



MEG Energy Corporation

Construct and Operate a 25-kV Electrical Distribution System

June 15, 2006

ALBERTA ENERGY AND UTILITIES BOARD

Decision 2006-057: MEG Energy Corporation
Construct and Operate a 25-kV Electrical Distribution System
Application No. 1416005

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Contents

| | | |
|----------|--|-----------|
| 1 | INTRODUCTION..... | 1 |
| 1.1 | Application..... | 1 |
| 1.2 | Intervention..... | 1 |
| 1.3 | Background..... | 2 |
| 1.4 | Interim Approval..... | 3 |
| 2 | ISSUES CONSIDERED IN THE PROCEEDING | 4 |
| 3 | LEGISLATION..... | 4 |
| 4 | DOES MEG QUALIFY FOR EXEMPTION UNDER SECTION 24 | 6 |
| 4.1 | Views of MEG..... | 6 |
| 4.2 | Views of FortisAlberta..... | 8 |
| 4.3 | Views of the Board..... | 9 |
| 5.1 | Views of MEG..... | 10 |
| 5.2 | Views of FortisAlberta..... | 13 |
| 5.3 | Views of the Board..... | 14 |
| 6 | DECISION..... | 14 |

**MEG ENERGY CORPORATION
CONSTRUCT AND OPERATE A 25-KV
ELECTRICAL DISTRIBUTION SYSTEM**

**Decision 2006-057
Application No. 1416005**

1 INTRODUCTION

1.1 Application

MEG Energy Corporation (MEG) filed Application No. 1416005 (the Application) on August 25, 2005, requesting the approval of the Alberta Energy and Utilities Board (Board or EUB) for the construction of a new customer owned 240/25-kV substation in the Conklin area south of Fort McMurray in North-east Alberta. Conklin substation 762S is required to supply electrical power to MEG's Christina Lake Regional Pilot Project (the Pilot Project) and Steam Assisted Gravity Drainage (SAGD) facilities as well as future facilities associated with its full project.

In addition to the substation, the project also required a 25-kV electrical distribution system to supply three MEG load sites associated with the Pilot Project. For this purpose, in the Application, MEG also stated that it was applying for an exemption pursuant to section 24(1) of the *Hydro and Electric Energy Act* (HEEA), RSA 2000, c. H-16, to allow it to construct and operate three 25-kV distribution feeders:

- Feeder A - as outlined in the Application, to supply its pilot plant, being confined within MEG's plant perimeter and within its lease boundary;¹
- Feeder B - as outlined in the Application, to supply its production pad and source wells, being located outside the plant perimeter, but within the MEG lease boundary;² and
- Feeder C - as outlined in the Application, to supply its source water and pumping station. The pumping station would be located adjacent to the plant and within the MEG lease boundary. The source water wells would be outside the MEG lease boundary³, but access to the site would be available via a private MEG road.

(collectively, the Distribution Feeders).

1.2 Intervention

The application area is located in the general area serviced by FortisAlberta Ltd. (FortisAlberta). By letter to the Board, dated November 21, 2005, FortisAlberta stated that it had recently become aware of MEG's request for confirmation from the Board pursuant to section 24 of

¹ MEG response to BR-MEG-3, dated December 2, 2005

² Ibid, and MEG response to BR-MEG-4, dated December 2, 2005

³ MEG response to BR-MEG-3, dated December 2, 2005 and MEG response to FortisAlberta-MEG-1, dated February 13, 2006

HEEA. FortisAlberta stated that its interest in the application was to ensure that its rights and obligations respecting the provision of distribution access service were retained and to ensure facilities were developed in accordance with legislation and, thus, in the public interest. FortisAlberta urged the Board to use its discretion allowed under section 24 to deny the exemption request.

In a letter to MEG, dated December 23, 2005 (Interim Approval), the Board stated that it was prepared to allow MEG to proceed with construction of Feeders A and B and the portion of Feeder C that was within the boundaries of MLL 050007, upon the conditions described in Section 1.4 below. The Board further stated that it would allow the construction of that portion of Feeder C outside the lease boundary once MEG demonstrated " *to the Board's satisfaction that (a) it has acquired sufficient rights to the land to qualify under section 24, and (b) Feeder C will not cross a public highway as defined in HEEA.*" The Board stated: "*The Board believes that whether or not the Board exercises its discretion to remove the exemption should be based on a more extensive consideration of the public policy issues involved. As such, the Board considers that a final decision on the Subject Facilities under section 24 should be made following a public hearing on the extent, if any, to which the Board should exercise its discretion to allow section 24 to remain applicable to the Subject Facilities.*"

On January 24, 2006, the Board issued Notice of Written Proceeding (the Notice) containing a proposed schedule for a written proceeding. The Notice provided an opportunity for all interested parties to register as interveners in the proceeding by January 31, 2006 and requested comment on the appropriateness of a written proceeding to deal with the issue of the section 24 approval and the proposed schedule for such a proceeding.

FortisAlberta and ATCO Electric Ltd. (ATCO) both registered as interveners. Both agreed with the Board's proposal of a written proceeding and to the proposed schedule, as did MEG. ATCO indicated that it would not provide any evidence or argument, but rather merely supported that submitted by FortisAlberta.

1.3 Background

On January 26, 2005, the EUB issued Approval No. 10159 to MEG to construct, operate and reclaim its Christina lake Pilot Project. The pilot plant site would be located within the Regional Municipality of Wood Buffalo in northeast Alberta, approximately 150 km south of Fort McMurray. The Pilot Project would produce bitumen using the SAGD process. MEG submitted that it was its intention to secure an Industrial System Designation (ISD) in the future for its required electric facilities for the purposes of self-supply, distribution, and owning and operating its own electrical distribution system within the ISD to support the SAGD process and associated facilities. MEG further submitted that upon possible future approval and construction of a cogeneration plant, it would utilize the onsite steam and electrical generation to support its SAGD process with any excess electrical energy being sold to the Alberta Interconnected Electrical System (the AIES).

Prior to submitting the Application to the Board for Conklin substation 762S, MEG obtained an approval pursuant to section 101(2) of the *Electric Utilities Act* (EUA) from FortisAlberta, consistent with MEG's intention to contract directly with the Alberta Electric System Operator (AESO) as a direct connect client. In turn, AESO provided a letter of endorsement to MEG

acknowledging its agreement for MEG to construct, own, operate, and connect the substation to the AIES).

Separately, the AESO applied to the Board for the need for 240-kV electrical facilities to connect Conklin substation to the AIES. Approval No. U2005-291 was issued to the AESO which then direct assigned the construction and operation of those facilities to AltaLink Management Ltd. (AltaLink). AltaLink subsequently applied:

- to construct 21 km of 240-kV transmission line designated as 957L from existing 240/25-kV Leismer substation located in LSD 10-10-77-8 W4M to 72S Christina Lake substation 723S located in LSD 16-6-76-6 W4M (Application No. 1418326; Permit and Licence No. U2005-411);
- to construct 240/25-kV Christina Lake substation 723S (Permit and Licence No. U2005-413); and
- to construct 25 km of 240-kV transmission line designated as 971L from Christina Lake substation 723S to Conklin substation 762S located adjacent to MEG's pilot plant in the North half of Section 9 and the South half of Section 16-77-5 W4M. (Application No. 1418924; Permit and Licence No. U2005-417).

According to Application No. 1418924, which MEG confirms in Application No. 1416005, MEG was responsible for the entire cost of construction of 240-kV transmission line 971L, which MEG reported exceeded \$10 million.

1.4 Interim Approval

In its Interim Approval, the Board recognized MEG's urgency for the applied for facilities, and indicated that a separate communication would follow with respect to the portion of the Application requesting approval to construct and operate Conklin substation 762S. The Board further stated:

The Board is prepared to allow MEG to proceed with construction of the Subject Facilities based on claimed urgency surrounding the project, conditional upon:

- the Board's ultimate decision resulting from the public hearing to be held to consider the extent, if any, to which the Board should exercise its discretion under section 24 with respect to the Subject Facilities; and
- the Subject Facilities being constructed in accordance with the technical standards of FortisAlberta.

This conditional approval would not preclude the Subject Facilities from being built in the meantime by MEG or a party of MEG's choosing. The public hearing may involve a determination on matters relating to ultimate ownership and operatorship of the Subject Facilities.

With respect to the portion of Feeder C that would be outside the boundary of MLL 050007 as it presently exists, MEG does not appear to have surface leases or other rights to the relevant lands that allow it to construct this portion of the distribution line in the

proposed location of Feeder C. For this portion of Feeder C, the requirements of section 24 have not been satisfied. In addition, The Board notes that MEG states that the final routing and termination point of Feeder C is yet to be determined. Based on the record to date in this proceeding, the Board is prepared to allow MEG to construct this portion of Feeder C, conditional upon:

- MEG demonstrating to the Board's satisfaction that (a) it has acquired sufficient rights to the land to qualify under section 24, and (b) Feeder C will not cross a public highway as defined in HEAA;

and if the Board becomes so satisfied, upon the further following conditions:

- the Board's ultimate decision resulting from the public hearing to be held to consider the extent, if any, to which the Board should exercise its discretion under section 24 with respect to this portion of Feeder C; and
- this portion of Feeder C being constructed in accordance with the technical standards of FortisAlberta.

Permit and Licence U2005-386 for Conklin substation and Interconnection Order U2005-478 for the interconnection of Conklin substation to AltaLink's 240-kV transmission line 971L were subsequently issued.

2 ISSUES CONSIDERED IN THE PROCEEDING

Although the parties addressed a number of issues and sub-issues in their evidence and argument, the Board concludes that in the context of the Application, only two basic issues need to be addressed in this report, namely:

1. does MEG qualify for an exemption under section 24 of the HEAA, and, if so,
2. is it in the public interest to allow MEG to own and operate its own 25-kV electrical distribution system pursuant to section 24 of the HEAA or should the Board invoke its discretion to otherwise direct?

3 LEGISLATION

In the Board's view, certain provisions in the EUA and HEAA are relevant to its consideration of the Application. These provisions provide guidance as to the public interest in the particular circumstances of the Application.

The Electric Utilities Act

- 101(1) A person wishing to obtain electricity for use on property must make arrangements for the purchase of distribution access service from the owner of the electric distribution system in whose service area the property is located.

- (2) If the person has an interval meter and receives electricity directly from the transmission system, the person may, with the prior approval of
- (a) the owner of the electric distribution system in whose service area the person's property is located, if any, and
 - (b) the Independent System Operator,
- enter an arrangement directly the Independent System Operator for the provision of system access service.

The Hydro and Electric Energy Act

- 1(1) In this Act,
- (1) "public highway" means any land owned by the Crown or a local authority that is used or surveyed for use as a public highway, road, street or lane, or other public way.
- 24(1) A person distributing or proposing to distribute electric energy solely on land of which the person is the owner or tenant for use on that land and
- (a) not across a public highway, or
 - (b) across a public highway if the voltage level of the distribution is 750 volts or less
- is not subject to this part unless the Board otherwise directs.
- 25(1) Notwithstanding anything in any other act or in any approval or order pursuant to any other act, no person shall construct or operate an electric distribution system or alter the service area of an electric distribution system without the approval of the Board, which approval shall include the designation by the Board of the person's service area.
- (2) Approval under this section shall not be given unless the Board is satisfied, having regard to the availability of any other source of electric energy and to any other circumstances, that it is in the public interest having regard to those circumstances and the present and future need for the extension of electric service throughout Alberta.

In addition, the Board notes that generation and retail services have been deregulated through industry restructuring and are now open to competition and, thus, provide a degree of customer choice. However, the wires part of the electric industry continues to be regulated, such that customers are not provided with an opportunity to choose their own wire provider.

4 DOES MEG QUALIFY FOR EXEMPTION UNDER SECTION 24

4.1 Views of MEG

MEG's interpretation of section 24 was that it had the right to construct and operate its own distribution feeders. It pointed out that a party wishing to distribute electric energy solely on land of which the person is the owner or tenant for use on that land needs only to meet one of the two requirements listed in section 24 in order to qualify for exemption under that section. In MEG's case it proffered that requirement is that the line does not cross a public highway as defined in the HEEA. MEG maintained that since the only road in the area was its own private access road and there are no surveyed road allowances within its lease boundary,⁴ any distribution feeders that it may require would comply with section 24(1). MEG provided documentation to show that it had the appropriate government department surface leases required for all its proposed facilities including the three distribution feeders⁵ and, therefore, had met the section 24 requirement of land ownership or tenancy. It believed that on this basis, it had the right to go ahead to construct and operate the Facilities that it currently requires. However, it acknowledged the ability that section 24 gives to the Board to otherwise direct.

MEG stated that its intention for the area had always been to have an ISD in which it could own and operate its own transmission and distribution facilities within its project area. It pointed out that the confirmation of the Board pursuant to section 24 of HEEA was only necessary for the Pilot Project. It further pointed out that once its full production project, including the associated cogeneration facilities, were approved; it fully expected to receive an ISD approval. This, MEG indicated, was the reason for its request for the Board's confirmation because, in the past, FortisAlberta had not been willing to allow ISD holders to purchase the distribution feeders serving their facilities, therefore, duplicate facilities had to be built. It pointed out that in Information Requests to FortisAlberta, the indication from FortisAlberta was that it would not sell or transfer ownership of any distribution facilities built to serve MEG at the time of an ISD approval. MEG was concerned that it would have to build duplicative facilities at that time were FortisAlberta to own the existing distribution feeders.

MEG was of the view that FortisAlberta was fully aware of MEG's intentions to rely on section 24 of the HEEA since the first meeting of the two parties on March 10, 2005. MEG stated that it had been open and forthright with FortisAlberta regarding the manner in which it proposed to develop its oil sands project from the outset. MEG maintained that FortisAlberta expressed the view that it had "no concern in principle" with MEG's approach and that FortisAlberta's Actions were always supportive of MEG applying as a direct connect customer to the AESO. MEG states that for these reasons it was surprised when FortisAlberta objected to its application for an exemption under section 24 of the HEEA.

MEG pointed out that FortisAlberta had previously provided an approval to MEG under section 101 of the EUA and was aware of its intention to become a direct connect customer of the AESO. MEG stated that throughout a period of almost nine months of dealings with FortisAlberta and AESO, both continuously treated MEG as a generation customer. MEG opined

⁴ MEG response to BR-MEG-2, dated December 2, 2005 and MEG response to FortisAlberta-MEG-2, dated February 13, 2006

⁵ MEG responses to BR-MEG-3 and BR-MEG-4, dated December 2, 2005, and MEG response to FortisAlberta-MEG-1, dated February 13, 2006

that it would neither have been entitled to a section 101 exemption nor if AESO did not consider it to be a generation customer. MEG further opined that if it were a load customer, AESO would have refused to deal directly with it.

MEG stated that FortisAlberta attended numerous joint meetings between MEG and AESO to discuss the MEG project. It further stated that both MEG and FortisAlberta were periodically provided with detailed financial information clearly outlining the division of the overall contribution between FortisAlberta and MEG. The Construction Commitment Agreement calculations provided by AESO to both parties contained an explicit cost allocation which showed the costs that would be payable by both parties including the benefits derived by FortisAlberta due to the existence of the MEG project.

MEG maintained that section 101 of the EUA and section 24 of the HEEA are in contradiction with each other. To support its view, MEG submitted that section 101 stated that one must obtain electric service from the distribution company in whose service area the property is located but deferred to the HEEA for a definition of service area.

MEG considered it to be significant that Part 3 of HEEA, entitled “Electric Distribution Systems”, commenced with section 24. It further opined that Part 3 set out up front the situations that are inapplicable for exemptions for distribution systems. It was of the view that the legislators understood the consequences of structuring the legislation in this manner and, therefore when the legislators provided for section 24, they were acting in a consistent, informed manner. Thus, MEG argued that qualifying under section 24 would not amount to an infringement on Fortis' service area, since section 24 supersedes section 25 which in turn contemplates the establishment of service areas.

MEG suggested that the legislation recognizes the importance of orderly and efficient development of electrical systems. MEG did not agree with FortisAlberta's suggestion that allowing MEG to rely upon the exemption provided for in section 24 of HEEA would lead to a circumvention of section 101 of the EUA. It stated that this was not the case since the two pieces of legislation co-exist. It maintained that allowing one piece of legislation to operate as it was intended to does not lead to a circumvention of the other. Furthermore, MEG disagreed with FortisAlberta's suggestion that if section 24 was interpreted as suggested by MEG, a party could simply expand distribution facilities as it saw fit and then advise the Board and resolve the matter later. MEG stated that it had never made such a suggestion and, furthermore, it had always acknowledged the residual discretion of the Board as provided for in section 24.

MEG pointed out that section 24 does not require a distribution company to be able to supply electricity before a party could qualify for a section 24 exemption. However, MEG maintained that even if it wanted FortisAlberta to provide its distribution requirements, in its opinion, FortisAlberta was not in a position to do so. MEG further maintained that FortisAlberta's response to MEG's Information Requests clearly confirmed that FortisAlberta was not able to meet MEG's needs.

In support of its view, MEG stated that what it termed as FortisAlberta's “last minute” Caribou protection plan was only submitted to correct a deficiency identified by MEG.⁶ MEG proffered

⁶ MEG Argument, page 18, paragraph 3

that it did not know what conditions Alberta Sustainable Resource Development may have put on FortisAlberta's Caribou protection plan approval since only a copy of the application was submitted and not a copy of the issued approval. MEG maintained that since FortisAlberta's Caribou protection plan did not specifically refer to MEG's facilities, the approval received would not be sufficient to permit FortisAlberta to build the facilities required by MEG.

MEG further claimed that FortisAlberta was also not in a position to serve since there was no third party load, no other party willing to pay customer commitment, and no FortisAlberta facilities in the area. MEG indicated that the existing facilities, some distance from its plant site, had inadequate capacity to meet MEG's requirements and new facilities would have to be built.

Comfortable in its belief that FortisAlberta was unable to serve and having obtained a section 101 approval from Fortis in any event, MEG proceeded to make arrangements to connect to the transmission line and to construct the substation. MEG pointed out that it sized its facilities to meet only its own needs and not those of any third parties. Therefore, it opined that FortisAlberta might have to design and build new facilities in the future to accommodate the needs of any third parties regardless of MEG's ownership of the subject feeders.

MEG claimed that it had established a prima facie case for an exemption, by satisfying the enumerated criteria found in section 24 of HEEA. It pointed out that a section 24 exemption was not a situation where Board approval was required from the outset. It maintained that once specifically enumerated criteria have been met, reliance on section 24 should be automatically allowed unless there was an overriding basis for finding to the contrary. MEG submitted that such a compelling reason did not exist in this case. It concluded that MEG had satisfied the criteria enumerated in section 24, thereby exempting it from Part 3 of the HEEA and therefore, it should be allowed to move forward with the construction of the Distribution Feeders without further delay.

4.2 Views of FortisAlberta

FortisAlberta confirmed that in all its discussions with MEG, MEG had indicated its intention to have generation and an ISD designation for the project. However, FortisAlberta noted that despite the initial plans of oil sands developers, it was not always the case that plans for generation and/or the creation of an ISD actually occur. Therefore, according to FortisAlberta, it was only through the Application that FortisAlberta became aware that MEG wanted to rely on the exemption provided for in section 24 of the HEEA to operate its own distribution system served from the AIES.

FortisAlberta maintained that the legislation recognizes the importance of orderly and efficient development of electrical systems. FortisAlberta was concerned that under MEG's suggested interpretation of section 24, any party could simply expand or construct its own distribution facilities as it saw fit and then advise the Board and resolve the matter later.

It was FortisAlberta's view that section 24 of the HEEA does not impact later sections of that Act and specifically does not diminish service areas. It argued that the granting of a service area is a matter of geographic definition and the geographic ambit comprised in a service area grant should not be altered by any section 24 exemptions. It stated that section 24 exemptions deal with certain specified facilities and not with geographic area exemptions or reductions.

FortisAlberta was of the view that where the regulated company was ready and able to provide timely service, it would not be in the public interest for the Board to permit reliance on the section 24 exemption. FortisAlberta stated that it was prepared and able to supply MEG's needs in a timely manner. FortisAlberta confirmed that it had never refused to serve MEG's distribution needs. It further confirmed that if it been aware that MEG would have distribution loads before being able to serve them with its own generation, it would not have provided MEG with a section 101 approval but instead would have planned facilities for that purpose. FortisAlberta maintained that it was ready to build and operate distribution facilities to serve MEG in a timely manner, that there were no obstacles or further permits needed to proceed with construction, and it could have the required facilities in place according to MEG's timetable.

In its section 101 approval, FortisAlberta stated that it included the condition that it would not release any facilities which could be served through the distribution system or have distribution assets involved in the delivery of service. A section 101 approval, FortisAlberta contended, is for transmission service and allows the applicant to deal directly with the AESO for the same. A section 101 approval, FortisAlberta further contended, does not empower a person to provide for his own distribution service nor to construct and operate a distribution system for that purpose.

FortisAlberta stated that once it provided MEG with a conditional approval pursuant to section 101 on July 20, 2005, MEG became a generation customer of AESO with FortisAlberta having no more dealings in the matter. It further stated that once it provided its section 101 approval, it was no longer involved in commercial discussions between MEG and AESO.

On the matter of transferring distribution assets to an ISD holder, FortisAlberta confirmed that it had previously refused to transfer facilities to a customer in the Foster Creek area under similar circumstances. FortisAlberta further confirmed that if it were to own the Distribution Feeders, it is not aware of any right or entitlement for MEG to get the ownership of those feeders back.

In conclusion, FortisAlberta stated that it had never opposed nor sought to impede the oil sands activities proposed by MEG. It was FortisAlberta's contention that MEG always led it to believe that it would have generation and an ISD approval prior to project startup therefore making it a generation customer and not a distribution customer. Since MEG was now a distribution customer, FortisAlberta maintained that section 101 of the EUA gave it the right to serve MEG's needs until such time as an ISD approval was issued and that should take precedence over section 24 of the HEEA.

4.3 Views of the Board

The Board considers that while the minutes⁷ of meetings between MEG and FortisAlberta clearly show MEG's intention to have cogeneration on site and to establish an ISD, they do not clearly indicate the timing of MEG's intentions whereby it would apply to build its own ISD pursuant to a section 24 exemption. The Board agrees with FortisAlberta that not all generation or ISD projects come to fruition as originally planned.

Notwithstanding the different views put forward by the parties, the essential issues for the Board to determine are: first, do the Distribution Feeders meet the criteria for a section 24 exemption;

⁷ Document 1 (kick off meeting notes, March 10, 2005) enclosed with letter from MEG's counsel to EUB dated December 16, 2005, filed on December 21, 2005

and if so, secondly, is it in the public interest for the Board to deny MEG the opportunity to rely on section 24? With respect to the criteria to qualify for an exemption under section 24, the Board notes that there are two primary criteria. The first required criterion is that the person proposing to distribute the electrical energy must be proposing to use that energy solely on land on which that person is the owner or tenant. MEG provided documentation indicating that it has all the surface leases in place for all the facilities that it proposes for its Pilot Project.⁸ This now includes surface leases for Feeder C⁹ which, at the time of the issuing of the Board's Interim Approval, it did not have. Therefore, the Board is satisfied that MEG meets the criterion for ownership or tenancy of the land involved, as contemplated by the preamble to section 24(1) of the HEEA.

The second criterion that must be met to qualify for an exemption under is that the distribution lines must (a) not cross a public highway (as defined in section 1(1)(1) of the HEEA), or (b) be under 750 volts if it is to cross a public highway. Since the Distribution Feeders exceed 750 volts, the second criterion means that the Distribution Feeders must not cross a public highway as defined in the HEEA.

MEG has indicated that the only road in the area is its private road into the lease property which does not meet the definition of a public highway. MEG has also indicated that there no surveyed road allowances in the area. This is consistent with the Board's review of the information on the record in this proceeding. Therefore, based on the information on the record in this proceeding, the Board considers that none of the Distribution Feeders would cross a public highway as defined in the HEEA and that as a result, the Distribution Feeders fall within section 24(1)(a) of the HEEA.

MEG therefore has demonstrated that it meets the criteria required under section 24 of the HEEA to qualify for an exemption under that section to supply its own electrical distribution needs through the Distribution Feeders required for its Pilot Project.

However, section 24 does allow for the Board to otherwise direct. Although section 24 does not state any grounds under which the Board might do so, the Board is of the view that if the exemption would not be in the public interest, then it could exercise its authority to otherwise direct.

5 IS IT IN THE PUBLIC INTEREST TO ALLOW MEG TO OPERATE ITS OWN DISTRIBUTION SYSTEM

5.1 Views of MEG

MEG identified the Distribution Feeders as ancillary facilities to its overall oil sands project intended to form part of the integrated industrial processes involved in the development of the project. It has always been MEG's intention, it pointed out, to have generation and an ISD as part of its overall project. It further pointed out that it had stated repeatedly in its submissions that it was proposing to pursue an ISD as part of its overall project development. However, MEG opined that FortisAlberta's responses to IRs had created serious concerns for MEG regarding its

⁸ MEG responses to BR-MEG-3 and BR-MEG-4, dated December 2, 2005, and MEG response to FortisAlberta-MEG-1, dated February 13, 2006

⁹ MEG response to FortisAlberta-MEG-1, dated February 13, 2006

ability to obtain an ISD if FortisAlberta were permitted to own the Distribution Feeders. MEG contended that it had been open and forthright with FortisAlberta regarding the manner in which it proposed to develop its oil sands project from the outset.

MEG explained that it had expended considerable time and expense on a course of action which it believed it had FortisAlberta's agreement on. It pointed out that FortisAlberta provided MEG with an approval pursuant to section 101 and then subsequently opposed the Application. MEG submitted that it would be inappropriate and inconsistent with the public interest to allow FortisAlberta to do an about face on this issue.

MEG submitted that section 24 does not require that a distribution company must first be unable to supply the electrical energy before a party qualifies for a section 24 exemption. Furthermore, MEG maintains that FortisAlberta's response to its IRs confirmed that FortisAlberta is not able to meet MEG's needs. MEG claimed that FortisAlberta was not in a position to serve since there is no third party load, no party willing to pay customer commitment, and no FortisAlberta facilities in the area. MEG indicated that the existing facilities, some distance from its plant site, had inadequate capacity to meet MEG's requirements and new facilities would have to be built. All these things, MEG submitted, suggested that it would not be in the public interest to preclude it from relying on the exemption provided for in section 24 of the HEEA. MEG submitted that it would not be in the public interest to delay MEG's project because the service area provider is unable to provide in a timely and efficient manner.

MEG refuted FortisAlberta's argument that the public interest would be better served by allowing it to proceed in what FortisAlberta termed "the normal course" to construct, own, and operate the distribution facilities emanating from Conklin substation. It further refuted FortisAlberta's suggestion that it was in the public interest for it to serve in its service area. Even if that was true, MEG submitted, it was not necessarily contrary to the public interest to allow MEG to rely on an exemption provided for in the same legislation that establishes FortisAlberta's service area. By qualifying for an exemption, MEG further submitted that FortisAlberta's service area would not be impacted. MEG argued that the whole concept of FortisAlberta serving its facilities being in the public interest was not applicable to MEG's facilities. It argued that FortisAlberta could not look for support from one provision of the legislation by ignoring another applicable section.

If FortisAlberta were to provide the distribution service, MEG submitted that it would be required to execute a DTS contract with FortisAlberta for the service required to meet its current needs. MEG contended that it would not be reasonable to expect MEG to execute a contract now that would cover all of its future needs. However, absent long-term financial commitment, FortisAlberta would not be prepared to design and build facilities beyond those for which it had received an upfront customer contribution, MEG submitted. MEG confirmed that it is prepared to take the capital risk associated with installing facilities now that would meet its long-term requirements. This, MEG contended, is more closely aligned with the public interest than building facilities piecemeal over time. Thus, MEG submitted that its proposed approach was consistent with the economic, orderly, and efficient development of electric facilities.

Since FortisAlberta provided a section 101 EUA approval to MEG in July of 2005, MEG stated that it proceeded to obtain approval for its own substation and to make arrangements for a dedicated transmission line for which it was responsible for the entire cost of construction. MEG

said that it sized its facilities to meet only its own needs and not those of any third parties. Therefore, MEG noted that FortisAlberta may have to design and build new facilities in the future for potential third parties regardless of MEG's ownership of the Distribution Feeders.

MEG noted that many of the ISDs approved to date are in areas where there was extensive pre-existing infrastructure, yet the Board found these ISDs to be in the public interest. It further indicated that it was not aware of any previous applications for exemption under section 24 that had been rejected on the basis of speculation surrounding potential partial duplication of facilities at some point in the future. In addition, MEG submitted that the existence of REAs could be argued to be inconsistent with economic, orderly, and efficient development of electric facilities in the Province, yet they form part of the overall electric system in Alberta. MEG submitted that all of these facilities (ISDs, section 24 exemptions, and REAs) co-exist in a manner that provides a framework that is obviously seen as being consistent with the overall public interest. It observed that all of these types of facilities are contemplated and permitted by legislation and there is no suggestion that their existence is contrary to the public interest. MEG's facilities, it suggested, are no different.

MEG pointed out that FortisAlberta refused to respond when asked if it would agree to transfer or sell the Distribution Feeders to MEG as part of an ISD. MEG was concerned that FortisAlberta would attempt to frustrate any ISD application by refusing to transfer the Distribution Feeders to MEG.

MEG noted that FortisAlberta refused to respond when asked if it would agree to transfer or sell the Distribution Feeders to MEG as part of an ISD. MEG was concerned that FortisAlberta would attempt to frustrate any ISD application by refusing to transfer the Distribution Feeders to MEG. MEG said that its concerns were validated when FortisAlberta confirmed that it refused to transfer facilities to a customer in the Foster Creek area under similar circumstances. Therefore, MEG believed that it was apparent that FortisAlberta would frustrate MEG's right to establish an ISD if it is required to transfer ownership of the Distribution Feeders to FortisAlberta. MEG contends that by FortisAlberta having the position of being able to frustrate its attempts to obtain an ISD approval would also frustrate the operation of the legislation which would not be consistent with the public interest. MEG further contended that it is simply inappropriate for the Board to put FortisAlberta in the position where it could exert leverage against MEG.

If MEG was required to transfer ownership of the Distribution Feeders to FortisAlberta, it was apparent, MEG claimed, that FortisAlberta would frustrate MEG's right to establish an ISD. Putting FortisAlberta in the position of being able to frustrate the operation of the legislation was not consistent with the public interest. It was MEG's view that it was simply inappropriate for the Board to put FortisAlberta in the position where it could exert leverage against MEG.

MEG stated that allowing the legislation to operate in accordance with its terms is consistent with the public interest. It argued that the manner in which section 24 is structured confirms that the Board's residual discretion should be used sparingly and that a party such as MEG which has satisfied the enumerated criteria should not be deprived of its entitlement unless there are compelling reasons to do so. This, suggested MEG, was not a situation where Board approval was required from the outset. The ability to otherwise direct, MEG suggested, was an extraordinary power given to the Board to override a situation where specifically enumerated criteria would otherwise operate to the benefit of a party versus the public interest. Therefore,

MEG argued that reliance on the exemption provided for in section 24 should be allowed unless there is some overriding basis for finding to the contrary. It suggested that such a compelling reason did not exist in this case.

MEG concluded that:

- it had satisfied the criteria for an exemption from Part 3 of the HEEA as contained in section 24(1);
- despite having full opportunity to do so, FortisAlberta had put forward no credible public interest argument that should persuade the Board to exercise its discretion, and, therefore,
- no basis had been established for the Board to exercise the residual discretion available to it.

5.2 Views of FortisAlberta

FortisAlberta pointed out that regardless of its discussions with MEG regarding the intention to have generation and an ISD designation, it was not always the case that the initial plans of oil sands developers for generation and/or the creation of an ISD actually come to fruition. FortisAlberta said that it had not opposed any existing ISDs since ISDs are transmission oriented and contain transmission facilities not distribution facilities. It noted that section 4 of the HEEA states that an ISD must not facilitate (i) the development of independent electric systems that attempt to avoid costs associated with the interconnected electric system and (ii) uneconomical by-pass of the interconnected system. FortisAlberta reiterated that it had always been under the impression that MEG would have generation and an ISD approval.

FortisAlberta was of the view that where the regulated utility is ready and able to provide timely service, it is not in the public interest to permit a section 24 exemption. FortisAlberta maintained that it is prepared and able to supply MEG's needs in a timely manner. FortisAlberta opined that if EUA and HEEA provisions, designed to give rise to optimal planning and efficiency of the electric distribution system, are not matters that the Board may consider in assessing when and to what extent a party without a service area may be allowed to build specific distribution facilities then the Board could not consider any public policy matters.

The public interest is better served, claimed FortisAlberta, by proceeding in the normal course for it to construct, own, and operate the distribution facilities emanating from Conklin substation. FortisAlberta, it said, had never refused to serve MEG's distribution needs and, in fact, maintained that it was ready to build and operate distribution facilities to serve MEG in a timely manner. However, FortisAlberta confirmed that if it provided distribution to MEG, it would have to pay a DTS tariff which would be passed back to MEG.

In its section 101 approval, FortisAlberta stated that it included the condition that it “*would not release any facilities which can be served through the distribution system or have distribution assets involved in the delivery of service.*” A section 101 approval, according to FortisAlberta, is for transmission service and allows the applicant to deal directly with AESO for transmission access. A section 101 approval, according to FortisAlberta, does not empower a person to provide distribution service nor to construct and operate a distribution system for that purpose.

FortisAlberta confirmed that if it owned the Distribution Feeders, it was not aware of any right or entitlement for MEG to reacquire ownership of those feeders. However, notwithstanding that view, FortisAlberta reiterated that it had not opposed nor sought to impede the oil sands activities proposed by MEG. It stated that it remained ready to serve MEG's needs in a timely and effective manner.

5.3 Views of the Board

The Board notes that FortisAlberta has stated that it neither opposes nor wishes to impede the progress of MEG's Pilot Project. It further notes FortisAlberta's desire to serve MEG's distribution load recognizing that industrial loads can be lucrative customers for distribution companies.

The Board agrees with MEG that there are many examples of smaller distribution systems operating within a designated distribution company's service area within the Province of Alberta. Although this can sometimes result in duplicity, overall the system operates in a reasonably efficient and effective manner. As for the allowance for FortisAlberta to serve any future customers in the area, the Board does not see this to be a problem since a section 24 exemption only allows MEG to serve its own needs. Therefore, should any future loads arise in the area, the developer would have to, at least initially, deal with FortisAlberta who, in turn, would have to negotiate with the AESO and, possibly MEG, for access to the AIES via Conklin substation.

The Board accepts MEG's intentions of having onsite generation and acquiring an ISD approval as part of its full project as being genuine. Since the legislation allows industrial customers to own and operate their own facilities within an ISD, this would clearly be within the public interest. As with other oil sands operators, the Board believes that MEG, being a large industrial corporation, would be capable of constructing and operating electrical facilities such as applied for in the Application. Therefore, the Board does not accept FortisAlberta's argument that the public interest would be better served by it owning and operating the distribution facilities of MEG until such time as an ISD is in place. In fact, if the Board was to decline to otherwise direct as allowed under section 24, and thereby allow MEG to rely on the exemption provided for in section 24, the Board fails to see how the public interest would be compromised.

Consequently, the Board fails to see that there is any compelling reason for it to otherwise direct with regard to MEG's desire to afford itself of the exemption provided for in section 24 of the HEEA.

6 DECISION

After carefully considering all of the evidence presented by the parties, the Board has determined not to exercise its discretion to otherwise direct, and considers it reasonable for MEG to own and operate the Distribution Feeders, as outlined in the Application, in reliance on the exemption provided for in section 24 of the HEEA, solely on land that it is the owner or tenant, for use on that land. The Board finds that MEG meets the criteria for a section 24 exemption and, furthermore, fails to find how otherwise directing, in this case, would be in the public interest.

The Board's determination is limited only to the facilities applied for in the Application. Should MEG require further distribution facilities in the area prior to receiving an ISD approval, the Board directs that MEG must once again apply to the Board for the appropriate approval or determination. The Board cautions that a similar outcome may not be automatically expected for any future applications by MEG or any other operator. The merits of such applications would be weighed carefully at that time and a decision would be determined by the specific circumstances of any such application.

The Board is of the view that section 24 of the HEEA is a continuing exemption, and that it is possible that the situation could change in the future such that based on the clear wording of section 24, that exemption may cease to apply. For example, if a public highway (within the meaning of HEEA) is constructed on that land, or MEG ceases to be an owner or tenant of the land, then under the clear wording of section 24, MEG would cease to qualify under the exemption and would be required to make alternate arrangements. The Board encourages MEG to consider this eventuality, and to monitor any impending changes in the area that may affect its reliance on section 24.

Dated at Calgary, Alberta, on June 15, 2006.

ALBERTA ENERGY AND UTILITIES BOARD

(original signed by)

R. G. Lock, P.Eng.
Presiding Member

(original signed by)

T. McGee
Member

(original signed by)

Gordon J. Miller
Member