



Grande Cache Coal Corporation

Application for an Exemption Under Section 24
and a Connection Under Section 18 of the
Hydro and Electric Energy Act

March 15, 2010

ALBERTA UTILITIES COMMISSION

Decision 2010-115: Grande Cache Coal Corporation

Application for an Exemption Under Section 24 and a Connection Under Section 18
of the *Hydro and Electric Energy Act*

Application No. 1605319

Proceeding ID. 238

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Published by

Alberta Utilities Commission
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ALBERTA UTILITIES COMMISSION

Calgary Alberta

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1 INTRODUCTION

1. On July 29, 2009, Grande Cache Coal Corporation (GCC) filed Application No. 1605319 (Application) with the Alberta Utilities Commission (Commission or AUC) requesting an exemption under section 24 and a connection under section 18 of the *Hydro and Electric Energy Act*.

2. GCC is an Alberta based company that owns and operates a coal mining operation in the Grande Cache area located approximately 20 kilometres (km) Northwest of Hinton, Alberta. The mine was previously owned and operated by McIntyre Porcupine Mines which began its operations in 1969 and later changed its name to Smoky River Coal. Smoky River Coal operated the mine until March 2000, at which time Smoky River Coal ceased its operations. GCC began mining coal in August 2004.

3. GCC's mining leases cover approximately 22,000 hectares of the Smoky River Coalfield. The mining operations are comprised of both underground and surface mines.

4. GCC stated that the mining operations have historically been supplied by electric distribution lines constructed, owned, and operated by Smokey River Coal and its predecessors. The existing lines were deactivated and salvaged when Smoky River Coal ceased its operations.

5. GCC is now seeking approval to construct a new distribution line to serve its mining operations. The proposed distribution line would connect to an ATCO Electric Ltd. (AE) distribution line North of Alberta Highway 40, such that it would not cross Highway 40.

6. AE owns the distribution service area where GCC's mining operations are located. As the owner of the distribution service area, AE has exclusive rights to distribute electrical energy within its distribution service area, except in cases where other small authorized distribution service areas have been approved, a section 24 exemption has been issued by the Commission, or AE has permitted a third party to own and operate a distribution system within its service territory.

2 APPLICATION AND COMMISSION PROCESS

7. In its Application, GCC requested expedited directions from the Commission to construct, own, operate and connect a 25-kV distribution line on its mine site. GCC provided that the proposed distribution line would connect GCC's No. 12 South B2 Underground Mine, its No. 12 South B2 Pit and the No.12 Mine Maintenance Facility initially, and thereafter its No.12

South A Pit to AE's distribution system. GCC stated that subsequently, individual mines and pits would be added or removed from connection to GCC's 25-kV distribution line, in accordance with standard coal mining practice.

8. GCC explained that on-site electricity is required for the integrated mining operation, to develop and operate both the current mine and new mines and pits to replace its existing No. 7 underground mine, which is nearing the end of its economic life. It further explained that the decommissioning of the No. 7 underground mine would continue as production was ramping up at the No. 12 mines.

9. GCC stated that although it currently has on-site diesel generators that supply marginal amounts of electricity, the existing diesel generation would be inadequate to run the expanded operations and new equipment to be purchased by GCC.

10. In its Application, GCC anticipated that the electrical operating load in the first year of operation would be in the order of 2.5 MVA with a connected load of 6 MVA, and subsequently in year two, the load would be in the order of 4.5 MVA with a connected load of 7 MVA. GCC further anticipated that its mining operations would continue to expand in the future and, therefore, increase its electric energy needs making the installation of the distribution line critical to its future operations.

11. GCC explained that the realities of resource depletion, as well as other economic and geological factors, require mining operations to move around within GCC's permit area over time, to access different deposits. GCC suggested that historically, the electrical infrastructure serving the mine facilities in the area was relocated from time to time to accommodate the shifts in mining location.

12. GCC indicated that it required the same flexibility from its future power supply. Accordingly, as new mines and pits are developed in accordance with accepted coal mining industry practices, a portion of the 25-kV distribution line would require relocation or reconstruction from time to time to continue to service GCC's mines and pits in their changing locations.

13. GCC stated in its Application that the proposed distribution line would be located along its existing haul road and entirely within GCC's permitted mine area and government leased lands for which it owns the surface leases.

14. GCC stated that it held consultations with a number of First Nations, trappers and municipal groups and none voiced any concerns with the proposed distribution line. GCC also held discussions with AE which was the only party to object in this proceeding. GCC asserted that AE's objection was based on what it described as a commercial interest.

15. GCC requested that the Commission adopt a process that would allow the construction of the line in a timely manner and prior to the onset of winter.

16. On August 6, 2009, the Commission issued a series of information requests (IRs) to GCC to clarify aspects of GCC's application. GCC replied to the Commission's IRs on August 13, 2009. In its response, GCC emphasized that it was requesting Commission approval to construct the distribution line and connect it to AE's existing system. GCC stated that AE

would not be prejudiced by the construction and connection of the distribution line. GCC stated that the only question at issue was who would ultimately be entitled to own and operate the line.

17. On July 29, 2009, AE filed a letter with the Commission in which it expressed its objection to GCC's application and in particular, GCC's request for an expedited process for approving the construction and operation of the proposed distribution line. AE requested a formal process to deal with GCC's application including an opportunity to ask IRs and to submit written evidence and written argument.

18. GCC responded to AE's letter on July 30, 2009, expressing disappointment with AE's request for what it considered a longer process than was necessary. GCC stated that AE neither opposed the need for nor the routing of the distribution line. AE's only concern was who would ultimately own and operate the line.

19. As a result of AE's request for a formal process, the Commission issued a Notice of Application and Proceeding (Notice) on August 20, 2009. The Notice contained a schedule for the proceeding that took into account AE's desire for a formal process and GCC's need for an expedited process. In response to the Notice and in accordance with the Commission's process schedule, AE filed IRs in respect of GCC's application.

20. On August 27, 2009, GCC requested an extension of time in which to reply to AE's IRs. It further advised that it could no longer meet the construction schedule as originally anticipated.

21. In light of GCC's request for an extension and its assertion that it could no longer construct the line before the onset of winter, the Commission revised its process schedule and requested comments from AE regarding GCC's request for a time extension. AE agreed with both the time extension and the Commission's newly amended process schedule.

22. As per the revised schedule, GCC supplied its IR responses to AE on September 14, 2009. On September 22, 2009, AE filed a motion with the Commission requesting an order to compel further and better responses from GCC in relation to AE's IRs.

23. On October 7, 2009, the Commission issued its ruling granting AE's motion. As a consequence of this procedural matter, the Commission further revised its process schedule.

24. In reaching the determinations contained within this Decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the evidence and argument provided by each party. Accordingly, 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 with respect to that matter.

3 VIEWS OF THE PARTIES

3.1 Exemption from Part 3

25. GCC maintained that there was an arguable case that it was entitled to an exemption under either section 16 or 24 of the *Hydro and Electric Energy Act* which respectively allow a person to transmit or distribute electrical energy for his own use on private land and not across a public highway as defined in the *Hydro and Electric Energy Act*.

26. In addition to considering these statutory provisions, GCC requested that the Commission be mindful of the principle against the confiscation of private property. The *Electric Utilities Act* expressly states that nothing in the legislation requires any person to transfer or divest itself of any property owned by it. GCC stated that its right to "win, work and recover" its coal, without having to divest itself of private distribution lines that it will pay for and use exclusively to recover its resource, is relevant to the Commission's interpretation of the legislative framework.¹ GCC suggested that industrial activities in a free market economy are not viable if property rights are not respected.

27. GCC noted that the *Hydro and Electric Energy Act* allows for exemptions in all aspects of the electric energy system in Alberta, including section 24 under which GCC filed its application. It contended that section 24 effectively exempts qualifying distribution systems from Part 3 of the *Hydro and Electric Energy Act* dealing with service areas in general.

28. GCC argued that this concept is not new to the Commission. It cited three prior cases that were dealt with by the Commission or its predecessor whereby interim approvals and exemptions were granted in relation to the transmission or distribution of electrical energy for one's own use.²

29. GCC stated that the exemptions in the *Hydro and Electric Energy Act* and the *Electric Utilities Act* create a special regime for private electric energy. GCC argued that the Commission and its predecessor, the Alberta Energy and Utilities Board (EUB or Board) have a history of applying this regime in similar cases and that expedited relief is in harmony with the legislation, the judicial tests for interim relief, and previous Commission rulings.

30. GCC argued that based on its evidence, it clearly meets the test for an exemption under section 24 of the *Hydro and Electric Energy Act*. GCC noted that it would be the sole occupant of the lands over which the line would be built, with exclusive possession pursuant to the combined effects of its surface leases and Mine Area Permit. The 25-kV distribution line would be located entirely within GCC's Mine Area.

31. AE argued that the proposed distribution line did not meet the criteria set out in section 24 of the *Hydro and Electric Energy Act* and, therefore, GCC did not qualify for an exemption. AE argued that it is essential that electric distribution systems are approved within the clear confines of the legislation and that the overall responsibility of the Commission is to ensure that electric distribution facilities are constructed in an economic and orderly manner that is consistent with the overall public interest.

32. The parties' positions in respect of each of the criteria identified in section 24 are set out in the subsections that follow.

¹ Exhibit No. 27, GCC Argument at paragraph 18.

² Re MEG Energy Corp, Decision 2006-057 (EUB) (MEG Decision), Re Imperial Oil Resources Ventures Ltd, [Decision 2009-020](#) (AUC), EnCana Exemption Approval E2008-23.

3.1.1 Sole Possession of the Land

33. The first element under section 24 of the *Hydro and Electric Energy Act* states that the person proposing to distribute electric energy does so "solely on land of which the person is the owner or tenant for use on that land." In its application, GCC indicated that the 25kV distribution line would run along the existing haul road and would be located entirely within GCC's leased and permitted holdings.

34. GCC indicated that the EUB has held that surface leases were sufficient to meet the criterion for ownership or tenancy of the land involved.³ GCC also noted that Regulated Rate Tariffs approved by the AUC use a similar definition: "... any Person who has the use of or occupies a premises or property owned by another Person."⁴ As such, GCC argued that it is a tenant on all parts of the distribution line.

35. In its Reply Argument, AE did not challenge GCC's tenancy in the leased area, nor its right to develop the mine site which includes "access roads".⁵

3.1.2 Does Not Cross a Public Highway

36. In its Application, GCC stated that the proposed line would not cross any public highways and the only roads the proposed line would cross would be private access roads and private haul roads. GCC also stated that the line would not cross any Crown land surveyed for use as a public highway.

37. AE filed evidence that the proposed distribution line crossed Beaverdam Road which was considered to be a public highway within the contemplation of the *Hydro and Electric Energy Act*. GCC denied this assertion, and argued that Beaverdam Road was built by its predecessor, McIntyre Mines, not for public use, but for private coal exploration. GCC further argued that another of its predecessors, Smokey River Coal, built and operated a 25-kV line across Beaverdam Road in the early 1990s, when the requirements of section 24 of the *Hydro and Electric Energy Act* were the same as they are today. This, GCC suggested, would not be possible if Beaverdam Road were considered to be a public highway.

38. GCC further submitted that there is no public maintenance of Beaverdam Road at the point where the 25-kV line would cross the road. The road is snowbound during the winter and GCC provided pictures illustrating its poor condition and the signage which restricts public access. GCC stated that this privately built, privately maintained and often inaccessible dirt track in a remote area cannot be regarded as a public highway within the contemplation of the *Hydro and Electric Energy Act*. Further, GCC suggested that if Beaverdam Road was considered to be a public highway, it loses this characterization at the point where it intersects with GCC's Mineral Surface Lease 071330 (MSL 071330).

39. GCC was of the view that MSL 071330 sets out GCC's right of exclusive occupation under lands administered by Alberta Sustainable Resource Development (ASRD) and leased to GCC. GCC maintained that MSL 071330 clearly demonstrates that Beaverdam Road is interrupted where it crosses GCC's MSL.

³ Re MEG Energy Corp, Decision 2006-057 (EUB).

⁴ Exhibit No. 27, GCC Argument at paragraph 22.

⁵ Exhibit No. 29, AE Reply Argument at paragraph 11.

40. GCC argued that it has full rights to occupy and use all parts of its MSL, including the portion that intersects Beaverdam Road, as was the case in *R. v. Breriton*.⁶

41. GCC argued that MSLs in Alberta are treated as granting exclusive rights to occupy and possess. GCC made reference to the ASRD Public Lands Operational Handbook which defines an MSL as follows:

Mineral surface leases issued to the mineral producers... grant exclusive surface rights for surface mining and quarries,... or for other purposes incidental to the recovery and production of minerals.⁷

42. GCC further argued that the *Petty Trespass Act* prohibits entry onto any Crown land that is under a disposition under the *Public Lands Act*, such as an MSL, in any case where entry is prohibited by natural or man-made barriers, or by notice, given either orally or through signage. GCC maintained that it has exclusive rights of possession within its MSL and has also posted a sign indicating this exclusivity to the public.

43. GCC suggested that within the boundary of an MSL, the leaseholder's rights are continuous and uninterrupted, analogous to the rights-of-way sometimes created by railroad tracks. GCC submitted that the MSL interrupts Beaverdam Road; Beaverdam Road does not interrupt the MSL.

44. GCC summarized its view by stating that if Beaverdam Road is a public highway, which GCC does not agree with or acknowledge, the mere fact that it crosses MSL 071330 does not interrupt GCC's continuous rights to exclusive possession within the entire boundary of its MSL. No part of the MSL is a public highway, and building the line within GCC's MSL would satisfy section 24 of the *Hydro and Electric Energy Act*.

45. In its response, AE submitted that Beaverdam Road had been surveyed, was under the control of and is the responsibility of Alberta Transportation and the proposed distribution line would cross Beaverdam Road.

46. In response to GCC's suggestion that Beaverdam road is not a public highway as it was constructed by McIntyre Mines, AE maintained that the definition of a public highway makes no mention of the construction of the road. Regardless of who constructed Beaverdam Road, AE contended that the road remains a public highway as defined in the *Hydro and Electric Energy Act*.

47. Additionally, while GCC submitted that Beaverdam Road was not publicly maintained, AE stated that maintenance is not a requirement of a public highway as defined in the *Hydro and Electric Energy Act*.

48. AE further argued that although GCC provided several pictures in Attachment 7 of its rebuttal evidence in an attempt to show that there is restricted public access on Beaverdam Road, the pictures support AE's position that Beaverdam Road is a public highway. In particular, AE argued that both pictures 4 and 5 illustrate that public use of the road is not restricted.

⁶ *R. v. Breriton*, (1998) 59 Alta. L. R. (3d) 285 (ABQB).

⁷ Exhibit No. 27, GCC Argument at paragraph 35.

49. AE stated that public access along the entire length of Beaverdam Road remains unrestricted and that GCC has failed to establish that MSL 071330 interrupts Beaverdam Road. AE maintained that section 24 does not provide a further exemption to allow a line to cross a public highway if the lease overlaps the highway.

50. In summary, AE submitted that Beaverdam Road meets the definition of a public highway as found in section 1(1) of the *Hydro and Electric Energy Act*, and as the proposed distribution line would cross a public highway, GCC failed to demonstrate that the requirements of section 24 have been met.

3.1.3 Across a Public Highway

51. GCC also stated that section 24 does not prevent a private line from being built under a public highway. GCC referenced the decision in *Bell Telephone Co. of Canada v. Middlesex (County)*⁸ where the Supreme Court of Canada interpreted that the meaning of “across” did not include “under” in the context of the *Railway Act*, R.S.C., 1927, c. 170. GCC stated that the *Hydro and Electric Energy Act* only requires that a line not be constructed “across a public highway” and constructing the distribution line under Beaverdam Road would satisfy the condition in section 24.

52. AE stated that allowing GCC to construct the distribution line under a public highway does not adhere to the specific requirements, spirit and intent of the *Hydro and Electric Energy Act*. Furthermore, AE stated that the fact that the word “across” is used in section 24 cannot be read as to override AE’s exclusive rights under the *Electric Utilities Act*.

3.2 Industrial System Designation (ISD) Consideration

53. GCC stated that the unifying principle between sections 4 and 24 of the *Hydro and Electric Energy Act* is that industrial owners requiring electric facilities to support their business activities are able to construct, operate, and connect their private systems.

54. Although GCC stated that it does not believe it would require an ISD as it fully qualifies under section 24 of the *Hydro and Electric Energy Act*, the Commission could use its powers pursuant to section 4 of the *Hydro and Electric Energy Act* to designate GCC’s proposed distribution line as an ISD.

55. GCC noted that it was successfully argued in the MEG Decision that an application for an ISD was not needed to pre-build the distribution lines. Further, GCC submitted that the MEG Decision made it clear that large industrial customers are capable of constructing and operating electrical facilities, such as distribution facilities, and that the public interest would not be served by having the utility own and operate the distribution facilities until such time as an ISD is in place.

56. AE submitted that GCC has not applied to construct the distribution line as an ISD. Accordingly, AE maintained that GCC should not be treated as an ISD and any provisions of the *Hydro and Electric Energy Act* with respect to an ISD are not relevant for the purposes of this Application.

⁸ [1947] S.C.R. 1.

4 COMMISSION FINDINGS

4.1 Section 24 Exemption

57. The Commission considers that the key legislative provision respecting whether GCC may be permitted to construct, own and operate its proposed distribution facility is section 24 of the *Hydro and Electric Energy Act*.

58. Section 24 of the *Hydro and Electric Energy Act* provides an exemption from the requirement for a “person wishing to obtain electricity for use on property” to “make arrangements for the purchase of electric distribution service from the owner of the electric distribution system in whose service area the property is located” as required by section 101 of the *Electric Utilities Act*.

59. The exemption found in the *Hydro and Electric Energy Act* states:

Exemption from Part 3

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 Commission otherwise directs.

60. To give effect to the exemption provided for in section 24 of the *Hydro and Electric Energy Act*, to the extent that this provision in the *Hydro and Electric Energy Act* conflicts with the provisions of section 101 of the *Electric Utilities Act*, section 24 of the *Hydro and Electric Energy Act* prevails.

61. The Commission’s jurisdiction to approve the construction, ownership, connection and operation of electric distribution facilities is based upon the legislation applicable to the development of electric distribution facilities in Alberta.

62. In this regard, the Commission is mindful of the purpose and relationship between the *Electric Utilities Act* and the *Hydro and Electric Energy Act* insofar as those acts establish a comprehensive system for the regulation of electricity in Alberta.

63. The purposes of the *Electric Utilities Act* are set out in section 5 of the *Electric Utilities Act* and generally focus upon the efficient development and operation of the electricity market. In comparison, the *Hydro and Electric Energy Act* establishes the regulatory framework for the construction and operation of electric-related infrastructure and facilities in Alberta. The *Electric Utilities Act* and the *Hydro and Electric Energy Act* may be considered partner legislation through which the former establishes the regulatory framework for utility matters, such as a utility’s right to provide service to customers in its service area,⁹ while the latter regulates the construction and operation of electrical infrastructure. Given this inter-relationship, the overlapping considerations in the *Hydro and Electric Energy Act* and the *Electric Utilities Act*, and the mutual reference in the two pieces of legislation, specific provisions of the *Hydro and Electric Energy Act* must be read with regard to the *Electric Utilities Act*.

⁹ Section 101 of the *Electric Utilities Act*.

64. In the MEG Decision, the Board granted to the applicant, a large industrial company, an exemption under section 24, finding that it was reasonable for the applicant to own and operate the distribution feeders within Fortis Alberta's service territory. The Board stated at page 14 of the decision:

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.

The Board went on to accept MEG's intention of instituting onsite generation and acquiring an ISD approval as a genuine intention. The Board made the following comments in this regard:

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 Fortis Alberta'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.

65. Although the Board allowed the exemption and chose not to exercise its discretion to otherwise direct under section 24, it cautioned that a similar outcome should not be expected for any future applications by MEG or any other operator.

66. Without an exemption under section 24, GCC is limited in its ability to operate within AE's service area and must make arrangements with AE pursuant to section 101 of the *Electric Utilities Act*. As the proposed distribution facility will be a 25-kV line, GCC cannot meet the requirements of section 24 (1)(b). Consequently, the Commission must consider whether the proposed distribution facility falls within the parameters set out in section 24 (1)(a). If the answer to this question is yes, the Commission will then consider whether it would be in the public interest to grant the exemption. If the answer to this question is no, that is the end of the inquiry.

67. There are multiple components to the exemption found in section 24 (1)(a). First, a party seeking to avail itself of this exemption must demonstrate that it is proposing to distribute electric energy solely on land of which the person is the owner or tenant for use on that land. Second, the person must not be seeking to distribute electric energy across a public highway. The Commission has addressed each of these requirements and notes that both requirements must be met in order to qualify for an exemption.

Sole Possession of the Land

68. The evidence of GCC is clear that it has a tenancy within the lease area where the proposed distribution facility would be located. This tenancy has been demonstrated by the filing on the record of GCC's Mineral Surface Lease 071330 (MSL 071330), Mine Area Permit 2003-1 and 2003-1A, Licence 2005-10 and Metallic and Industrial Minerals Lease No. 9409030456 in response to Commission information request AUC-GCC 01(a). Further, the Commission notes that AE, in its Reply Argument submission, does not challenge GCC's tenancy. The Commission considers GCC to have met the first component of the section 24 requirement.

Does Not Cross a Public Highway

69. In its Application, GCC stated that the proposed distribution facilities would be located entirely within Mine Area Permit C2003-1A and that “there are no public highways that will be crossed by GCC’s distribution line. The only roads in the area are a private access road and haul roads; there are no public highways near the route, either constructed or surveyed, with the exception of Alberta Highway 40, which the GCC’s 25-kV line would not cross.”¹⁰

70. In the evidence filed by AE, AE advised that the proposed GCC distribution facility would cross Beaverdam Road which AE has asserted is a public highway as defined under the *Hydro and Electric Energy Act*. In support, AE filed several documents including the Land Standing Report which shows that the Alberta Government Department of Transportation is responsible for Beaverdam Road from Hwy 40 North to the Caw Ridge Turnoff.

71. GCC acknowledges that its distribution facility will cross Beaverdam Road but asserts that Beaverdam Road is not a public highway because (1) it was originally constructed by McIntyre Mines to carry out coal exploration; (2) historically its predecessor had built distribution lines that crossed Beaverdam Road even in the early 1990s; (3) there is no public maintenance on Beaverdam Road where the 25-kV line would cross as maintenance is done by GCC; (4) the road is not ploughed in the winter by Alberta Transportation or the local Municipality thus access is restricted to snowmobiles, horseback or on foot and (5) the public nature of Beaverdam Road is interrupted by GCC’s MSL 071330 where the road moves through GCC’s lands.

72. Section 1 (l) of the *Hydro and Electric Energy Act* defines a “public highway” as follows:
(l) “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;

73. From this definition, it is reasonable to conclude that in order for a road to qualify as a public highway, it must satisfy two elements: (1) it must be on land owned by the Crown or a local authority and (2) it must be used or surveyed for use as a public way.

74. With regard to the first element and the first factor raised by GCC concerning the historic ownership and initial purpose for which Beaverdam Road was built, the Commission considers that a plain reading of the language used in section 1(l) requires the Commission to determine the ownership issue in the context of who currently owns the land at the time the exemption is sought. It is clear from the evidence filed that while GCC’s predecessor McIntyre Mines, may have, at one time, owned Beaverdam Road, the road is now under the jurisdiction of Alberta Transportation. The Commission considers the first element of the public highway test to have been satisfied.

75. With respect to the second element, the Commission considers that a plain reading of the definition indicates that the term public highway is to be construed rather broadly given the list of different types of pathways found in the definition, including the general term “public way”.

¹⁰ Exhibit No. 2, GCC Application at paragraph 13.

76. In view of the many pathways that are included in the meaning of “public highway”, the Commission considers that a determination as to whether Beaverdam Road is a public highway must turn on the manner in which the road is used.

77. As noted above, GCC has suggested that Beaverdam Road cannot be a public highway because it is not maintained by Alberta Transportation and is often inaccessible, particularly in winter months, unless a person has a snowmobile or horse. The Commission does not consider either of these factors to be of assistance in determining the use of Beaverdam Road. Rather, the Commission considers Attachment 6 to the evidence of AE to be informative. Attachment 6 is a photograph of the sign at the entrance to Beaverdam Road off of Highway #40. The sign includes a map outlining the distance and length of Beaverdam Road, the distances to different scenic destinations and icons depicting the manner in which these scenic destinations can be reached. The icons illustrate that these destinations can be reached by foot, all terrain vehicles or horse. There is nothing to indicate that there are any restrictions to the use by the public of Beaverdam Road to reach these destinations. The Commission therefore finds that the use of Beaverdam Road is for a “public way” and that the second element of the “public highway” definition in the *Hydro and Electric Energy Act* has been met.

78. GCC has suggested that in the areas in which Beaverdam Road crosses its lands, that the public nature of Beaverdam Road is subordinate to the private nature of the lands granted to GCC by virtue of its MSL. The Commission does not consider that simply because a public road crosses private lands that that part of the road is encompassed by the lands included in the lease and therefore no longer a public road. The purpose of the exemption granted under section 24 is to ensure that development was restricted to private property only. The proposed distribution facility is not restricted to the leased area as it will cross over public land.

79. For all of the above reasons, the Commission finds that Beaverdam Road is a “public highway” within the meaning of section 1(1) of the *Hydro and Electric Energy Act*.

80. Having found that Beaverdam Road is a public highway, the Commission must determine whether the proposed distribution facility will be “across” a public highway.

81. GCC has proposed that, in the event that the Commission determined that Beaverdam Road was a public highway, it would construct its distribution line underground and in this way would meet the requirements of the exemption provided for in section 24 (1)(l).

82. As noted by Sullivan in *Sullivan on the Construction of Statutes*, fifth edition, at page 359, “when words are read in their immediate context, the reader forms an initial impression of their meaning. ...But any impression based on immediate context must be supplemented by considering the rest of the Act, including the other provisions of the Act and its various components.” Further, at page 364, the author notes “[w]hen analyzing the scheme of the Act, the court tries to discover how the provision or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. ...The fundamental presumption in scheme analysis is being able to grasp and explain the basic structure on which the Act is built and how the various parts and provisions were meant to function within this structure to achieve the desired goal, or more often, the desired mix of goals.”

83. As noted at the beginning of this section, the legislative scheme which has been developed regarding electricity infrastructure in Alberta emanates primarily from two companion pieces of legislation, the *Electric Utilities Act* and the *Hydro and Electric Energy Act*. In terms of the development of distribution facilities, this legislative scheme presumes that absent an exemption, a person will obtain its distribution service from the distribution utility in the service area where that person is located. While there are exceptions to this presumption, those exceptions are limited to specific circumstances and as exceptions, should be construed in such a way as to not undermine the overall legislative scheme.

84. The Commission considers that if it were to interpret “across” narrowly and in the manner suggested by GCC, the effect of such an interpretation would effectively undermine the legislative intent. If all a person had to do to construct and operate its own distribution facilities across land that was bisected by a public highway was to bury the facilities, this would undermine section 101 of the *Electric Utilities Act* and would render the exemption in section 24 meaningless. Further, the Commission notes that even if all of the criteria for an exemption under section 24 are met, there is not automatic entitlement to an exemption. The Commission still retains the authority to direct the application of Part 3 of the *Hydro and Electric Energy Act* and this residual oversight suggests that the Commission consider the legislative scheme and the impact that such an exemption would have on that legislative scheme.

85. For the above reasons, the Commission finds that even if GCC were to construct its distribution line underground, this would result in a person distributing electric energy across a public highway as contemplated by section 24 of the *Hydro and Electric Energy Act*.

4.2 Industrial System Designation (ISD) Consideration

86. In addition to the exemption provision found in section 24 of the *Hydro and Electric Energy Act*, section 4 of the Act permits the Commission to designate the whole or any part of an electrical system as an industrial system in which event the ISD proponent may construct and operate its own electrical facilities.

87. Section 4 of the *Hydro and Electric Energy Act* states, in part, the following:

4(2) Where the Commission is considering an application for designation as an industrial system, the Commission shall have regard to the following principles:

- (a) the designation must be consistent with the objective of giving appropriate economic signals so that integrated industrial processes can develop their own internal supply of electricity where that is the most economical source of generation;
- (b) the designation must support
 - (i) the development of the economical supply of generation to meet the requirements of integrated industrial processes,
 - (ii) the efficient exchange, with the interconnected electric system, of electric energy that is in excess of the industrial system’s own requirements, and
 - (iii) the making of decisions respecting the location of generation and consumption facilities so that the efficiency of the interconnected electric system is improved, including improved voltage stability and reduction of losses and congestion on transmission lines;

- (c) the designation 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 electric system;
 - (d) duplication of the interconnected electric system must be avoided where it is more economical to use the transmission facilities or electric distribution systems owned by persons in whose service area the industrial system is or will be located.
- (3) The Commission may make a designation under subsection (1) if the Commission is satisfied that all of the following criteria have been met:

- (a) the electric system includes a generating unit located on the property of the one or more industrial operations it is intended to serve, there is a high degree of integration of the electric system with one or more industrial operations the electric system forms part of and serves, and there is a high degree of integration of the components of the industrial operations;

...

(5) Where the Commission is not satisfied that all of clauses (a) to (g) of subsection (3) have been met, the Commission may make a designation under subsection (1) if the Commission is satisfied that

- (a) all of clauses (a) to (g) of subsection (3) and subsection (4) have been substantially met, and
- (b) there is a significant and sustained increase in efficiency in a process of the industrial operation or in the production and consumption of electric energy by the industrial operation as a result of the integration of the electric system with the industrial operations the electric system forms part of and serves.

(emphasis added)

88. In its Argument submission, GCC has suggested that the Commission could designate the proposed electrical system on GCC's lands as an industrial system as there would be "a significant and sustained increase in efficiency in GCC's industrial operation, and in its consumption of electrical energy, as a result of the integration of GCC's electric system within its mining operations".¹¹

89. While the Commission accepts GCC's characterization of the benefits that could be achieved from its proposed electrical system, the above provisions illustrate the requirement for generation development in order to be eligible for designation as an industrial system. There is no evidence provided by GCC that it intends to construct a generation facility. On the contrary, the application submitted by GCC proposes to connect to the Alberta interconnected electric system and receive its electricity directly from the grid as necessary. As there is no generation facility, GCC cannot be designated as an industrial system under the *Hydro and Electric Energy Act*.

¹¹ Exhibit No. 27, GCC Argument at paragraph 53.

4.3 Owner's Right to Provide Electric Distribution Service

90. As noted above, section 101 of the *Electric Utilities Act* confers on the owner of an electric distribution system the right to provide electric distribution service on the electric distribution system of that owner.

91. Although not necessary to the determination reached by the Commission in this Decision, the Commission notes that its determination recognizes and upholds the right of AE to provide electric distribution service within its territory in furtherance of the legislative scheme respecting the development and service of electricity within Alberta.

5 DECISION

92. For all of the above reasons, the Commission finds that GCC is not entitled to an exemption pursuant to section 24 of the *Hydro and Electric Energy Act*, and its application for approval to construct, own and operate the proposed distribution facilities and connect these facilities to the Alberta interconnected electric system is denied.

Dated on March 15, 2010.

ALBERTA UTILITIES COMMISSION

(original signed by)

Bill Lyttle
Chair

(original signed by)

Thomas McGee
Commissioner

(original signed by)

Anne Michaud
Commissioner