on the approved route.

184. During the hearing, the Heartland applicants addressed the allegation of Aspen valley Farms regarding its ability to participate in the Heartland hearing. They explained that there is a clause in their agreement with Aspen Valley Farms that states "Power line Route - I/we have no objection to the proposed transmission line and its general routing as shown on the attached

Schedule A. I/We have no objection to the Alberta Utilities Commission granting a permit and license to construct and operate the transmission line." [51]

185. The Heartland applicants stated that the additional submissions filed by Aspen Valley Farms do not allege an error of law, jurisdiction or fact and do not point to new facts, a change in circumstances or facts not previously in evidence. They noted that the preferred relief proposed by Aspen Valley Farms is a re-route of the transmission line across its lands. The Heartland applicants stated that the alternative relief proposed by Aspen Valley Farms, namely more compensation or a buy-out, are matters outside of the Commission's jurisdiction. They also stated that they remain prepared to discuss compensation with Aspen Valley Farms. They also described some accommodations offered to address concerns about interference with farming operations.

### 8.1 Review panel findings

186. Aspen Valley Farms stated that it intended to provide a brief submission to the hearing panel at a community session in Fort Saskatchewan. However, it expressed concern that its ability to participate in the proceeding was compromised when the Commission cancelled the Fort Saskatchewan session due to lack of interest. Aspen Valley Farms also states that it did not participate in the hearing because it was told by an agent of the Heartland applicants that it could not because of the right of way agreement it signed.

187. The review panel finds that Aspen Valley Farms had notice of the Heartland hearing and could have participated in that hearing had it chosen to do so. The owners of Aspen Valley Farms confirmed at the review hearing that they attended portions of the hearing in Edmonton and if they had questions about their ability to participate in the proceeding it was open to them to seek information from the Commission directly or indirectly by asking Commission staff. In the review panel's view, the fact that Aspen Valley Farms had signed an agreement with the Heartland applicants in which it agreed not to object to the transmission line or the route was not a barrier to their participation in the hearing from the Commission's perspective. Indeed, the Heartland applicants acknowledged that, as registered participants, the owners of Aspen Valley farms could have made submissions to the hearing panel at the Sherwood Park Community Session or in the formal hearing.[52]

188. The concerns expressed by Aspen Valley Farms were not framed in the language of the Commission's test for a review. In other words, this review applicant has not alleged an error of law, fact or jurisdiction or the existence of new facts changed circumstances or previously unavailable evidence. Rather its primary concerns relate to the approved route for the Heartland transmission line across its lands. It argues that the current route interferes with farming operations and submits that the route should either be changed or that it should be better compensated for the associated impacts.

189. Aspen Valley Farms consented to the route location on its land by executing a right-of-way agreement with the Heartland applicants and accepting compensation for this agreement, as described above. In accordance with the right-of-way agreement this intervener agreed to the

[51] Transcript, Volume 2, pages 292 to 293 (Proceeding 1592)
[52] Exhibit 0041.02, AML and EDTI Submissions, paragraph 128 (Proceeding 1592)

line routing on its lands and did not object to it in the Heartland hearing. The fact that Aspen Valley Farms now has misgivings about that routing constitutes neither an error of law, fact or jurisdiction, nor new facts, a change in circumstances or previously unavailable evidence sufficient to create a reasonable possibility that the Commission could materially vary or rescind the Heartland decision. Further, the Commission lacks the jurisdiction to address the matters of compensation raised by Aspen Valley Farms.

190. Having regard to the foregoing, the review panel finds that a review hearing is not warranted based upon the application for review filed by Aspen Valley Farms.

## 9 Conclusion

191. For the foregoing reasons it is the review panel's opinion that none of the review applicants have raised a substantial doubt as to the correctness of the Heartland decision due to an error of fact, law or jurisdiction. Further, it is the review panel's opinion that none of the review applicants have raised a reasonable possibility that there are new facts, a change in circumstances, or facts not previously placed in evidence that could lead the Commission to materially vary or rescind the Heartland decision. The review panel therefore dismisses the review applications of Strathcona County, RETA, James and Michelle Prins, William, Kenton and Trevor Prins and Aspen Valley Farms.

Dated on May 14, 2012.

**The Alberta Utilities Commission**

*<original signed by>*

Carolyn Dahl Rees
Vice Chair

*<original signed by>*

Mark Kolesar
Vice Chair

*<original signed by>*

Bill Lyttle
Commission Member

# Appendix 1 - 2011-12-19 AUC Ruling on Heartland Suspension

# Appendix 2 - 2012-01-24 Ruling on first Review and Variance Application

AUC
Alberta Utilities Commission

Fifth Avenue Place, #400, 425 – 1 Street SW
Calgary, Alberta, Canada T2P 3L8
Phone 403-592-8845 Fax 403-592-4406
www.auc.ab.ca

**ELECTRONIC NOTIFICATION**

December 19, 2011

**To all interested parties:**

**Re: Proceeding 1592, Motion to suspend Decision 2011-436**

**Ruling on a motion by Strathcona County to suspend the operation of Decision 2011-436**

## Introduction

1. Strathcona County (the County) filed an application requesting the Commission to review and vary its decision on the Heartland transmission project application (Decision 2011-436) and a motion to suspend the operation of that decision pending the outcome of its review request. The Commission established a process and schedule for its consideration of the County's motion which included the filing of written submissions and an opportunity to provide oral argument.

2. In this ruling the Commission must decide whether to suspend the operation of Decision 2011-436. For the reasons that follow the Commission has denied the County's motion.

## Background

3. The Heartland application was filed on September 27, 2010. The application included a preferred east route and an alternate west route for the Commission's consideration. Additionally, the application included an underground option for the preferred east route. The underground option was proposed for the first 20 kilometres of the preferred east route within the Edmonton transportation and utility corridor, from the Ellerslie substation to the vicinity of Baseline Road. Strathcona County and some other interveners supported the approval of the preferred east route with the underground option.

4. On November 1, 2011, the Commission issued Decision 2011-436 in which it approved, subject to conditions, the application for the Heartland transmission project. Specifically, the Commission approved the preferred east route described in the application using a combination of lattice and monopole towers. The Commission rejected the underground option for the reasons provided in Decision 2011-436.

5. Strathcona County filed its request to review and vary Decision 2011-436 and its motion to suspend the operation of that decision on November 25, 2011. The County's request to review and vary decision 2011-436 is based upon the following four grounds:

(a) the Commission erred in fact or law by misapprehending the evidence of the Heartland applicants as it related to the underground option being proposed;
(b) the Commission erred in law in its determination of what is in the public interest;
(c) the Commission erred in fact or law in its considerations and findings regarding the East TUC; and

(d) the Minister of Energy has made various directions related to the Critical Infrastructure Projects in Alberta. These directions are new facts, a change in circumstances or facts not previously in evidence that were not known to parties, including the Commission, at the time of the hearing, and which could lead the Commission to materially vary or rescind Decision 2011-436.

6. On November 30, 2011, the Commission received a second request to review and vary Decision 2011-436 from James and Michelle Prins.

7. On November 8, 2011, the Commission wrote to interested parties and established a process and schedule for its consideration of the County's motion and for its consideration of the review and variance requests. Submissions on the suspension motion were received on December 12, 2011, from ATCO Electric, The Alberta Electric Systems Operator (the AESO), Blackland ranches, Inc., and AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc. (the Heartland applicants). Attached to the Heartland applicants' submission was an affidavit sworn by Mr. Darrin Watson, an officer of AltaLink Management Ltd. (Altalink).

8. On December 13, 2011, the County wrote to the Commission and requested the opportunity to examine Mr. Watson on his affidavit. The Commission found the County's request to be reasonable and amended its schedule to allow the County to cross-examine Mr. Watson on December 14, 2011. As a result, oral argument was rescheduled from December 14, 2011, to December 15, 2011.

**Strathcona County's suspension motion: the application of the three-part suspension test**

9. The County asked the Commission to suspend the operation of Decision 2011-436 pending its decision on the County's application to review and vary that decision. The County stated that it was making the motion under section 10(3) of the *Alberta Utilities Commission Act* and section 9(1) of AUC Rule 001.

10. The County argued that the correct test to apply to an application to suspend the operation of one of the Commission's decision is the three-part test described by the Supreme Court of Canada in *RJR MacDonald v. Canada (Attorney General)*[1]. This test requires that the person seeking the suspension, in this case the County, must demonstrate:

(a) there is a serious issue to be argued;
(b) that it will suffer irreparable harm; and
(c) the balance of convenience (or inconvenience) favours granting the suspension.

11. The County asserted that a suspension is warranted because it has satisfied all three parts of the *RJR MacDonald* test. It contended that its application to review and vary the Heartland decision raises serious issues regarding the Commission's interpretation of new legislation relating to the public interest. It argued that irreparable harm to the County and ratepayers will

[1] *RJR MacDonald v. Canada (Attorney General*) [1994] 1. S.C.R. 11 (*RJR MacDonald* )

result if the suspension is not granted and that the balance of convenience favours the granting of the suspension.

12. The County's suspension motion was supported by Responsible Electricity Transmission for Albertans (RETA). The motion to suspend was opposed by the AESO, ATCO Electric, Blackland Ranches Inc., Morris and Evelyn Presisniuk and the Heartland applicants.

13. The AESO, ATCO Electric and the Heartland applicants all agree that the three part test set out in the *RJR MacDonald* decision is the correct test to apply when considering a suspension request under section 10(3) of the *Alberta Utilities Commission Act*. These parties all noted that the Commission recently issued a ruling on a suspension request related to AUC Decision 2011-389 (the BP suspension ruling) in which it endorsed and applied the three part *RJR MacDonald* test and stated:

> While the test was developed with respect to an application to stay proceedings or for an interlocutory injunction before the courts, the Commission agrees that the RJR MacDonald three-part test is the proper analytical tool for the Commission to apply to a consideration of the Motion and in determining whether to grant a suspension or stay pursuant to section 10(3) of the *Alberta Utilities Commission Act*. [2]

14. The *RJR MacDonald* decision makes it clear that the onus is on the suspension applicant, in this case Strathcona County, to satisfy the Commission that it has satisfied each element of the three-part test.

15. Morris and Evelyn Presisniuk own lands located on the preferred east route north of the City of Edmonton. They did not address the application of the three-part test for a suspension. However, the Presisniuks did explain the effects of a suspension of the decision on their own interests. The Presisniuks stated that they had come to an agreement with the Heartland applicants regarding the purchase of their lands for the Heartland project. They explained that delay of the project would result in further uncertainty, anxiety and stress for them as they cannot relocate until the permits and licenses for the Heartland project are issued. They stated that if a suspension is granted, it should be limited to those lands which are the focus of the County's review request while having construction commence on the remainder of the east preferred route. They argued that this would allow them to proceed with their relocation plans and would bring to an end the uncertainty about their future that they have been living with.

16. Mr. David Loren also filed a brief submission on the suspension motion on behalf of his family and his business, Blackland Ranches Inc. Mr. Loren stated that he owns land immediately adjacent to the preferred east route upon which his business and residence are located. He explained that he has taken substantial measures to adjust the business operations and his residence to accommodate the transmission line. He stated that there would be financial and moral burdens imposed upon his business and his family if the suspension is granted.

[2] Commission Ruling on Motion for Suspension of Decision 2011-160, July 21, 2011, at paragraph 19

**Serious issue to be argued**

17. The County contends that, to answer this question, the Commission must make a preliminary assessment of the merits of the County's review and variance request. The County argues that, in accordance with the *RJR MacDonald* decision, the threshold for this assessment is a low one. It notes the Supreme Court's direction that, if the decision maker is satisfied that the application is neither frivolous or vexations he or she should proceed to consider the second and third parts of the test.

18. The County stated that its application is neither frivolous nor vexatious. It observed that Decision 2011-436 marks the Commission's first consideration of new legislation for critical transmission infrastructure. It also noted that the application was novel as the transmission towers applied for would be the largest ever constructed in Alberta and the proposed underground option would be the first of its kind in Alberta. The County reviewed these arguments in the oral hearing and emphasized the Supreme Court's direction that this is not intended to be a prolonged examination of the merits.

19. The AESO submitted that the County has failed to demonstrate that its application to review and vary the Heartland decision raises serious questions to be argued. The AESO argued that there is no evidence to support the County's argument that the Commission misapprehended or failed to properly evaluate the evidence before it. The AESO also submitted that the County's arguments regarding new facts or change in circumstances are without merit.

20. ATCO Electric (ATCO) argued that, notwithstanding the *RJR MacDonald* decision, the threshold for demonstrating that there is a serious question to be tried is higher when the relief sought is to restrain a public authority. In support of this position ATCO relied upon *Metz v. Prairie Valley School Board*[3] a case of the Saskatchewan Court of Queen's Bench.

21. While the Heartland applicants acknowledged that the threshold for satisfying the first test was low they argued that it is doubtful that the County had met that threshold. However, the Heartland applicants stated that it is unnecessary to consider this issue in detail because it is clear that the County has failed to establish irreparable harm or that the balance of convenience favours a suspension.

**Commission ruling – Serious issue to be argued**

22. The law on this part of the three-part test is clear;there is a low threshold for establishing a serious issue to be argued. The Supreme Court of Canada in *RJR MacDonald* tells us that if the decision maker is satisfied that the issues raised are neither frivolous nor vexatious he or she should proceed to consider the second and third tests.[4]

[3] *Metz v. Prairie Valley School Board*, 2007 CarswellSask 473 at paragraph 22 (QB)
[4] *RJR MacDonald*, at paragraph 50

23. In the Commission's view, the grounds raised by the County in its review request are neither frivolous nor vexatious. The Heartland application was the first critical transmission infrastructure project considered by the Commission under new legislation enacted specifically to address such infrastructure. The issues raised in the County's review raise questions of fact and law that relate, in part, to the Commission's interpretation of that legislation and its public interest mandate for critical transmission infrastructure. Given the low threshold for this part of the three-part test, the Commission is satisfied that the County's review application raises serious issues to be argued. In making this determination on the motion, the Commission is in no way making a determination of the merits of the review application itself.

**Irreparable harm if the suspension motion is denied**

24. Strathcona County adopted the Supreme Court's definition of irreparable harm from the *RJR MacDonald* decision: "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." [5]

25. The County initially asserted two types of harm that may arise if the suspension is denied. First it argued that if the stay is not granted and construction commences, the Heartland applicants will incur costs that must ultimately be paid for by the electricity consumers of Alberta. The County argues that the fact that such costs have been incurred may influence the Commission's decision to review and vary Decision 2011-436 so as to avoid treating those costs as "thrown-away" costs. Second, the County argues that the electricity consumers of Alberta would be responsible for the payment of any thrown-away costs and that there is no mechanism by which they could recover these costs. During oral argument, the County refined this argument by clarifying that this harm would occur specifically to the County as a ratepayer and to its residents that are also ratepayers. The County asserted that it was acting for its constituents, who are also ratepayers.

26. In the County's supplemental submissions filed on December 12, 2011 it described a third type of harm should its motion be denied. It argued that landowners adjacent to the Edmonton transportation and utility corridor would be exposed to increased noise, traffic restrictions and other negative impacts if the suspension is not granted. It also noted that many individuals living along the approved transmission line will be harmed by the stress and anxiety caused by these activities.

27. The AESO argued that the granting of a suspension is an extraordinary form of relief which requires the applicant to demonstrate that it is threatened with irreparable harm. The AESO submitted that the harm asserted by the County lacks the certainty required to meet the test of irreparable harm. The AESO noted that the Federal Court of Appeal has found that the evidence of irreparable harm must be clear and not speculative.[6] The AESO observed that the County has submitted no evidence to support its claim that construction costs incurred by the Heartland applicants would be thrown away or what the impacts of such costs would be on rate-payers.

[5] *RJR MacDonald,* at paragraph 59
[6] *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34, at 45-46 (F.C.A.)

28. At the oral hearing the AESO emphasized that it is necessary for a suspension applicant to provide evidence to establish the probability of irreparable harm. The AESO recognized that the decision by the Commission to suspend one of its own decisions is discretionary. However, it argued that to exercise that discretion when there is no evidence of irreparable harm would be an abuse of that discretion and a jurisdictional error.

29. ATCO argued that the County's review and variance application is nothing more than a request to reconsider the Heartland decision based upon the same factual record that was before the Commission in the first instance. ATCO submitted that there are no new facts, no change in circumstances and no facts not previously placed in evidence.

30. The Heartland applicants emphasized that evidence of irreparable harm must be clear and not speculative and cannot be inferred. They argued that the harms asserted by the County are vaguely defined and not specific to the County itself. Like the AESO, the Heartland applicants asserted that there is simply no evidence that the County or its residents will be irreparably harmed if the suspension is not granted. The Heartland applicants stated that the irreparable harm asserted must be to the County's own interests and cannot be based upon irreparable harm suffered by third parties.[7]

31. The Heartland applicants argued that the irreparable harm asserted by a suspension applicant must be identifiable and probable and cannot be founded on speculation or assumption. They stated that the County's assertion that denial of the suspension application would impact the Commission's determination on the accompanying review and variance request was without, merit, speculative and founded on fear. They stated that this 'harm" was not identifiable, self-evident or certain.

32. At the oral hearing the County stated that it is not opposed to having its suspension apply only to segment one, as described in the affidavit of Mr. Watson, Altalink's Vice President Major Projects – North (Exhibit 016.03), and as proposed by Mr. and Mrs. Presisniuk. This segment of the line represents the area wherein the County submitted that the underground option should be approved. The County noted that, based upon the affidavit filed by Mr. Watson on behalf of the Heartland applicants, the work to be performed in segment one during this winter season was limited in scope and expense.

33. The County acknowledged that its concerns about thrown away costs were alleviated to some degree when it learned that the costs for segment one would be between one and two million dollars during the upcoming winter construction period. The County stated that if the Commission is not prepared to grant the suspension, an alternative remedy would be for the Commission to specifically state in its ruling that it is relying upon the evidence filed by the Heartland applicants and is directing them to abide by the construction schedule described in Mr. Watson's affidavit.

[7] *RJR MacDonald*, at paragraph 58, *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 290 at paragraph 33, *Canada (Attorney general) v. Amnesty International Canada*, 2009 FC 426, at paragraph 34

**Commission ruling - irreparable harm**

34. The County argues that three species of irreparable harm will result if its motion is denied. First, the costs incurred by the Heartland applicants for construction will be thrown away costs that must be paid by ratepayers, including the County and its residents, if the County's review request is successful. Second, the fact that costs have been incurred at the expense of ratepayers may influence the outcome of the County's review request. Third, residents within Strathcona County will be disturbed as a result of construction activities which will result in stress, anxiety and inconvenience. The Commission will first review the law as it relates to irreparable harm and then address each of these concerns in turn.

35. The court in the *RJR MacDonald* decision described irreparable harm as follows:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other…

36. In *Dreco Energy Services Ltd. V. Wenzel*, the Alberta Court of Appeal stated "the test for irreparable harm has a high threshold and only relates to the party seeking the injunction…"[8]

37. The Federal Court recently described the onus that rests upon the suspension applicant to meet the irreparable harm test:

> The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, (2005), at para.59, aff'd 2005 FCA390, 44 C.P.R. (4th) 326.
>
> That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.[9] (Emphasis in the original)

[8] *Dreco Energy Services Ltd. V. Wenzel*, [2008] A.J. No. 944, at paragraph 33
[9] Canada (Attorney General) v. Amnesty International Canada [2009] F.C.J. No. 545, at paragraphs 29 and 30

38. In the BP suspension ruling the Commission reviewed the position of the parties and their respective authorities and concluded that "in order for harm to be considered irreparable it must be identifiable, self evident, certain and not capable of being rectified by damages alone".[10]

i. Harm resulting from potential for thrown away costs

39. The County claims that if its review is ultimately successful but a suspension is denied, any construction costs incurred in the meantime will be thrown away at the expense of ratepayers including the County and its residents. The Commission finds that this is not irreparable harm as the courts have described it because the harm alleged is speculative and uncertain. It is harm that may occur, not harm that will occur. In the Commission's view this does not satisfy the high threshold of the irreparable harm test.

40. Further, and as discussed in the oral hearing, there is a remedy available to ratepayers to challenge the prudence of such costs within the context of the applicants' tariff applications. Such costs may be reviewed by the Commission upon the application of an interested party. As a remedy is available to the County and its residents, the harm alleged is not irreparable.

41. The Commission observes that the County expressed some comfort in the fact that the work contemplated for segment one during the 2011/2012 winter season, as described in Mr. Watson's affidavit, would be of a limited scope and cost. The Commission expects that the Heartland applicants' construction activities within segment one during the 2011/2012 construction season will be consistent with those described in Mr. Watson's affidavit.

ii. Harm in the form of prejudice to the County's review application

42. The County essentially alleges that if construction costs are incurred prior to the Commission's determination of the review application, the Commission will be inclined to deny the review application to avoid the prospect of thrown away costs. The Commission finds that this is also not irreparable harm as defined by the courts. The County's assertion that this constitutes irreparable harm fails for several reasons.

43. First, it is premised upon the notion that the Commission's decision on the review request would be compromised by an improper consideration. This notion is contrary to the Commission's public interest mandate and to the statutory duty of care created by section 6 of the *Alberta Utilities Commission Act* that requires each Commissioner to act honestly, in good faith and in the public interest.

44. Second, this form of harm is also speculative and uncertain as the County provided no evidence to suggest that the Commission would not decide the review request in a fair, impartial and independent manner.

45. Third, specific harm alleged by the County is not based on the specific circumstances of the Heartland case, rather it is premised upon the review process itself, which is established by

[10] BP suspension ruling, at paragraph 40

statute. The Commission's governing legislation does not prohibit a permit-holder from commencing construction of transmission facilities pending the outcome of a review application. Rather, it gives the Commission the discretion to suspend a decision based upon the circumstances of each case. If the Commission were to accept this as irreparable harm it would lead to a conclusion that irreparable harm could arise anytime a party sought to review and vary one of the Commission's decisions on a transmission line or facility.

46. Finally, in the event that the County decides that the Commission premised its decision on the review request upon an improper consideration its remedy is to seek leave to appeal that decision. In that sense the harm alleged would not be irreparable.

iii. Harm to Strathcona County residents from construction activities and ongoing stress

47. In support of this type of harm the County referred to the findings of the Commission in Decision 2011-436 regarding the concerns expressed by several interveners regarding health and safety, property value and negative visual impacts. The County observed that the construction activities will result in noise, dust and other disturbances which will impact area residents. It submitted that as a result of these activities the ongoing the stress and anxiety associated with the project would be exacerbated if construction commences and noted that this could be avoided by suspending the decision.

48. The County has provided no evidence that such harm will arise should its motion for a suspension be denied. In this respect, it did not provide an affidavit from its client, the County, nor from any of the County residents in support of this assertion. In the Commission's view it is not sufficient to assert this type of harm based solely upon a general reference to the Commission's findings in Decision 2011-436. In the Commission's view this type of harm, like the two that precede it, is hypothetical and uncertain. Further, as discussed at the hearing, this type of harm is transitory and Decision 2011-436 specified or approved mitigation measures that are designed to minimize these impacts.

Conclusion on irreparable harm

The Commission finds that the County has failed to establish that, based upon the evidence before the Commission, irreparable harm as alleged will occur if the suspension is not granted. In the Commission's view the harms alleged by the County do not meet the criteria set out in the *RJR MacDonald* Case and adopted by the Commission in the BP suspension ruling. Specifically the harms alleged by the County are not identifiable, self evident or certain.

**Balance of Convenience**

49. As explained above, an applicant for a stay must satisfy each element of the three-part test set out in the *RJR MacDonald* decision if it is to be successful in its motion to stay a Commission decision. In light of the findings of the Commission above that Strathcona County has failed to satisfy the second test (demonstrating irreparable harm), a consideration of the third test (balance of convenience), is therefore not necessary.

## Conclusion

50. For the reasons provided above Strathcona County's motion to suspend the operation of Decision 2011-436 is denied.

## The Alberta Utilities Commission

(*original signed by*)

Carolyn Dahl Rees
Vice-Chair

AUC
Alberta Utilities Commission

Fifth Avenue Place, #400, 425 – 1 Street SW
Calgary, Alberta, Canada T2P 3L8
Phone 403-592-8845 Fax 403-592-4406
www.auc.ab.ca

**Electronic Notification**

jp.mousseau@auc.ab.ca
Writer's direct line
(403) 592-4452

January 24, 2012

Mr. Jim Graves
Graves Engineering Corporation
11461 University Avenue
Edmonton, Alberta T6G 1Y9

Dear Mr. Graves:

**EPS Proceeding No. 1592**
**Ruling on the application by FIRST to review and vary Decision 2011-436**

## I. Overview and nature of the issue to be decided

1. On January 16, 2012, Mr. Jim Graves of Graves Engineering Corporation filed what appears to be an application to review and vary Decision 2011-436 with the Alberta Utilities Commission (AUC or Commission). The application was made on behalf of the FIRST group (FIRST stands for "First Peoples, Indian Reserves and Street peoples"). Accompanying that application was a letter from the Papaschase First Nations supporting the FIRST application.

2. In this ruling the Commission must decide whether to consider the application for review and variance filed by FIRST. The Commission has made a decision on the application and instructed me to provide its reasons for its decision.

## II. Background

3. The Heartland application was filed on September 27, 2010. The application included a preferred east route and an alternate west route for the Commission's consideration. Additionally, the application included an underground option for the preferred east route.

4. FIRST made numerous applications for standing to participate in the Heartland hearing many of which were supported by correspondence from or on behalf of the Papaschase First Nations.[1] FIRST asserted standing on two grounds. First, that its members had First Nations and or Aboriginal rights arising from the *Canada Act, 1982*, treaty rights, and other rights that may be directly and adversely affected by the Commission's decision on the application. FIRST also argued that it had members that lived within 800 metres of the proposed heartland transmission line.

5. On February 16, 2011, the Commission denied FIRST's request for standing based upon Aboriginal or First Nations rights. The Commission found as follows:

[1] The Commission's rulings on FIRST's numerous applications for standing are found in Decision 2011-436 in Appendices 3a, 3c, 3f, 3i, 3j, and 3k.

> 24. In the *Dene Tha'* decision[2], the Alberta Court of Appeal recognized that it is reasonable for the Commission to require those asserting an aboriginal or treaty right in support of a request for standing to demonstrate "some degree of location or connection between the work proposed and the right asserted".
>
> 25. FIRST asserts that standing should be granted to 15 of its members on the basis of traditional rights. However, FIRST provided no elaboration on the source and nature of those rights or how those rights may be directly and adversely affected by the Commission's decision on the Heartland application. Absent this information the Commission lacks the requisite degree of location or connection between the work proposed and the right asserted to determine the standing for these 15 members.[3]

6. However, the Commission granted FIRST standing to participate in the Heartland proceeding subject to the condition that it could file information with the Commission that demonstrated that one or more of its members own or reside property within 800 metres of the proposed transmission line.

7. On March 14, 2011, Mr. Graves wrote to the Commission to inquire whether FIRST had satisfied the Commission's condition and could therefore have standing to participate in the hearing. The Commission responded to Mr. Graves on March 15, 2011 and stated that the condition had not been met as FIRST had not filed any information demonstrating that one or more of its members owned or resided upon property within 800 metres of the proposed transmission line. The Commission stated that if FIRST did not obtain standing the Commission would be prepared to exercise its discretion to allow FIRST to make a brief statement in the hearing.[4]

8. On April 3, 2011, the Commission received additional correspondence from Graves Engineering Corporation on behalf of FIRST. In that letter FIRST requested the Commission to reconsider its application for standing based upon a direct and adverse impact of the project on the traditional rights of its members. FIRST provided the Commission with additional information about the rights asserted. The Commission considered the additional evidence and found as follows in a letter to FIRST dated April 8, 2011:

> 21. The Commission has reviewed the information submitted by FIRST and considered its request for standing. While it is not expressly stated in the information provided, the Commission understands that the rights asserted by Mr. Goodstriker and Mr. Bruneau are rights under section 35 of the *Constitution Act*3. Based on the information filed, it is not clear to the Commission the basis upon which Mr. Bruneau or Mr. Goodstriker is entitled to assert these rights.
>
> 22. Further, the Commission finds that the information provided by FIRST does sufficiently demonstrate how the rights asserted may be directly and adversely

[2] Dene Tha' First Nation v. Alberta Energy and Utilities Board, 2005 ABCA 68
[3] Exhibit 513.01
[4] Exhibit 759.01

> affected not by the Commission's decision on the Heartland application. FIRST does not provide information and explanation on the nature of these rights or the degree of location or connection between the proposed Heartland transmission project and these rights. Without the necessary connection between the rights asserted and the potential direct and adverse impact on FIRST's members, the Commission finds that FIRST has failed to demonstrate that its members may be directly and adversely affected by the Commission's decision on the Heartland application. [5]

9. The Heartland hearing commenced on April 11, 2011 and concluded on May 17, 2011.

10. On April 11, 2011, Mr. Calvin Bruneau filed a statement of intention to participate in the Heartland hearing on behalf of the Papaschase First Nations. Mr. Bruneau refiled his statement of intention to participate on May 20, 2011. Neither Mr. Bruneau nor the Papaschase First Nations participated further in the Heartland proceeding other than to file additional materials in support of FIRST's numerous applications for standing to participate in the hearing.

11. On April 14, 2011, FIRST wrote to the Commission and provided additional information regarding two of its members who were seeking standing on the basis of traditional rights and one of their members, Mr. Glen Brown, who sought standing on the basis of the proximity of his residence to the Heartland project. The Commission responded to FIRST on April 28, 2012 and found, once again, that FIRST's claim for standing based on traditional rights did not establish the necessary "degree of location or connection between the work proposed and the right asserted" as required by the Dene Tha decision".[6] The Commission also found that FIRST had provided no information supporting its claim that Mr. Brown lived in close proximity to the proposed project.

12. On May 6, 2011, Mr. Graves again wrote to the Commission and explained that Graves Engineering Corporation, on behalf of FIRST, had been retained to represent Ms. Lorelei Hamilton, an individual who resides within 800 metres of the right of way of the preferred east route. On May 12, 2011, the Commission received further correspondence from Mr. Graves outlining FIRST's intended participation on behalf of Ms. Hamilton. The Commission responded to Mr. Graves on May 16, 2011 and stated:

> FIRST's latest request for standing was received four weeks after the hearing commenced and contains very little information regarding how Ms. Hamilton may be directly and adversely affected by the Commission's decision on the Heartland application. Specifically, the Commission finds that FIRST has provided insufficient information regarding the nature of the constitutional rights asserted by Ms. Hamilton and how those rights may be directly and adversely affected by the Commission's decision on the application. In the Commission's view, the concerns expressed on behalf of Ms. Hamilton do not establish the necessary "degree of location or connection between the work proposed and the right asserted" as required by the Dene Tha decision (*Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* 2005 ABCA 68.

[5] Exhibit 854.01
[6] Exhibit 973.01

> However, because Ms. Hamilton resides within 800 metres of the proposed right-of-way, the Commission will allow her to make a short presentation of no more than 30 minutes to explain how she may be directly and adversely affected by the Commission's decision on the Heartland application. The Commission will also allow FIRST to participate in argument on her behalf. Given the timing of FIRST's latest request for standing, the Commission is not prepared to require the applicants and the AESO to respond to the information requests filed by FIRST.

13. Ms. Hamilton did not make a submission at the Heartland hearing.

14. Mr. Graves filed argument and reply argument for FIRST. While Ms. Hamilton was briefly mentioned in the argument but there was no description or explanation of how or why the Commission's decision on the Heartland application might directly and adversely affect her rights. Instead, the focus of the FIRST argument was the issues of constitutional, aboriginal and property rights. In Decision 2011-489 (the Heartland Cost Decision) the Commission expressed the opinion that the FIRST arguments "were not advanced on behalf of Ms. Hamilton, rather they were made on behalf of individuals that the Commission had previously ruled did not have standing to participate in the hearing."[7]

15. On November 1, 2011, the Commission issued its decision on the Heartland transmission application (Decision 2011-436).

16. On December 8, 2011, the Commission wrote to interested parties and set a process and schedule for the consideration of all review and variance applications of the Heartland decision in a single proceeding, which was assigned as Proceeding ID No. 1592. The Commission stated as follows:

> 20. The Commission has received two requests to review the Heartland decision. In accordance with the two-stage process described above, the Commission must first decide whether there are grounds to review the Heartland decision. The Commission has established the following amended process for its first stage consideration of such requests. <u>This amended process takes into account the fact that the deadline for requests to review and vary Decision 2011-436 is January 2, 2011.</u>

17. On December 14, 2011 Graves Engineering Corporation registered to participate in proceeding 1592.

18. On January 16, 2011, Mr. Graves filed what appears to be an application for review and variance of the Heartland decision on behalf of FIRST. The application asserted that the Commission made an error of law by failing to issues and arguments about the treaty, constitutional and other rights asserted by FIRST on behalf of its members.

[7] Decision 2011-436, paragraph 157

## III. Commission Ruling

19. In accordance with section 10 of the *Alberta Utilities Commission Act* the Commission may review one of its own decisions in accordance with the rules made by the Commission. The Commission's rules for reviewing its decisions are found in *AUC Rule 016, Review and Variance of Commission Decisions* (Rule 016).

20. Section 3 of Rule 016 provides that the Commission may review one of its decisions on the basis of an error of fact law or jurisdiction. This section states that such an application may only be made by a party to the decision within 60 days of the issuance of the decision. In accordance with section 12 (a)(i) of Rule 016, the Commission must grant a review under this section if it is of the opinion that the applicant has raised a substantial doubt as to the correctness of the decision.

21. The correspondence from Graves Engineering Corporation is dated January 13, 2012, the date set by the Commission as the deadline for filing submissions in support of, or objecting to, the five Heartland review and variance applications. However, neither the letter from Graves Engineering Corporation nor the attached letter of support from the Papaschase First Nations, supports or objects to the five review and variance applications that constitute Proceeding 1592. Instead, this correspondence is clearly a request for review and variance based upon an error of law. The error of law asserted was not raised in any of the five applications for review and variance that constitute Proceeding 1592.

22. The application by FIRST for review and variance of Decision 2011-436 was not filed within the 60 day time period specified in Rule 016 despite the fact that on December 8, 2011, the Commission notified all interested parties and their representatives, including Mr. Graves, that the deadline for filing a review and variance request was January 2, 2012.

23. In addition to being out of time, the Commission finds that FIRST is not a party to Decision 2011-436. In Decision 2011-464 the Commission recently decided that an intervener group that was denied standing to participate in a hearing was not a party to the decision resulting from that hearing. The Commission found that, because the review applicant was not a party to the decision, as required in section 3 of Rule 016, the review applicant was not entitled to apply to review the decision.

24. The Commission never granted standing to FIRST to participate in the Heartland hearing. Rather, the Commission allowed Graves Engineering Corporation, in its capacity as agent to file argument on behalf of a single individual, Ms. Hamilton, with the purpose of explaining how she may be directly and adversely affected by the Commission's decision on the Heartland application.

25. The issues raised in FIRST's review request are the same issues raised by it in support of its request for standing on behalf of those of its members who were asserting various forms of First Nations or Aboriginal rights. The Commission ruled on a number of occasions that FIRST lacked the necessary standing to assert these issues in the proceeding. There is nothing in the FIRST submission to suggest that the late application for review and variance was filed on behalf of the only member of FIRST who had standing to participate in the hearing, Ms. Hamilton. In

the Commission's view, FIRST's application for review and variance was filed on behalf of persons who had no standing to participate in the first instance.

26. Having regard to the foregoing, the Commission has dismissed FIRST's application for review and variance for two reasons: first, because it was filed out of time and second, because FIRST is not a party to Decision 2011-436.

Yours truly,

*<original signed by >-*

JP Mousseau
Commission Counsel