

In the Court of Appeal of Alberta

Citation: Dutta Energy Corporation v Alberta Utilities Commission, 2025 ABCA 246

Date: 20250703

Docket: 2503-0062AC

Registry: Edmonton

Between:

Dutta Energy Corporation

Applicant

- and -

Alberta Utilities Commission

Respondent

**Reasons for Decision of
The Honourable Justice Dawn Pentelchuk**

Application for Permission to Appeal

Reasons for Decision of The Honourable Justice Dawn Pentelechuk

Introduction

[1] Dutta Energy Corporation seeks permission to appeal an internal review decision of the Alberta Utilities Commission. The decision relates to Dutta Energy's application to construct and operate a 9.5-megawatt solar power plant, the Sunbeam Meadows Project, near the town of Whitecourt (the Project). The Commission has two streams of approval for power plants with a capacity of between one to ten megawatts: a checklist application, which is a faster and more streamlined process, and a full application. Dutta Energy submitted three checklist applications for approval of the Project, one of which is at issue on this application.

[2] The Commission issued a closure letter dated November 20, 2024, informing Dutta Energy that the Project did not qualify as a checklist application due to environmental concerns and an unresolved objection filed by FortisAlberta. The Commission stated Dutta Energy was required to file a full application. Dutta Energy applied for an internal review of the closure decision, which a review panel denied on March 6, 2025: Decision 29738-D01-2025.

[3] Dutta Energy applies for permission to appeal the March 2025 review decision, pursuant to s 29(1) of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*AUC Act*). It argues that the Commission made multiple errors of law or jurisdiction.

Legislative Framework

[4] The construction and operation of any proposed power plant in Alberta must be approved by the Commission: *Hydro and Electric Energy Act*, RSA 2000, c H-16, s 11. The Commission has a statutory duty to consider whether the construction and operation of a proposed project is in the public interest, having regard to the social and economic effects of the development and its effects on the environment: *AUC Act*, s 17(1).

[5] The Commission has broad authority to make rules that govern this approval process: *AUC Act*, s 76(1)(a). The Commission's Rule 007, which governs the application process for power plants, was enacted under this authority.

[6] Rule 007 outlines two procedures for approval to construct and operate a power plant: the checklist application process and the full application process. The expedited checklist application process was established to reduce the regulatory burden for low-risk projects. Section 4.2 of Rule 007 states that, to qualify for the checklist process, the applicant must demonstrate that the proposed project:

- Is or will be located at a site that will have a total capability of one MW [megawatt] or greater and less than 10 MW, regardless of whether the energy generated is solely for its own use or for export to the Alberta Interconnected Electric System;
- Does not directly and adversely affect any person;
- Has no adverse effect on the environment; and
- Complies with Rule 012: *Noise Control*.

[7] These requirements are drawn from section 3 of the *Hydro and Electric Energy Regulation*, Alta Reg 32/2024, which excludes certain projects with a total capability of less than one megawatt from the Commission’s approval process.

[8] The primary difference between the checklist application process and the full application process is the documentation that an applicant must submit to the Commission. Every applicant must substantially satisfy the 30 information requirements set out in section 4.4.2 of Rule 007. However, if an applicant satisfies the checklist criteria, they are not required to file all the documentation required for a full application. In reviewing a checklist application, the Commission may request the applicant to file supplemental information or refile their application as a full application. If the Commission closes a checklist application, that does not preclude the applicant from filing a full application.

[9] The Commission has authority to review its own decisions: *AUC Act*, s 10. The Commission’s Rule 016 governs this process. Section 5 sets out the grounds on which the Commission will review a decision, which includes whether the decision made a “palpable and overriding error of fact, or mixed fact and law where the legal principle is not readily extricable, which is material to the decision.” Section 1 defines a “decision” as follows:

“decision” includes a decision, order, costs order, licence, permit, approval and administrative penalty issued by the Commission under the *Alberta Utilities Commission Act* or any other enactment or rule under the jurisdiction of the Commission, but does not include a complaint resolution letter made by the Compliance and Enforcement division (an independent division of the Commission).

Decision of the Review Panel

[10] Dutta Energy argued before the review panel that, in closing its checklist application, the Commission erred in its application of the checklist criteria.

[11] The review decision made two findings. First, the panel found that the November 20, 2024 closure decision was not a “decision” within the meaning of section 1 of Rule 016 and was therefore not reviewable under Rule 016. The panel found that the closure decision was “administrative” and did not determine the merits of Dutta Energy’s application for approval of the Project. The review panel concluded that because the closure decision was “not the type of decision that Rule 016 is intended to address”, it could “dismiss the review application on this basis alone.”

[12] The review panel nevertheless exercised its discretion to address Dutta Energy’s grounds for review to ensure that Dutta Energy fully understood the application process and could “effectively access that process in the future.”

[13] The review panel upheld the closure decision. First, it confirmed that the application did not meet the requirement to have no adverse effect on the environment. The review panel noted that the proposed site for the Project is forested land and therefore the Project posed potential adverse impacts on the environment. It explained that, for the purposes of section 4.2 of Rule 007, a project with potential adverse environmental effects that can be mitigated is not a project with no adverse environmental effect. Second, the panel confirmed that, because FortisAlberta had an unresolved objection, the Project did not satisfy the requirement that it not directly and adversely affect any person.

[14] Failure to meet these requirements meant the application did not qualify as a checklist application. To fulfill its statutory mandate and determine whether the Project is ultimately in the public interest, the Commission required Dutta Energy to file a full application.

[15] Following the March 2025 review decision, Dutta Energy submitted a full application for the Project that is being considered by the Commission on its merits.

Test for Permission to Appeal

[16] Section 29 of the *AUC Act* provides that “an appeal lies from a decision or order of the Commission to the Court of Appeal on a question of jurisdiction or on a question of law”, if permission to appeal is granted. Issues of fact, mixed fact and law, and policy, are not subject to appeal: *WCSB Power Alberta Limited Partnership v Alberta Utilities Commission*, 2022 ABCA 177 at para 22 .

[17] An application for permission to appeal engages various factors. As Slatter JA wrote in *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2022 ABCA 18 at para 13, some of the factors frequently in play include:

- (a) whether the question of law is of general importance, or only of interest to the immediate parties;

(b) whether the point raised is of significance to the action itself, or is merely interlocutory, or may not affect the ultimate outcome of the action;

(c) whether the appeal raises a serious, arguable point of law;

(d) in the case of ongoing proceedings, whether an appeal would unduly hinder the progress of the action.

[18] Where a statutory right of appeal is limited to questions of law or jurisdiction, it is open to this Court to look behind the wording of issues, as articulated by the applicant, to determine the true nature of the issues: *ATCO Electric Ltd v Alberta (Utilities Commission)*, 2019 ABCA 417 at para 20; *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30 at para 29, leave to appeal to SCC refused, 40121 (29 September 2022). This scrutiny is a central element of the court’s gate-keeping function. It ensures that the legislative intent to restrict appeals to questions of law or jurisdiction is respected.

The Proposed Grounds of Appeal do not Meet the Test for Permission to Appeal

[19] Dutta Energy proposes multiple grounds of appeal, directed at different parts of the review decision.

[20] First, it argues that the Commission exceeded its jurisdiction by declining to review the closure decision under Rule 016. Dutta Energy submits that the review panel misapplied Rule 016 and breached its duty of procedural fairness by declining to review the closure decision despite having advised Dutta Energy that a separate closure letter could be reviewed under Rule 016. In the review decision, the Commission acknowledged it so advised Dutta Energy.

[21] While an alleged breach of procedural fairness raises a question of law, the other factors relevant to whether permission to appeal should be granted weigh against permission being granted on this proposed ground. Dutta Energy may have had legitimate procedural expectations that the review panel would engage in the merits of the closure decision based on representations made to it. However, the fact of the matter is the review panel did proceed to consider Dutta Energy’s substantive arguments. As a consequence, this proposed ground of appeal lacks sufficient merit and significance, and is not of general importance.

[22] Dutta Energy frames its other proposed grounds of appeal as questions of law regarding the interpretation of the Commission’s Rules. It argues the Commission erred by:

- a. interpreting “no adverse effect on the environment” to exclude projects with any potential impacts, even if fully mitigated; and
- b. failing to apply the correct legal test for determining whether a person is “directly and adversely affected”.

[23] Dutta Energy asserts that the Commission's interpretation of Rule 007's requirement that the Project have no adverse effect on the environment is illogical and imposes an impractical and rigid threshold. It argues the requirement to demonstrate *no* environmental impact is absurd, as every project will have some impact on the environment. Dutta Energy argues that the Commission is therefore obliged to consider the mitigation strategies it proposed, which it submits adequately addressed the environmental concerns.

[24] In oral submissions, the Commission explained that the threshold used to assess checklist applications is more accurately described as a requirement that the project has no "non-negligible or more than *de minimis*" adverse effects on the environment. By way of example, the Commission stated that adding solar panels to already existing infrastructure may have some adverse environmental effect. However, the potential impact would be theoretical or incalculable and would therefore meet the threshold to proceed as a checklist application. By contrast, a requirement to clear forest is a calculable and non-negligible environmental impact.

[25] Dutta Energy's third proposed ground of appeal concerns the checklist requirement that the Project must not directly and adversely affect any person. It asserts that FortisAlberta does not meet the legal test for standing, and that the Commission erred in law by failing to apply the legal test for standing.

[26] The Commission asserts that this checklist criterion is a threshold requirement; the Commission is not assessing the objecting party's standing nor the merits of the objection at this stage in the application process. They contend that if an unresolved objection exists, the information gathered in a full application is required to assess the potential impact of the proposed project on the public interest.

[27] In my view, these proposed grounds of appeal do not engage questions of law. The issues engage questions of mixed fact and law regarding the Commission's application of Rule 007. The heart of Dutta Energy's complaint is the Commission's factual inquiry into whether Dutta Energy's application met the threshold requirements regarding the Project's environmental impact and potential adverse effects on another person. Checklist applications are the exception rather than the rule. The true nature of the issues raised is the Commission's exercise of its discretion, in light of its statutory duties and myriad policy considerations existing, to vet and reject checklist applications and direct that the proposed project be evaluated through a full application. The true nature of the issues raised by Dutta Energy are not questions of law.

[28] In any event, even if Dutta Energy had demonstrated an extricable question of law, the other factors relevant on an application for permission to appeal weigh strongly against granting permission. The proposed appeal is premature. It is well established that this Court will not review interlocutory decisions of administrative tribunals, absent rare and exceptional circumstances: **689799 Alberta Ltd v Edmonton (City)**, 2018 ABCA 212 at para 2, leave to appeal to SCC refused, 38279 (8 November 2018).

[29] The claims raised by Dutta Energy do not constitute rare and exceptional circumstances. The Commission's two application procedures, as outlined in Rule 007, are not mutually exclusive. The Commission found that the Project does not meet the qualifications for the streamlined checklist application. However, Dutta Energy is not precluded from, and indeed has engaged in the process of, applying for approval using the full application process. If the full application for the Project is successful, this appeal would lose significance: see *Fort McKay First Nation v Alberta Energy Regulator*, 2013 ABCA 355 at para 11.

Conclusion

[30] The application for permission to appeal is dismissed.

Application heard on June 25, 2025

Reasons filed at Edmonton, Alberta
this 3rd day of July, 2025

Pentelechuk J.A.

Appearances:

A.M. Zia
for the Applicant

C. Graham
M.M. Anderson
for the Respondent