



Town of Devon

Appeal of Water Rates by Imperial Enterprises Inc.

April 12, 2018

Alberta Utilities Commission

Decision 22785-D01-2018

Town of Devon

Appeal of Water Rates by Imperial Enterprises Inc.

Proceeding 22785

April 12, 2018

Published by the:

Alberta Utilities Commission

Eau Claire Tower, 1400, 600 Third Avenue S.W.

Calgary, Alberta

T2P 0G5

Telephone: 403-592-8845

Fax: 403-592-4406

Website: www.auc.ab.ca

Contents

1	Introduction.....	1
2	Details of the appeal.....	1
3	Commission findings.....	5
	3.1 The Commission’s authority.....	5
	3.2 Were the increased rates improperly imposed?	5
	3.3 Are the increased rates discriminatory?	9
4	Relief.....	9
	Appendix 1 – Proceeding participants	11
	Appendix 2 – Summary of Commission directions.....	12

1 Introduction

1. For the reasons that follow, the Alberta Utilities Commission finds, pursuant to Section 43 of the *Municipal Government Act*, that the Town of Devon (Devon) improperly imposed the increased water rates that are the subject of this appeal. The Commission therefore disallows those increased rates.
2. Water utility services are provided to residents and businesses within the municipal boundaries of Devon by the municipality. Water rates are set by Devon town council.
3. On July 4, 2017, the Commission received a formal complaint (the appeal) from Imperial Enterprises Inc. (Imperial) appealing an increase in water rates charged to Imperial by Devon commencing March 13, 2017 (the increased rates).
4. On July 6, 2017, the Commission issued a letter establishing Proceeding 22785 and invited Devon to provide its response submissions, including any details it considered relevant to the appeal submitted by Imperial.¹ Devon provided its submission on July 20, 2017.²
5. The Commission requested additional information from Devon, regarding the method by which Devon established the increased rates.³ Devon provided additional information on October 16, 2017.⁴
6. In reaching the determinations contained in this decision, the Commission has considered the record of this proceeding, including the evidence 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 other portions of the record with respect to that matter.

2 Details of the appeal

7. Imperial carries on the business of selling bulk water to its customers. Imperial sources its bulk water supplies from Devon. The appeal asserted that on March 13, 2017, without notice to or consultation with Imperial, Devon raised the bulk water commodity rates charged to Imperial to \$3.25 per cubic metre (/m³) from \$1.47/m³ for the first 5,000 m³ of water and to \$4.50/m³ for all volumes over 5,000 m³. Imperial argued that in doing so, Devon put into effect a new, specific rate structure that affects Imperial and no other similar business. Imperial further

¹ Exhibit 22785-X0004.
² Exhibit 22785-X0007.
³ Exhibit 22785-X0013.
⁴ Exhibit 22785-X0014.

asserted that by putting “two classes of rates” in effect, Devon has made Imperial’s business of selling bulk water uncompetitive and more difficult in terms of setting competitive and consistent rates for its customers.⁵

8. Imperial identified the following as the reasons for the appeal:
- (a) Devon increased the water rates by policy and not by bylaw.
 - (b) Devon discussed the rate change partially *in camera*, which is contrary to good governance and the *Municipal Government Act*.
 - (c) The amended rate structure sets out a two-tiered system of rates to similar users. Other customers, such as a water co-op, receive water at the rate of \$2.72/m³.
 - (d) Imperial has been a bulk water seller in Devon since 2003 and has consistently paid based on the residential rate which, with regular increases, is currently at \$1.55/m³.
 - (e) Imperial has built and invested in significant infrastructure to sell bulk water, and despite Devon’s assurances that no other business would be allowed to sell bulk water, several businesses are doing so illegally. These factors and the fact that Devon sells bulk water at \$4.50/m³ after 5,000 m³ without the same development costs and fees “creates an unfair advantage to Imperial.”⁶

9. In its July 20, 2017 response submission, Devon argued that Bylaw 836/2010 (the Bylaw) identifies the rights and responsibilities relevant to the appeal, relying specifically on sections 5.1, 7.4.6, 11.2 and 13. In Devon’s submission, Section 5.1 of the Bylaw provides Devon with the authority to determine the terms and conditions for all utility services, and Section 7.4.6 addresses the resale of water by Devon water utility customers. Devon submitted that Imperial entered into an agreement with Devon that allowed resale of water as provided under Section 7.4.6(b) and that, pursuant to that agreement, Imperial agreed to pay for water supplied at the metered water commodity charge described in Policy 4501, as amended by Devon council from time to time.

10. Devon argued that Section 11.2 of the Bylaw provides the specific authority for the rates, tolls and charges that apply to all utility services delivered pursuant to the Bylaw.⁷ That section states, “There shall be paid for all utilities supplied and sewer service rendered hereunder the amounts set out in Policy 4501 – Utility Rates.”⁸

⁵ Exhibit 22785-X0001.

⁶ Exhibit 22785-X0001.

⁷ Exhibit 22785-X0007, paragraphs 3-5.

⁸ Exhibit 22785-X0008.

11. According to Devon, its authority to amend the rates, tolls, charges and schedules forming part of the Bylaw and Policy 4501 is provided in Section 13 of the Bylaw. That section states:

13. Amendments

The Council of the Town of Devon may, by bylaw or resolution in Council, alter, amend or repeal any or all of the Schedules, which form part of the bylaw and the rates as set out in Policy 4501-Utility Rates.⁹

12. Devon disagreed with Imperial's claim that the rate change occurred without notice or consultation with Imperial and also with Imperial's assertion that its discussion of the rate change partially *in camera* was contrary to good governance and/or the *Municipal Government Act*. Devon asserted that it did discuss the proposed changes in rates and a new agreement for water supply with Imperial and that it was asked by Imperial to bring forward an alternative rate to council for approval. Devon explained that because the matter was a matter of negotiation, and referred to matters specific to one commercial account, Imperial's request was submitted to council as a Confidential Request for Decision (the request).¹⁰ Devon asserted that in accordance with Section 197(2) of the *Municipal Government Act* and Section 16(1) ("Disclosure harmful to business interests of a third party") of the *Freedom of Information and Protection of Privacy Act*, Devon decided to consider the request *in camera* to protect Imperial's private or sensitive information. Devon stated that the *in camera* consideration and denial of the request occurred at a meeting of council on March 13, 2017, following which council returned to open meeting and moved to accept changes to Policy 4501. Those changes were approved by Resolution 065/2017 and included the bulk water commodity rates now being appealed by Imperial.¹¹

13. Devon also denied Imperial's claim that the increased rates were made arbitrarily. Devon asserted that "The changes in rates as approved by Policy 4501 are not arbitrary, but were designed so as to generate annual revenue requirements for the water utility based on outcomes of Devon's budget deliberations."¹²

14. With regard to Imperial's claim that several businesses are selling bulk water illegally, Devon stated that it is not aware of any businesses or water accounts that are selling bulk water illegally. Devon also expressed the view that it is not appropriate to cast aspersions on other customers without being able to identify and verify such illegal sales.¹³

15. In response to Imperial's assertions that Devon has set out a two-tiered system of rates to similar users, such as the water co-op, Devon submitted that there is no similarity between the services provided to Imperial and the water co-op. Devon asserted that the only similarity between these two customers is the fact that both have their respective services defined by their individual agreements for water service with Devon.¹⁴

16. Devon identified a number of factors that, in its submission, serve to distinguish those two customers. Devon noted that Imperial is located within the corporate boundaries of Devon

⁹ Exhibit 22785-X0008.

¹⁰ Exhibit 22785-X0007, paragraph 8.

¹¹ Exhibit 22785-X0007, paragraphs 8-10.

¹² Exhibit 22785-X0007, paragraph 13.

¹³ Exhibit 22785-X0007, paragraph 26.

¹⁴ Exhibit 22785-X0007, paragraph 20.

and is a commercial enterprise reselling water to customers outside of the Devon boundaries without limitation or restriction to rates of flow or annual volumes.¹⁵ In contrast, the water co-op accepts delivery of water from Devon at a point of delivery at the town's corporate boundaries and distributes that water only to the co-op's members, consisting of approximately 50 farm and rural acreage owners in lands beyond the town's corporate boundaries. Further, Devon's agreement with the water co-op sets out specific limitations on both the allowed rates of flow and annual volumes that Devon will deliver, with no guarantee or security of supply required in excess of those defined flow rates and volumes. Devon expressly denied that it created a two-tiered system of rates that is discriminatory to Imperial and asserted that Imperial is the only customer of its kind; that is, Imperial is the sole bulk water reseller supplied from Devon's distribution system.¹⁶

17. In response to Imperial's argument that the "raising of water rates was done by policy and not bylaw," Devon asserted that the increase in water rates was permitted by Section 11.2 of the Bylaw and approved by resolution as provided for in Section 13 of the Bylaw.¹⁷

18. In response to Commission information requests, Devon confirmed that it approved amendments to Policy 4501 – Utility Rates, by way of resolution rather than bylaw. In explaining why the rate change was approved by resolution rather than bylaw, Devon relied on sections 7(g) and 180(3) of the *Municipal Government Act*.¹⁸ According to Devon, Section 7 of the *Municipal Government Act* is not specific regarding the scope and extent of bylaws that a municipality may or is required to pass, nor does it restrict a municipality from exercising its discretion in approving policies applicable to such bylaws by resolution. Devon acknowledged that pursuant to Section 7(g), a bylaw is required to establish a public utility and to collect utility charges for utility services provided to customers. However, Devon submitted that nothing in the *Municipal Government Act* stipulates that the actual utility rates, which are subject to change from time to time, must themselves be approved by bylaw.¹⁹

19. Devon further asserted that consistent with Section 180(3) of the *Municipal Government Act*, the Bylaw authorizes the approval of various schedules including Policy 4501 – Utility Rates, by resolution, or by bylaw, as council may choose. Pursuant to the Bylaw, Devon chose to approve the Schedule of Fees and Charges, including Policy 4501 – Utility Rates, by way of a resolution rather than by bylaw.²⁰

20. Devon concluded that "Sections 7(g), 180(1) and 180(3) of the *MGA* [*Municipal Government Act*] are the appropriate legislative references specifically authorizing use of a resolution to enable changes to the Schedule of Fees, as referenced in Sections 2.51, 11.2 and 13 of the Utility Bylaw."²¹

¹⁵ Exhibit 22785-X0007, paragraph 21.

¹⁶ Exhibit 22785-X0007, paragraph 22.

¹⁷ Exhibit 22785-X0007, paragraph 19.

¹⁸ Exhibit 22785-X0014, paragraphs 2 and 6.

¹⁹ Exhibit 22785-X0014, paragraph 9.

²⁰ Exhibit 22785-X0014, paragraph 6.

²¹ Exhibit 22785-X0014, paragraph 10.

3 Commission findings

3.1 The Commission's authority

21. The Commission's authority in respect of this matter is set out in Section 43 of the *Municipal Government Act*:

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.

22. Although Imperial advanced a number of arguments in support of its appeal, its principle arguments can generally be characterized as alleging that:

- the increased rates were improperly imposed
- the increased rates are discriminatory because Devon has, in essence, created "two classes of rates" and/or "a two-tiered system of rates to similar users" without justification

23. Before addressing whether the increased rates were improperly imposed or are discriminatory, it is important to reiterate that it is only the increased rates that are the subject of the appeal. The Commission has not considered or made any findings concerning the validity of rates charged to Imperial for any period prior to March 13, 2017, or the validity of Policy 4501 – 2017 Utility Rates, more generally.

3.2 Were the increased rates improperly imposed?

24. Imperial argued that Devon's rate change effective March 13, 2017, was improperly imposed because it was made by policy, not bylaw, and because it was made partially *in camera*, contrary to "good governance" and the *Municipal Government Act*.

25. As to the first of those arguments, Devon confirmed in its response to the Commission's questions, that the impugned rate change was not made by bylaw but rather, was made by Resolution 065/2017. In summary, Devon argued that:

- (a) Neither Section 7(g) nor any other provision in the *Municipal Government Act* requires that utility rates be approved by bylaw.

- (b) Pursuant to sections 180(1) and 180(3) of the *Municipal Government Act*, a municipal council may pass a bylaw authorizing itself to do something by resolution.
- (c) Devon passed the Bylaw, which authorizes Devon’s council to alter, amend or repeal Policy 4501 – Utility Rates either by bylaw or by resolution in council, as it chooses.

26. In Decision 21497-D01-2016,²² the Commission dealt with arguments similar to those being advanced by Devon in this appeal. However, before commenting on the Commission’s analysis in that decision, it is useful to begin with a review of the relevant legislative framework.

27. As a municipality, Devon has, those powers, duties and functions identified in sections 5 and 6 of the *Municipal Government Act*. Of relevance to this appeal are those described in Section 5:

Powers, duties and functions

5 A municipality

- (a) has the powers given to it by this and other enactments,
- (b) has the duties that are imposed on it by this and other enactments and those that the municipality imposes on itself as a matter of policy, and
- (c) has the functions that are described in this and other enactments.

28. The *Municipal Government Act* defines “enactment” as an act or regulation but excludes a bylaw.

29. Section 7 of the *Municipal Government Act* identifies those matters in respect of which a municipality may pass bylaws. Public utilities are among those matters:

General jurisdiction to pass bylaws

7 A council may pass bylaws for municipal purposes respecting the following matters:

...

- (g) public utilities;

30. The *Municipal Government Act* also defines “public utilities”:

Interpretation

1(1)(y) “public utility” means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

- (i) water or steam; ...

²² Decision 21497-D01-2016: County of Thorhild, Appeal of Water Rates at Long Lake, Proceeding 21497, August 3, 2016.

31. Section 180 of the *Municipal Government Act* details the methods by which a municipal council may act:

Methods in which council may act

180(1) A council may act only by resolution or bylaw.

(2) Where a council or municipality is required or authorized under this or any other enactment or bylaw to do something by bylaw, it may only be done by bylaw.

(3) Where a council is required or authorized under this or any other enactment or bylaw to do something by resolution or to do something without specifying that it be done by bylaw or resolution, it may be done by bylaw or resolution.

32. Section 191 of the *Municipal Government Act* concerns the power to, and the method by which, bylaws may be amended:

Amendment and repeal

191(1) The power to pass a bylaw under this or any other enactment includes a power to amend or repeal the bylaw.

(2) The amendment or repeal must be made in the same way as the original bylaw and is subject to the same consents or conditions or advertising requirements that apply to the passing of the original bylaw, unless this or any other enactment provides otherwise.

33. In the context of facts and arguments similar to those present in this appeal, the Commission considered the above statutory framework in Decision 21497-D01-2016 and stated:

23. According to the *Municipal Government Act*, Thorhild may pass bylaws for municipal purposes respecting public utilities. This may only be done by bylaw. An amendment to a bylaw must be made in the same way as the original bylaw, unless the *Municipal Government Act* or any other enactment provides otherwise.... an enactment does not include a bylaw.

24. Thorhild attempted to amend rates in Schedule A of Bylaw 1142-2011 by resolution ... the Commission observes that Section 8 of Bylaw 1142-2011 purported to enable the council to amend the bylaw by resolution: ...

25. The Commission finds that Thorhild's actions were inconsistent with the legislative framework.... If a municipality were permitted to simply include a provision within a bylaw giving it the authority to amend the bylaw by resolution where the legislation has precluded this action, the municipality would be indirectly doing what the legislation has stated that it cannot do...²³

34. The Commission agrees with the legislative interpretation expressed above and, for the reasons that follow, concludes that Devon's actions were similarly inconsistent with the statutory framework.

35. Devon acknowledged that pursuant to Section 7(g) of the *Municipal Government Act*, a bylaw is required to establish a public utility and to collect utility charges for utility services

²³ Decision 21497-D01-2017.

provided to customers.²⁴ However, Devon argued that there is nothing in the *Municipal Government Act*, in Section 7(g) or otherwise, that stipulates that the actual utility rates must be approved by bylaw.

36. Section 7(g) refers generally to matters relating to municipal public utilities. The Commission cannot accept that the absence of express reference to utility rates in Section 7(g) reasonably leads to the conclusion that the legislature intended that rates for a public utility service could be established by a method of a municipal council's choice. Stated another way, Devon has offered no persuasive reason or basis upon which to conclude that the term "public utility" in Section 7(g) should be interpreted to relate to the establishment of a public utility service and the right to collect utility charges for the public utility service, but not to the establishment of the actual rates themselves. Such an interpretation does not accord with the plain and very broad language of Section 7(g) of the *Municipal Government Act*, particularly when considered in the context of the whole of the statutory framework identified above.

37. As the Commission is satisfied that Section 7(g) of the *Municipal Government Act* requires that rates charged for public utility service, including water rates, be established by bylaw, Devon's arguments based on Section 180(3) of the *Municipal Government Act* and Section 13 of the Bylaw must likewise fail.

38. Section 180(3) must be read in the context of Section 180 as a whole.

39. By its express language, Section 180(3) of the *Municipal Government Act* can have application only where a council is authorized to do something by resolution or without specifying that it be done by bylaw or by resolution. Such is not the case here. Section 7(g) of the *Municipal Government Act* authorizes Devon to provide water service and charge rates for it by bylaw. It is, therefore, Section 180(2) of the *Municipal Government Act* that applies to matters dealing with public utilities:

(2) Where a council or municipality is required or authorized under this or any other enactment or bylaw to do something by bylaw, it may only be done by bylaw. [emphasis added]

40. As noted above, Section 191 of the *Municipal Government Act* states that an amendment to a bylaw must be made in the same way as the original bylaw, unless the *Municipal Government Act* or any other enactment provides otherwise. Section 1(j) of the *Municipal Government Act* defines "enactment" as an act or regulation but excludes a bylaw. As a bylaw is not an enactment, it cannot authorize or allow action that the legislation does not. For this reason, Devon's argument based on Section 13 of the Bylaw must fail. By Section 13 of the Bylaw, Devon has attempted to give itself the authority to amend the Bylaw (and more specifically, establish utility rates) by resolution where the legislation has expressly precluded this action.

41. When read together, the effect of sections 7(g), 180(2) and 191 of the *Municipal Government Act* is to require that any amendment to rates charged for public utility service, including water rates, be made by bylaw.

42. As the increased rates were established by resolution and not by bylaw as required, the Commission finds that the increased rates charged to Imperial effective March 13, 2017, were

²⁴ Exhibit 22785-X0014, paragraph 3.

improperly imposed. Because the Commission is satisfied that Imperial's rates were improperly imposed on this basis, it is not necessary to consider Imperial's argument that the rates were improperly imposed because they were discussed partially *in camera* contrary to the *Municipal Government Act*.

3.3 Are the increased rates discriminatory?

43. Given the Commission's finding that the increased rates were improperly imposed, it is not necessary to consider Imperial's argument that the increased rates are discriminatory.

4 Relief

44. Section 43 of the *Municipal Government Act* provides that if the Commission finds that a person's service charge, rate or toll has been improperly imposed, it may order the charge, rate or toll to be wholly or partly varied, adjusted or disallowed. In this case, the Commission will disallow the amount of the rate increase billed to Imperial by Devon from and after March 13, 2017. It is not clear from the record whether Imperial has paid the increased rates charged to it since March 13, 2017. If not, the disallowed amounts may not be collected by Devon, including any associated penalties or arrears. In the event that Imperial has paid the increased rates charged to it since March 13, 2017, the Commission directs that Imperial's water utility service charges be recalculated on the basis of the rates in effect immediately prior to March 13, 2017, for the period from March 13, 2017, to the date of this decision and the excess refunded to Imperial.

Dated on April 12, 2018.

Alberta Utilities Commission

(original signed by)

Carolyn Hutniak
Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) Company name of counsel or representative
Town of Devon (Devon)
Imperial Enterprises Inc. (Imperial)

Alberta Utilities Commission Commission panel C. Hutniak, Commission Member Commission staff K. Dumanovski (Commission counsel) C. Burt
--

Appendix 2 – Summary of Commission directions

This section is provided for the convenience of readers. In the event of any difference between the directions in this section and those in the main body of the decision, the wording in the main body of the decision shall prevail.

1. Section 43 of the Municipal Government Act provides that if the Commission finds that a person’s service charge, rate or toll has been improperly imposed, it may order the charge, rate or toll to be wholly or partly varied, adjusted or disallowed. In this case, the Commission will disallow the amount of the rate increase billed to Imperial by Devon from and after March 13, 2017. It is not clear from the record whether Imperial has paid the increased rates charged to it since March 13, 2017. If not, the disallowed amounts may not be collected by Devon, including any associated penalties or arrears. In the event that Imperial has paid the increased rates charged to it since March 13, 2017, the Commission directs that Imperial’s water utility service charges be recalculated on the basis of the rates in effect immediately prior to March 13, 2017, for the period from March 13, 2017, to the date of this decision and the excess refunded to Imperial.
..... Paragraph 44