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Powering Economic Reconciliation: Revisions to Alberta Utilities AUC Rule 007 Address Electricity and Gas Utilities Projects Developed in Partnership with Indigenous Communities

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May 15, 2025

The Alberta Utilities Commission (AUC) is making changes to its application guidelines which provide a framework for the growing reality of Indigenous partnership on power generation and utility projects. The AUC's proposed changes are intended to reflect Indigenous project benefits in project applications, as referenced in two recent court decisions. These changes are proposed alongside a range of other changes to application guidelines and are important to understand for anyone involved in in power generation or storage, transmission, and gas utilities projects led by or in partnership with Indigenous communities. Comments remain open on these changes until May 23, 2025.

AUC Rule 007 Consultations

Specifically, the AUC is proposing to:

- Commit to considering the benefits which can flow to Indigenous groups from such projects, including social, environmental or economic benefits, or those related to the exercise of the Indigenous group's Aboriginal rights. This commitment reflects the direction of the courts to support economic reconciliation in *AltaLink Management Ltd v Alberta (Utilities AUC)*[1] (*AltaLink*); and *Ermineskin Cree Nation v Canada (Environment and Climate Change)*[2] (*Ermineskin*); and
- Apply a regulatory scheme for those projects on First Nation reserve lands which includes AUC jurisdiction but not provincial environmental and historic resources laws.

The AUC regulates electricity, gas and some water utilities in the province and is revising its Rule 007, which governs the applications for electricity and gas utility facilities, such as power plants, transmission lines, energy storage, and gas utility pipelines.

The proposed revised Rule 007 contains, in additions to the revisions addressing Indigenous projects, changes addressing recent topics from the Renewables Approvals Pause, procedural revisions, revisions to better accommodate energy storage, and imposition of a hard five-year time limit on most approvals.

Recognizing Indigenous Project Benefits

The AUC frames its proposed changes to reflect Indigenous project benefits as relating to the findings of two court cases, *AltaLink* and *Ermineskin*.

In *AltaLink*, the Alberta Court of Appeal (ABCA) ordered the AUC to consider benefits to Indigenous peoples in the test for the sale of utility assets, noting that "projects that increase the likelihood of economic activity on a reserve ought to be encouraged." The ABCA noted that such projects increase employment, potentially contributing to educational attainment and making "healthy and happy" Indigenous communities.[3]

In *Ermineskin* meanwhile, the Federal Court found that an impact and benefit agreement for a coal mine was "closely related to and thus derivative from Aboriginal and Treaty rights." The Federal Court based this conclusion on the fact that the impact and benefit agreement was explicitly made to compensate Ermineskin First Nation for the taking up of lands on which its members exercised their Aboriginal rights. However, the Federal Court also recognized the "broader economic interests" generally could trigger the duty to consult.[4]

More recently, the ABCA confirmed the importance of those economic interests and potential Indigenous benefits in *Benga Mining Limited v Alberta Energy Regulator*[5] (*Benga*). However, in *Benga,* the ABCA found that the regulatory body, a Joint Review Panel, did consider those interests and benefits and so its decision was reasonable. Moreover, the ABCA emphasized that the affected First Nations had the opportunity to put further evidence before the Panel on the potential benefits to the First Nations and did not do so.[6] The AUC has not cited *Benga* in their proposed Rule 007 revisions.

Taken together, *AltaLink*, *Ermineskin*, and *Benga* demonstrate that beyond the traditional attention paid to adverse impacts to Indigenous peoples' ability to exercise their rights, Indigenous peoples are also entitled to consideration of their economic interests in project regulatory processes.

The new revisions to AUC Rule 007 provide the framework to address potential Indigenous benefits, including but not limited to such economic interests, from electricity and gas utility infrastructure.

Application Requirements to Recognize Indigenous Project Benefits

In order for these potential Indigenous benefits to be recognized, an applicant for a utilities facility project must, under the proposed Rule 007 revisions:

- Clearly describe the benefits to Indigenous groups and the nature of those benefits;
- Clearly describe the implications of not approving the project;
- Provide supporting documentation such as community letters of support if available; and
- Provide business structures and formal instruments securing benefits, if the benefits derive in whole

or in part from Indigenous ownership of or involvement in project development.

None of this information on project Indigenous benefits is necessary for a facilities application to the AUC. Nonetheless, this clear framework and clear indication that this issue matters to the AUC provides a valuable tool for Indigenous developers or developers working in partnership with Indigenous communities. *AltaLink*, *Ermineskin*, and, most clearly, *Benga*, demonstrate the importance of taking full advantage of these tools and providing clear evidence of potential Indigenous benefits.

Projects on Reserve

The AUC's addition of a framework for consideration of on-reserve projects to Rule 007 is another area where it provides greater clarity for projects involving Indigenous groups.

The application of provincial laws of general application to physical projects on First Nation reserves is, from a pure principles perspective, an open question. It involves the potential application of constitutional tests and provisions of the *Indian Act*.[7] A lack of certainty on the applicable regime can hinder project development but also provide opportunities.

The AUC's proposed approach in the revised Rule 007 provides some further certainty. For example, it confirms, consistent with prior AUC decisions,[8] that certain environmental and historical resources approvals may not be required for some projects on-reserve.[9] These kinds of impacts must still be assessed and mitigated to a level consistent with provincial standards, and there may be Federal assessments or approvals required. The AUC explicitly acknowledges Indigenous, traditional and community knowledge can factor into assessments of impacts. If projects are located partially on-reserve and partially off-reserve, the AUC advises that proponents should contact the relevant Ministry to determine if the provincial regimes apply.

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[1] *AltaLink Management Ltd v Alberta (Utilities AUC)*, 2021 ABCA 342.

[2] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758.

[3] *AltaLink* at paras 59-75.

[4] *Ermineskin* at paras 105-107.

[5] *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30.

[6] *Benga* at paras 117-121.

[7] RSC 1985, c I-5; see *Derrickson v. Derrickson*, 1986 CanLII 56 (SCC) at para 57.

[8] See AUC Decision 24751-D01-2020 Akamihk Energy Incorporated Montana First Nation Solar Facility January 10, 2020 at para 31.

[9] Rule 007: Facility Applications, Draft Blackline, Appendix A1-B – Participant involvement program guidelines for Indigenous groups, 6 Environmental Impacts, PDF 192-193.

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