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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-188-14**

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**IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473**

and

**Application by Casa Del Mila Oro Geothermal
for Approval of Rates, Tariff Terms and Conditions and
a Certificate of Public Convenience and Necessity
and an Application for a Stay of Proceeding**

BEFORE: D.M. Morton, Panel Chair/Commissioner
C.A. Brown, Commissioner December 1, 2014
I.F. MacPhail, Commissioner

O R D E R

WHEREAS:

- A. On August 18, 2014, Mr. Chris Stewart, on behalf of 634012 BC Ltd. (Company), the owner and operator of Casa Del Mila Oro (CDMO) Geothermal, applied to the British Columbia Utilities Commission (Commission) for approval of rates, tariff terms and conditions and a Certificate of Public Convenience and Necessity (Application);
- B. On August 29, 2014, by Order G-123-14, the Commission established a public hearing process and a preliminary regulatory timetable for the review the Application;
- C. On September 24, 2014, the Commission received a request for a stay of proceeding on behalf of Strata KAS2860 (Strata), which stated that the Company was dissolved on March 19, 2012, and as a result, the assets of the Company escheated to the government;
- D. By letter dated September 24, 2014, the Commission requested that registered Interveners and CDMO Geothermal provide their comments on the Strata's request for a stay of proceeding by October 1, 2014, and that the Strata file its reply by October 8, 2014;
- E. By letter dated September 29, 2014, the Commission further requested that the parties address the three part test in Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, [1987] 1 SCR 110 in their comments on the request for a stay of proceedings. The letter also extended the deadlines

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for comments by interveners and CDMO Geothermal to October 8, 2014, and the Strata's reply to October 17, 2014;

- F. On September 29, 2014, the Commission received a complaint from the Strata stating that CDMO Geothermal is not taking steps in advance of the heating season to make repairs on certain equipment critical to the geothermal system operation;
- G. October 2, 2014, Commission Order G-152-14 amended the Regulatory Timetable to include a review of the Strata's complaint and to seek comments from the parties regarding the complaint;
- H. The Applicant did not file submissions regarding the Strata's request for a stay. Several interveners filed submissions supporting the request. Some interveners also expressed concern about the need to effect urgent repairs prior to winter and conduct maintenance on the utility system as identified in the report from Lakeview Geotech in Exhibit A2-5;
- I. By letter dated October 15, 2014, the Province responded to the submissions of the Strata regarding ownership of the assets of CDMO Geothermal contained in Exhibit C1-3. The Province advised that according to Easement KX152436, the geothermal building is located on the common property of the Strata. Therefore, the Province concluded that as the geothermal building is a fixture, it is owned by the Strata. However, Strata Lot 47 vested in the Province upon dissolution of the Company;
- J. By letter dated October 18, 2014, the Strata submitted that it had taken ownership of the geothermal system to the exclusion of the Province, 632402 BC Ltd. and Mr. Stewart;
- K. In a letter dated, October 24, 2014, the Commission requested evidence and submissions regarding who is currently operating the utility system, in a safe and reliable manner, or if there is a current operator; and
- L. The Strata filed comments on November 4, 2014 and 0800344 B.C. Ltd. filed its reply November 14, 2014;

NOW THEREFORE for the reasons attached as Appendix A to this order, the Commission grants the application by Strata KAS2860 for a stay of the proceeding.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of December 2014.

BY ORDER

Original signed by:

D.M. Morton
Panel Chair/Commissioner

Attachment

An Application by Casa Del Mila Oro Geothermal
for Approval of Rates, Tariff Terms and Conditions and
a Certificate of Public Convenience and Necessity
and an Application for a Stay of Proceeding

REASONS FOR DECISION

1. BACKGROUND AND APPLICATION

On January 16, 2014, by Order G-6-14 following a complaint and hearing, the British Columbia Utilities Commission (Commission) found the person, or the person's lessee, trustee, receiver or liquidator who owns or operates the geothermal heating and cooling facilities known as Casa Del Mila Oro (CDMO) Geothermal to be a public utility as defined by the *Utilities Commission Act* (UCA). CDMO Geothermal is located at 47-5401 Lakeshore Drive, Osoyoos, BC. It is a ground source thermal system that provides energy (heating and cooling) to Strata KAS2860 located at 5401 Lakeshore Drive, Osoyoos, BC.

In accordance with the UCA, a person must not begin the construction or operation of a public utility without first obtaining from the Commission a certificate that public convenience and necessity require or will require the construction or operation.¹ On July 9, 2014, by Order G-89-14, the Commission directed CDMO Geothermal to file its schedule of rates and terms and conditions of service with the Commission for approval.

Thus, on August 18, 2014, Mr. Chris Stewart, on behalf of 632402 BC Ltd (Company), which owns or operates the geothermal heating and cooling facilities known as CDMO Geothermal, filed an application for rates, tariff terms and conditions, and a certificate of public convenience and necessity (CPCN).

The Application requests the following orders of the Commission:

1. A CPCN for the ongoing operation of the utility;
2. Approval of the tariff terms and conditions as attached to this Application;
3. Approval of the proposed rates for service; and
4. An order requiring all customers who have withheld payment in the period since the Commission declaration of the public utility on January 16, 2014, to make all such payments owing since January 16, 2014, within 30 days of the approval of this Application.²

2. REGULATORY PROCESS

Commission Order G-123-14 established the regulatory timetable that provided for a round of information requests, which concluded on September 23, 2014. The following interveners registered to participate in this proceeding:

- Strata Council KAS2860 (Strata)
- Mclean, Bette and Brian
- Miller, John
- Cromwell, Chris and Debra
- Schonknecht, Robert and Dorothy
- Stevens, Mark and Barb
- Munro, Peter and Valerie
- McCall, Sari

¹ Utilities Commission Act, RSBC 1996, c473, s. 45(1).

² Exhibit B-1.

- 0800344 BC Ltd. (Mortgagee)

With the exception of the Strata and the Mortgagee, all interveners stated they are owners of strata lots in Strata KAS2860. The Mortgagee stated that it holds a registered mortgage over Strata Lot 47, which is “connected to the operation of the CDMO geothermal utility.”³ The Mortgagee further stated that “Strata Lot 47 has attached to it an easement giving certain rights related to the operation of the geothermal utility system.”⁴

3. STAY OF PROCEEDINGS

On September 24, 2014, the Strata submitted a request for an indefinite stay of the proceeding.⁵ The Strata explained that the Company was dissolved on March 19, 2012, and as a result, the assets of the Company escheated to the government, and therefore, those assets are now owned by the Province unless otherwise ordered by the Court. The Strata stated that it was in communication with Crown Counsel to establish the Province’s intent with respect to ownership and submitted that it may oppose an application to restore the Company on the basis that “it is prima facie and/or de facto bankrupt and will, inter alia, not be able to conform with its obligations in terms of section 4(7) of the Escheat Act.”⁶

In a letter dated September 24, 2014, the Commission requested that registered interveners and the Applicant provide their comments on the Strata’s request for a stay of proceedings.⁷ While the Applicant did not file submissions, several interveners filed submissions supporting the request for a stay.

4. COMPLAINT

By letter dated September 29, 2014, the Commission received a complaint from the Strata stating that CDMO Geothermal is not taking steps in advance of the heating season to make repairs on certain equipment critical to the geothermal system operation.⁸ In a letter dated October 2, 2014, the Commission amended the regulatory timetable of this proceeding to include a review of the Strata’s complaint and to seek comments from the parties regarding this complaint. Comments were requested to address the following issues:

- any actions CDMOG is taking including specific dates;
- if no actions are being taken, why;
- the risk of not taking action immediately; and
- potential consequences of a system failure.⁹

5. OWNERSHIP

By letter dated October 15, 2014, the Province filed a letter of comment in the proceeding and responded to the submissions of the Strata regarding ownership of the assets of the Company contained in Exhibit C1-3.¹⁰ The Province affirmed its understanding of the system as made up of:

³ Exhibit C9-1.

⁴ Ibid.

⁵ Exhibit C1-3.

⁶ Ibid., pp. 1 – 2.

⁷ Exhibit A-6.

⁸ Exhibit C1-4.

⁹ Exhibit A-8.

¹⁰ Exhibit E-3.

1. a geothermal building which houses the pumps, heat exchanger, electrical panel and warning lights (Geothermal Building); and
2. some geothermal controls in Strata Lot 47.¹¹

The Province stated that if a corporation that owns land in British Columbia dissolves, the land vests in the Province due to s. 4(1) of the *Escheat Act*, and advised that according to Easement KX152436, the Geothermal Building was located on the common property of the Strata. Strata Lot 47 vested in the Province upon dissolution of the Company; however, the geothermal building is a fixture, thus the Province concluded that it is owned by the Strata.¹²

By letter dated October 18, 2014, the Strata advised that:

The geothermal system, including geothermal controls, the separate geothermal building that houses the pumps, heat exchanger, electrical panel, and warning lights, as well as all pipes and supply lines (“the Geothermal System”), are all on common property, and are fixtures to the common property.

As the Geothermal System is *bona vacantia* it is our Client’s position that the Strata Corporation is now the *de facto* owner thereof.

This document serves as notice that our Client has taken ownership of the Geothermal System to the exclusion of the Province, 632402 BC Ltd. and Mr. Stewart.

As owners thereof, our Client will now deal with the management and maintenance of the Geothermal System and will supply services to its Owners. Our Client will also collect payment for services delivered and report to the proper authorities when, and in the manner, required.¹³

Considering the submissions from the Province, the Strata and other parties, by letter dated October 24, 2014, the Commission stated that it does not intend to make any orders regarding the service complaint issues at this time as there are more effective alternatives. Section 6(b) of Easement KX152436 provides the Strata the right to effect emergency repairs if the system is at imminent risk:

In the event of emergency, either party may make repairs necessary to ensure the continued supply of heat to both the Transferor's Lands and the Transferee's Lands and the Costs incurred in such event which were not approved by both parties and which are reasonable in amount and limited to repairs required only to ensure the continued supply of heat to the Transferor's Lands and/or the Transferee's Lands, must be paid promptly by the Transferee upon invoice.¹⁴

However, the Commission requested additional submissions as follows:

- evidence that would refute that the assets appear to be located on common property of the Strata and are therefore owned by the Strata members;
- information that would identify who is currently operating the utility system, in a safe and reliable manner, if anyone;
- evidence that if the Strata were appointed as the operator, whether the utility system can function effectively if the Strata does not have access to the assets located in Strata Lot 47; and

¹¹ Ibid., pp. 1 – 2.

¹² Ibid.

¹³ Exhibit C1-7.

¹⁴ Exhibit A-9, p. 2.

- information on whether any modifications could be made to the utility system located in the Geothermal Building to allow proper functioning of the entire utility system without having access to Strata Lot 47 and if so the nature of such.¹⁵

On November 4, 2014, the Strata submitted:

- The strata corporation will make necessary emergency repairs and maintain the utility system
- It is the strata corporation's position that it is the legal owner and in *bona fide* possession of the Geothermal System.
- The strata corporation has taken over and is currently operating the Geothermal System.
- The strata corporation currently has unhindered access to the Panel located in Lot 47. As long as the strata corporation has unhindered access to the Panel the system can be managed effectively.
- A discussion in relation to moving the Panel or modifications to the system is premature. It is unavoidable that Lot 47 will be sold to cover the charges against the property. The strata corporation will negotiate with the new owner of Lot 47 in this regard to find a solution to unhindered access, alternatively moving the panel and/or modifications to the system.¹⁶

On November 14, 2014, the Mortgagee submitted that “[w]ith the exception of the heat exchange pumps, pumps located in individual strata units, all of geothermal utility is located on strata common property. The strata unit heat exchange pumps belong to and are the responsibility of the strata unit owner.”¹⁷ Further, it stated, citing Easement KX21536 in support, that “[a]lthough the geothermal utility has always been physically located on common property, the right to operate the utility and charge the strata corporation and strata unit owners for the supply of geothermal heating and cooling has always rested with the owner of Strata Lot 47.”¹⁸ According to the Mortgagee “[e]ach purchaser of a strata unit in the resort was made aware of the arrangement for the operation and delivery of the geothermal utility service through the disclosure statement which the developer was required to provide to purchasers pursuant to the *Real Estate Development Marketing Act*.”¹⁹ However, it also states that no service agreements have been signed with unit purchasers.

Contrary to the Strata, Mortgagee is of the view that despite the dissolution of the developer's corporate entity, “the geothermal system cannot be said to have been abandoned, in that it continued to be operated and maintained by Mr. Stewart and to supply heating and cooling services to the strata unit owners. If the doctrine of *bona vacantia* is applicable, it is to the extent that the system has escheated to the Province pursuant to s. 344 of the *Business Corporations Act*.”²⁰

The Mortgagee also stated that it has a mortgage interest in Strata Lot 47, and that it “has had discussions with several potential purchasers and has received two offers from groups of comprised of strata unit owners seeking to purchase for the ultimate benefit of the strata corporation. In all of the discussions and negotiations with potential purchasers, the geothermal revenues were a significant consideration with respect to the purchase price and the ability of the potential purchaser to obtain financing.”²¹ It further stated that it “has recently received and accepted an offer for the purchase of Strata Lot 47. The offer is conditional upon a determination

¹⁵ Ibid.

¹⁶ Exhibit C1-8, p. 1.

¹⁷ 0800344 BC Ltd. Reply Submission, p. 2.

¹⁸ Ibid.

¹⁹ Reply Submission BC 0800344 BC Ltd. p. 2.

²⁰ Ibid., pp. 3 – 4

²¹ Ibid., p. 3.

of the purchaser's right to operate the geothermal utility as permitted by the terms of Easement KX152436 and upon the approval of the Utilities Commission"²².

In the circumstances, the Mortgagee submits that,
...the issue of ownership will need to be determined between the parties, either by negotiation or litigation.

In the meantime, it appears that the geothermal utility system is functioning and not in immediate danger of failure. Nonetheless, 0800344 B.C. Ltd. is prepared to commence repairs and maintenance on the system as a protective disbursement and intends to approval of the Utilities Commission for approval of a transfer to the prospective purchaser.²³

Commission determination

The Panel grants the stay requested by the Strata. The Application relates to a dissolved company that has no legal status before the Commission. The Panel will not grant a CPCN or rate approval to a dissolved company.

Regarding the ownership of the utility assets, the Commission Panel takes no position. In any event, the Panel notes that there is no application before it requiring such a determination. However, the Panel notes that there appears to be significant lack of agreement between the parties regarding the ownership and right of access to these assets. Further, there does not appear to be agreement among the parties regarding the location of the assets. The Mortgagee submits that all of the utility assets, with the exception of the heat exchange pumps, which are located in individual strata units, are located on common property of the strata. However, both the Strata and the Province suggest that some fixture is located on Strata Lot 47.

If upon resolution, either by negotiation or litigation, of these outstanding issues related to ownership a CPCN and revenue requirement application from the owner will be required before rates can be charged. However, if the Strata is the owner or operator of the facility, then under the Commission's Thermal Energy System Framework, the Strata would be exempt from part 3 of the *Utilities Commission Act* with the exception of sections 42, 43 and 44.²⁴

Regarding the service complaint, the Panel notes the Strata's intent to "deal with the management and maintenance of the Geothermal System and [to] supply services to its Owners [and] (...) collect payment for services delivered and report to the proper authorities when, and in the manner, required."²⁵ Further, section 6(b) of Easement KX152436 provides the Strata the right to effect emergency repairs if the system is at imminent risk:

In the event of emergency, either party may make repairs necessary to ensure the continued supply of heat to both the Transferor's Lands and the Transferee's Lands and the Costs incurred in such event which were not approved by both parties and which are reasonable in amount and limited to repairs required only to ensure the continued supply of heat to the Transferor's Lands and/or the Transferee's Lands, must be paid promptly by the Transferee upon invoice.²⁶

²² Ibid., p. 3.

²³ Ibid., pp. 4 – 5.

²⁴ British Columbia Utilities Commission Thermal Energy Systems Regulatory Framework Guidelines (2014), http://www.bcuc.com/Documents/Guidelines/2014/DOC_42213_G-127-14_BCUC-TES-Framework-Guidelines.pdf.

²⁵ Exhibit C1-7, p. 1.

²⁶ Exhibit A2-9, pp. 5 – 6.

In the Panel's view the Strata has sufficient authority to oversee the utility on an interim basis until such time as the ownership issue is resolved. The Panel supports this approach to resolving the service complaint and will take no further action on this issue at this time.