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A Rare Public Challenge to a Municipal Water Franchise Agreement

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Decision considered: *Rocky View County – Water and Wastewater Franchise Agreement with Harmony Advanced Water Systems Corporation* (29 November 2013), [Decision 2013-424](#)

This decision is significant because, in this rare instance of a public objection to a municipal utility franchise agreement, the Alberta Utilities Commission took a progressive approach and granted public interest standing to an objector who did not have a statutory right to standing.

Summary of the Decision

In May 2013, Rocky View County (Rocky View) applied to the Alberta Utilities Commission (AUC) for approval pursuant to s. 45 of the [Municipal Government Act](#), RSA 2000, c M-26, to grant approval to enter into a water and wastewater franchise agreement (franchise agreement) to Harmony Advanced Water Systems Corporation (Harmony) for 20 years for an area within Rocky View known as Harmony Lands. Under the agreement, Rocky View would determine annually a franchise fee to be paid by Harmony for the exclusive right to provide services to customers within Harmony Lands. The rates and charges established by Harmony for water and wastewater services to consumers would have to be approved by the AUC. Harmony sub-contracted with Corix Utilities (Corix) for Corix to construct and operate the water and wastewater facilities on the Harmony Lands. (The use of sub-contractors and operators was anticipated by the [franchise agreement](#)).

Mrs. Wilkinson, a resident and taxpayer of Rocky View (but who did not reside in the franchise area) objected to the application. Mrs Wilkinson argued that if the Harmony application was approved that there would be a chance taxpayers in Rocky View would ultimately be responsible for Harmony's debts as had occurred with a different utility service in the Balzac area. She also argued that a utility without a guaranteed water supply did not meet the requirements of public "convenience" and "public interest" in s. 106(2) of the [Public Utilities Act](#), RSA 2000, c P-45.

The first issue raised was whether Mrs. Wilkinson had standing to participate in the proceedings. The AUC determined that Mrs. Wilkinson was not "directly and adversely affected" as required by s. 9(2) of the [Alberta Utilities Commission Act](#), SA 2007, c A-37.2, as she did not own any lands in the franchise area. However, the AUC determined that its authority to control its own process gave it the ability to allow Mrs. Wilkinson to participate in the proceedings and therefore granted her standing.

Under s. 45 of the *Municipal Government Act* and s. 106 of the *Public Utilities Act*, the AUC has extensive powers to review franchise agreements, including to determine whether they: a) have been duly advertised, b) do not exceed 20 years, c) are necessary and proper for public convenience and d) properly conserve the public interest.

In this case, the AUC considered each of these elements, but the most contentious issue was whether the franchise agreement was necessary and proper for the public convenience. The AUC ultimately concluded that it was, but in doing so considered a number of sub-issues. The first of these was that the franchise agreement was atypical in that it applied to only one defined area in the municipality as opposed to all of Rocky View. To avoid the possibility of different franchise fees applying to different areas within Rocky View, the AUC directed that any change in the level of franchise fee required both notice and approval in advance by the AUC. Second, it considered whether the quantity of water allocated to Harmony under the preliminary certificate and, ultimately a water licence, would provide an adequate supply of water to customers within the franchise area. It cautioned Harmony to ensure that commitments made to irrigators were interruptible in the event these commitments needed to be curtailed to ensure an adequate supply of potable water. Third, it considered what steps had been taken by Rocky View to mitigate the risk that Rocky View taxpayers might potentially become responsible for the debt of Harmony. Rocky View confirmed that Harmony would be required to provide monetary security to ensure that the services and roads required for each subdivision would be completed at no cost to Rocky View. In addition, water and wastewater facilities were to be transferred to Harmony upon the issuance of construction completion certificates. The AUC was further satisfied by the fact that Corix, known to have expertise in water utility operations, had been contracted by Harmony to construct and operate the water utility. Accordingly, the AUC concluded that the provision of water and wastewater services by Harmony under the proposed franchise agreement was necessary and proper for the public convenience. (at paras 45-65).

Commentary

Franchise agreements are common in the public utility sector, particularly with respect to the delivery of electricity, gas and water services. It is not, however, that common for an objection to a franchise agreement to be made. More often than not, once an agreement is advertised pursuant to s. 45 of the *Municipal Government Act*, the agreement then proceeds to the AUC for review and approval.

In the case under consideration, Mrs. Wilkinson filed an objection to Harmony's application for a franchise agreement. The AUC granted standing to Mrs. Wilkinson to participate in the proceeding, even though she did not meet the "directly and adversely affected" test. As the AUC stated (at para. 26): "Mrs. Wilkinson voices particular public interest perspectives, hearing of which may be of some relevance and will not delay efficient consideration of this application."

According to some administrative experts, the AUC's approach to standing is typical of administrative agencies, which have traditionally taken a more democratic approach to public interest standing than the courts. As Macaulay and Sprague describe, generally, as part of their duty to represent and consider the public interest, administrative agencies have allowed members of the public to participate in proceedings provided their contribution was relevant (*Practice and Procedures Before Administrative Tribunals*, Volume 2, (Toronto: Thomson, 2004) at 9-30 to 9-31). However, the AUC's approach to public interest standing can be contrasted with the approach taken by other Alberta tribunals and commented on in past ABlawg posts. See for example, the post by Prof. Shaun Fluker [here](#).

The author wishes to thank Nigel Bankes for his comments on an earlier draft of this post.

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