

Via email only

June 5, 2023

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

Dear Sirs and Madam:

1724732 Alberta Ltd
Attention: Ron Walter

MAGA Energy Ltd.
Attention: Mark Ross

Alberta Energy Regulator - Regulatory Applications
Attention: Maria Lavelle, Counsel

**RE: Request for Regulatory Appeal by 1724732 Alberta Ltd.
Request for Regulatory Appeal No.: 1941798
MAGA Energy Ltd.
Regulator Directed Transfer Application No.: 1939473
Pipeline Licence No.: 63417
Location: Lot 3 Block 2 Plan 1511781 or 21-23-28-W4M**

The Alberta Energy Regulator (**AER**) has considered the request by 1724732 Alberta Ltd made pursuant to section 38 of the *Responsible Energy Development Act* (**REDA**) for a regulatory appeal (**Request**) of the AER's decision issued December 13, 2022 (**Decision**) to direct the transfer of pipeline Licence No. 63417 (**Licence**) from Lexin Resources Ltd. (**Lexin**) to MAGA Energy Ltd. (**MEL**). The AER has reviewed 1724732 Alberta Ltd.'s submissions, and the correspondence filed by the AER's Regulatory Applications branch. MEL did not file any correspondence or make submissions in response to the Request.

For the reasons that follow, the AER has determined that 1724732 Alberta Ltd. is not eligible to request a regulatory appeal of the Decision. Therefore, the Request is dismissed.

Background

On September 29, 2022, MEL made Application No.: 1939473 (**Application**) to the AER for a regulator-directed transfer of the Licence from Lexin, pursuant to the provisions of the *Pipeline Act*. Lexin is defunct and, at the time of the Application, the underlying disposal-related pipeline licenced by the Licence was discontinued and in the care and custody of the Orphan Well Association (**OWA**).

On October 4, 2022, the AER received a statement of concern (**SOC**) from 1724732 Alberta Ltd. in respect of the Application. On October 18, 2022, MEL responded to the concerns expressed in the SOC, and on October 20, 2022, 1724732 Alberta Ltd. replied.

On December 13, 2022, the AER issued the Decision, without a hearing, and provided notice of the Decision to 1724732 Alberta Ltd. as the filer of an SOC in respect of the Application.

On January 9, 2023, 1724732 Alberta Ltd. made the Request, and on January 19, 2023, the AER issued correspondence to the parties requesting submissions on the merits of the Request. Neither the AER's Regulatory Applications branch nor MEL made submissions on the merits of the Request.

Transfer Applications and Regulator-Directed Transfers

Under section 18 of the *Pipeline Act*, a pipeline licence, once granted, cannot be transferred from its licensee without the consent or direction of the AER. Under section 3 of the *Pipeline Act*, the AER may make rules prescribing the information to be included or accompany any application under the *Pipeline Act*, and may make rules respecting the transfer of pipeline licenses. Also under section 3 of the *Pipeline Act*, the AER may still consider or act on an application that does not contain the information required by the AER's rules.

Applications to transfer a pipeline licence come before the AER in two ways. First, in the normal course, by an application for the proposed transfer of a licence made through the AER's designated system by or on behalf of the proposed transferor of a licence (i.e., the current, active pipeline licensee) or the proposed transferee of a licence (i.e., the proposed new pipeline licensee). The application must be accepted by both the proposed transferor and the proposed transferee before the AER will process it. *Alberta Energy Regulator Directive 088: Licensee Life-Cycle Management* (Directive 088) contains, among other things, AER rules in respect of licence transfer applications brought in the normal course.

Or, second, by application for a regulator-directed transfer (**RDT**) of a pipeline licence. An RDT is when, pursuant to subsection 18(7) of the *Pipeline Act*, the AER may direct that a licence be transferred from the current licensee to a person who agrees to accept it and who, in the opinion of the AER, has the right to receive it. An application for an RDT is made by a party in respect of a pipeline licence that is held by an inactive or defunct company, or when the underlying asset is otherwise under the care and custody of the OWA, i.e., when there is no responsible licensee for the licence.

The OWA is not a licensee, but exercises care and custody over the underlying pipeline for the purposes of the eventual end-of-life requirements of the pipeline because there is no responsible licensee to fulfil those requirements.

The rules in Directive 088 specific to licence transfer applications brought by or on behalf of a proposed transferor or proposed transferee, and which must be accepted by both parties before the AER will transfer it, do not directly apply to applications for RDTs. There is no proposed transferor in RDTs, as the licence is not held by an active licensee; there is only the party who has agreed to accept the licence, should the AER decide that party has the right to receive it.

An application for an RDT cannot contain all the information required by the AER's rules in respect of a licence transfer application for the transfer of a licence between an active licensee as proposed transferor and another party as proposed transferee, but the AER may still act on it.

Requests for Regulatory Appeal

A regulatory appeal is an appeal mechanism to the AER in respect of the AER's decisions, and which must be requested. In order for a request for regulatory appeal to be granted, the request must first be eligible. The test for eligibility is set out in section 38 of REDA:

38(1) An **eligible person** may request a regulatory appeal of an **appealable decision** by filing a request for regulatory appeal with the Regulator **in accordance with the rules**.
[emphasis added]

There are three key parts to the test in section 38. If a request for regulatory appeal meets all three parts of the test, it is an eligible request and may be granted: the AER may decide to conduct a regulatory appeal proceeding based on the request for regulatory appeal. Pursuant to section 4 of the *Responsible Energy Development Act General Regulation*, should the AER grant a request for a regulatory appeal, the regulatory appeal must be conducted with a hearing unless otherwise resolved.

If a request for regulatory appeal does not meet all three parts of the test, the request is not eligible to be granted, and a regulatory appeal will not be held.

The three parts of the test in section 38 of REDA are as follows:

1. "Appealable Decision"

Section 36(a) of REDA defines an "appealable decision". For the present purposes, the relevant definition is contained in section 36(a)(iv). It says an appealable decision includes:

...a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing....

To be an "appealable decision" the decision must have been made under an energy enactment, and there cannot have been a hearing to make the decision. "Energy resource enactment" is defined in subsection 1(1)(j) REDA, and includes the *Pipeline Act*.

2. "Eligible Person"

Section 36(b) of REDA defines an "eligible person". In respect of the Request, the relevant definition is contained in section 36(b)(ii). It says an eligible person is:

...a person who is directly and adversely affected by a decision referred to in clause (a)(iv)...

That is, a person who is directly and adversely affected by a [decision made under an energy resource enactment, if that decision was made without a hearing].

For the Request, an “eligible person” must therefore be a person directly and adversely affected by the Decision.

3. “In Accordance with the Rules”

Subsection 30(2) of the *Alberta Energy Regulator Rules of Practice (Rules)* requires that a request must include a copy of the SOC filed by the requester, or an explanation as to why the requester did not file an SOC. Subsection 30(3)(m) of the Rules provides that a request for regulatory appeal made in respect of a decision made under an energy resource enactment without a hearing, must be made within 30 days after the making of the decision for which regulatory appeal is sought.

Reasons for Decision

In respect of the test set out in section 38 of REDA, the Decision was made under an energy resource enactment, and it was made without a hearing. Accordingly, the Decision is an appealable decision. Additionally, the Request attached the SOC filed by 1724732 Alberta Ltd., and was made within 30 days of the Decision being made. As such, the Request is in accordance with the Rules. Both of these two parts of the three-part test for eligibility under REDA have been met.

However, based on the submissions of 1724732 Alberta Ltd., the AER has determined that 1724732 Alberta Ltd. is not directly and adversely affected by the Decision, and, as such, is not an eligible person for the purposes of section 38 of REDA. Therefore, the Request does not meet all three parts of the test set out in section 38 of REDA, and is not granted.

Eligible Person

The existing pipeline that is licenced by the License crosses through lands owned by 1724732 Alberta Ltd., and 1724732 Alberta Ltd. submits that a pipeline riser is present on its property.

1724732 Alberta Ltd.’s submissions set out a number of concerns it holds in respect of the Application and a possible breach of application requirements, possible future breaches of the regulatory obligations and requirements held by a licensee of a pipeline, and possible direct and adverse effects to 1724732 Alberta Ltd., including its commercial operations and use of its lands, and to others stemming from future operation of sour gas-related energy resource activities on its lands or in proximity to its lands.

However, 1724732 Alberta Ltd.’s submissions in respect of direct and adverse effect do not relate to direct and adverse effects of the Decision, which does not authorize the carrying out of any energy resource activities, including any sour operations. 1724732 Alberta Ltd. cannot be directly and adversely affected by activities which are not authorized by the Decision.

The Decision transfers the Licence, which was held in the name of a defunct company, to MEL, an active company eligible to hold AER licences. Consequently, the Decision makes MEL, as the new licensee, responsible for all associated regulatory obligations and requirements of the pipeline, including the eventual end-of-life requirements. Before the Decision, due to the absence of a responsible licensee, the end-of-life requirements of the pipeline were to be fulfilled by the OWA.

The pipeline has been discontinued for a period greater than 12 months. Accordingly, in the event that MEL wishes to resume any pipeline activity, or amend the Licence in respect of authorized operations, it must apply to the AER to do so. Should MEL make any such applications, it would be open at that time for 1724732 Alberta Ltd. to raise any related concerns by filing an SOC with the AER in respect of the Application, for the AER's consideration at that time.

1724732 Alberta Ltd.'s submissions do not relate to any direct and adverse effect to it arising as a result of the transfer of the Licence. 1724732 Alberta Ltd. has not demonstrated that it is directly and adversely affected by the Decision, and is therefore not an eligible person for the purposes of the test set out in section 38 of REDA.

Compliance Concerns

In its Request, 1724732 Alberta Ltd. raised compliance-related concerns in respect of the Application and MEL's ability to fulfil its regulatory obligations stemming from lack of access to the lands.

Regarding the Application, 1724732 Alberta Ltd. alleges that MEL breached the requirements to make an application for an RDT, as it could not declare that it held valid surface access rights for the pipeline. While the AER appreciates 1724732 Alberta Ltd. raising its compliance concern with the AER, it appears to the AER that 1724732 Alberta Ltd. has misapprehended the requirements to bring an RDT application.

Section 5 of Directive 088 sets out rules for licence transfer applications made in the normal course, that is, for a proposed transfer between a proposed transferor and a proposed transferee. Item 22) of section 5 requires that both the proposed transferor and the proposed transferee make the declarations contained in appendix 1 of Directive 088. Appendix 1 of Directive 088 states that, in making a transfer application, a transferee declares that, among other things, it "holds valid surface access rights for all wells, pipelines [and] facilities included in [the] application".

This sets out that when a licence transfer application is made for the proposed transfer of a licence between a proposed transferor and a proposed transferee, a proposed transferee should hold all valid surface access rights at the time of application so that it can make the required declaration.

However, the Application was for an RDT. The rules in Directive 088 specific to licence transfer applications for the transfer of a licence between a proposed transferor and proposed transferee, and which

must be accepted by both parties before the AER will transfer it, do not directly apply to applications for RDTs. The requirement that 1724732 Alberta Ltd. is concerned that MEL breached is not a requirement applicable to the Application.

The AER notes that, with an RDT, it is foreseeable that a party agreeing to accept a licence that the AER has determined it has the right to receive will not yet have surface access in place. For example, this may be because, if the current licensee at the time of the application is a defunct company, there may be no associated commercial arrangement for the transfer of the underlying pipeline and any existing surface access agreements or entry orders. The SOC correspondence in respect of the Application shows the AER was aware at the time it decided the Application that MEL did not yet hold surface access rights for the lands owned by 1724732 Alberta Ltd.

Regarding 1724732 Alberta Ltd.'s compliance concerns regarding MEL's ability to meet its requirements as licensee absent surface access rights, regardless of what rights MEL held at the time of the Application, it must meet all regulatory requirements as the new licensee. If its ability to meet certain requirements is dependant on surface access, it must acquire surface access rights.

If 1724732 Alberta Ltd. has a compliance-related complaint to relay to the AER in future, it can do so through the AER's Energy and Environmental Emergency 24-Hour Response Line, at 1-800-222-6514.

Conclusion

For the reasons above, the AER has determined that 1724732 Alberta Ltd. is not directly and adversely affected by the Decision, and, as such, is not an eligible person to request a regulatory appeal of the Decision pursuant to the test set out in section 38 of REDA.

1724732 Alberta Ltd.'s Request is therefore dismissed.

Sincerely,

<Original signed by>

Jeffrey Moore
Senior Advisor, Legal/Regulatory

<Original signed by>

Isaac Amponsah
Senior Advisor, Regulatory

<Original signed by>

Todd Shipman
Senior Advisor, Induced Seismicity and Geologic
Hazards

cc: L. De Pauw, Orphan Well Association