October 11, 2019

Latest Municipal Utility Appeal Decision by the AUC: Business as Usual

By: Dana Poscente

Decision Commented On: *Village of Delia: Appeal of Utility Charges by Heide Peterson and Yvon Fournier*, October 1, 2019, Alberta Utilities Commission Decision 24678-D01-2019

In this recent municipal utility appeal, Ms. Peterson and Mr. Fournier (the Appellants) requested that the Alberta Utilities Commission (AUC) disallow all water, sewer, garbage and land fill utility charges imposed by the Village of Delia, including interest, from the time at which they disconnected from municipal utility service to the time of this decision. The AUC found, pursuant to section 43 of the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*), that certain of the appealed charges were discriminatory and ordered Delia to repay them. This post describes the statutory scheme under which the Commission can hear and make orders on such appeals, summarizes the decision, and compares the reasoning and outcome to similar past decisions.

Context

Since 1968, Alberta's *MGA* has given the AUC (previously the Public Utilities Board or Alberta Energy and Utilities Board) the authority to hear appeals by individuals of charges from municipally-owned utilities. While the AUC has the authority to set the rates of investor owned public utilities, a municipality has the jurisdiction under the *MGA* to set the rates for its own or subsidiary-owned utilities. However, the appeal process under section 43 of the *MGA* serves as a check on this authority. Section 43 reads:

> **Appeal**
> **43 (1)** A person who uses, receives or pays for a municipal utility service may appeal a service charge, rate or toll made in respect of it to the Alberta Utilities Commission, but may not challenge the public utility rate structure itself.
> **(2)** If the Alberta Utilities Commission is satisfied that the person's service charge, rate or toll
>
> (a) does not conform to the public utility rate structure established by the municipality,
> (b) has been improperly imposed, or
> (c) is discriminatory,
>
> the Commission may order the charge, rate or toll to be wholly or partly varied, adjusted or disallowed.

In this application, the Appellants requested that the Commission disallow all the impugned charges on the basis that these charges were improperly imposed and discriminatory, pursuant to subsections 43(2)(b) and (c) of the *MGA*. The Appellants also requested that the property be

returned to "grandfathered status", a reference to the applicability of section 9 of Bylaw #623-2017, the relevant municipal utility bylaw (the Bylaw) discussed below.

The Facts

The Appellants jointly own a commercial property in Delia. The property was vacant from 1980 to May 2017, during which time it did not receive utility service. The property was then leased to a commercial business for one year. The Appellants requested that Delia provide utility service to the property. When the lease ended, the property was once again vacant, and at the Appellants' request the water service was disconnected in May 2018. However, Delia informed the Appellants that they were still required to pay for utility services pursuant to the Bylaw, and indeed the Appellants were still charged for water, sewer, garbage and landfill services after the water service was disconnected.

The Bylaw stated that from the time it was enacted, April 27, 2017, property owners would be responsible for all service charges "whether water service is connected or has been disconnected" (at para 11). Delia included this provision to assist it in recouping the expenses of maintaining the utility system. Owners not currently being charged for utility services would be "grandfathered" and as such not charged until connected to service. Once connected, the owners would be obliged to continue to pay even if they later disconnected. Delia passed another bylaw, Bylaw #635-2019 (new Bylaw), on February 13, 2019, with an almost identical provision at section 9. While the two bylaws apply to utility charges for different time periods, the Commission dealt with them collectively in the decision and the new Bylaw raised no new issues.

The Decision

The Commission first discussed whether the rates were improperly imposed within the meaning of section 43(2)(b) of the *MGA*. The Appellants submitted that the Bylaw was improperly imposed on the grounds that Delia did not provide adequate notice and advertising of the Bylaw, and that there was no quorum of councillors present when the Bylaw was enacted. The Commission rejected both arguments.

The Appellants next alleged that the charges under the Bylaw were discriminatory because customers that connected and then disconnected their water service prior to April 27, 2017 were not required to pay fixed monthly charges, while customers that disconnected or both connected and disconnected water service on or after April 27, 2017, were required to pay fixed monthly charges. The Commission described the two circumstances under which discrimination can arise:

> First, when a utility fails to treat all its users equally where no reasonable distinction can be found between those favoured and those not favoured [and]…Second, when a utility treats all its users equally where differences between users would justify different treatment. (at para 42)

The Commission stressed the importance of assessing the presence or absence of any rationale or logic for the differential treatment of customers and to understand the whole context by which the charges were being imposed in assessing whether or not the rates were discriminatory. In this case

that required the Commission to assess whether Delia's use of the date of enactment of the Bylaw was a reasonable ground for differential treatment of the two groups of customers. In a recent municipal franchise agreement decision, the Commission found that treating new and existing customers differently based on a point in time "does not offer a reasonable rationale or fact-based justification for the differential treatment" (*Evergreen Gas Co-op Ltd.: Franchise Agreement with the Town of Drayton Valley*, May 2, 2019, AUC Decision 24257-D01-2019, at para 25). Applying that decision here, the Commission found Delia's rates to be discriminatory.

The Commission ordered Delia to repay the Appellants any amounts paid from the time of disconnection of water service to the date of this decision, for any monthly charges for water, sewer, garbage and land fill service, in addition to any interest or penalties that Delia may have charged on these amounts.

Discussion

This latest municipal utility appeal decision is in line with earlier decisions of the Commission assessing whether rates are discriminatory. In a 1994 PUB decision, the then Board stated for the first time that "rates are discriminatory when they fail to treat all users of a public utility equally where no reasonable distinction can be found between those favoured and not favoured" (*Re: The Town of Bassano, Complaint by Mrs. Elizabeth J. Zibell alleging discriminatory water and sewer billings by the Town of Bassano*, March 28, 1994, PUB Decision E94013, at page 20). The Board in that decision also noted that it was not enough to show differential treatment, there must also be no reasonable basis for the distinction, which is what the Commission found here: it was the lack of rationale underlying the distinction between customer groups that made Delia's rates discriminatory, not the fact that a distinction existed at all. If the distinction had been supported by logic, the Commission would likely have accepted the basic rate structure, the structure of which was similar to that upheld in *Village of Alliance: Appeal Pursuant to Section 43 of the Municipal Government Act* (August 29, 2018, AUC Decision 23398-D01-2018). For more examples of how the AUC has applied its two definitions of discrimination and determined if there is a reasonable basis for differential/similar treatment, see *K. David Campbell: Appeal on EPCOR Water Services Inc. Water Rates for 2012-2017* (August 9, 2013, AUC Decision 2013-295); *Town of Coaldale: Appeal Pursuant to Section 43 of the Municipal Government Act* (August 24, 2018, AUC Decision 23159-D01-2018); and *Village of Alliance*, (above, Decision 23398-D01-2018).

Another point to note about this decision is that the Commission refused to discuss or grant relief in response to the Appellants' request that their property be returned to "grandfathered status", because this request did not fall under the Commission's authority (para. 19). The Commission's jurisdiction over municipal utilities is restricted to the powers listed under section 43 of the *MGA*, that is to vary, adjust, or disallow, in whole or in part, the charge, rate or toll that meets the criteria in 43(2)(a) – (c). Previous decisions of the Commission and its predecessors emphasize that the Commission's jurisdiction should be interpreted narrowly in order to avoid infringing on the jurisdiction of municipalities; in enacting the *MGA* the legislature intended that jurisdiction to be very broad. The Commission's approach in the present case follows *Town of Coaldale* (above, Decision 23159-D01-2018), in which the Commission states that the only relief the Commission can grant is that which is listed in section 43 of the *MGA*, and thus the Commission could not grant, e.g., compensation for financial hardship. However, where a remedy was outside their direct

authority the predecessors of the Commission did occasionally make a non-binding recommendation that the municipality follow a certain course of action. For instance, in a 1971 PUB decision the Board recommended measures that the municipality could take to more prudently manage its utilities (*Application to the Public Utilities Board appealing the water rates levied by the County of Leduc No. 25, between Tom Oliver et al. (Applicants) and County of Leduc No. 25 (Respondent)*, October 19, 1971, PUB Decision 30340, at page 14). There was no such recommendation in the present case.

Overall, the Delia decision builds upon, rather than changes, the large and growing jurisprudence of the AUC and its predecessors over municipal utility rate appeals.

This post is part of a broader project under the supervision of Professor Nigel Bankes, examining the supervisory jurisdiction of the AUC over municipal utilities. The author would like to thank Professor Bankes for his guidance and editing of this post and the larger work.

This post may be cited as: Dana Poscente, "Latest Municipal Utility Appeal Decision by the AUC: Business as Usual" (October 11, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/10/Blog_DP_VillageOfDelia.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg