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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-60-15**

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**IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473**

and

**Superior Propane
Status as Public Utility in British Columbia for the Operation
of a Propane Distribution System at Seascapes Development Ltd.**

BEFORE: L. A. O'Hara, Panel Chair/Commissioner April 22, 2015

O R D E R

WHEREAS:

- A. On February 26, 2014 and March 25, 2014, the British Columbia Utilities Commission (Commission) received complaints from the Property Manager of a 100-unit strata development property called Seascapes, located at West Vancouver, British Columbia, and a resident of Seascapes, regarding propane services supplied by a division of Superior Plus LP doing business under the name Superior Propane (Superior);
- B. On July 10, 2014, following a review of information provided by Superior, the complainants and interested parties, the Commission issued Order G-91-14 which ordered, among other directives:
 - (i) The person, or the person's lessee, trustee, receiver or liquidator, who owns or operates Superior Propane at Seascapes Strata BCS 776 is operating as a public utility as defined by the *Utilities Commission Act*...
 - (iv) Superior Propane must make application [*sic*] to the Commission for its rates, including a proposal for an appropriate regulatory process to review this application, no later than 30 days from this Order...;
- C. On September 4, 2014, Superior filed an application with the Commission for reconsideration of Order G-91-14 pursuant to section 99 of the *Utilities Commission Act* (UCA) and a stay of proceedings pursuant to section 77 of the UCA (Reconsideration Application);
- D. On January 29, 2015, the Commission issued Order G-11-15 and ordered that the reconsideration be granted and that Order G-91-14 be set aside as a result of the inadvertent non-disclosure to the parties of a letter dated June 20, 2008 from the Ministry of Energy and Mines (Ministry);
- E. On January 30, 2015, the Chair of the Commission appointed a new panel to conduct the review of the status as public utility for the Superior Propane Distribution System at Seascapes Development Ltd (Exhibit A-1);

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- F. On February 12, 2015, the Commission proposed that certain evidence in the prior proceeding, listed in Appendix A, should also be entered into this proceeding without any further process, invited submission from the current and any new parties on three questions, and provided a regulatory timetable in Appendix B (Exhibit A-2);
- G. On February 24, 2015, Superior raised concerns arising from the intervener status of the Ministry in this proceeding and requested that a process be set to consider whether Item 1 of Appendix A – the Ministry’s June 20, 2008 letter to the Chair of the Commission – should be accepted as evidence in this proceeding (Exhibit B-2) and questioned the jurisdiction of the Commission to continue these proceedings in the absence of a new complaint being received;
- H. By letter dated March 2, 2015 the Panel sought submissions from the parties regarding Superior Propane’s concern over the intervener status of the Ministry in this proceeding. All parties subsequently provided comments to the Commission regarding this issue;
- I. By Order G-47-15, the Commission confirmed the intervener status of the Ministry and also requested that parties file submissions on two issues:
- Does the Commission retain jurisdiction to continue with this proceeding in the absence of a new complaint being made by Seascapes or another party to the Commission?
 - Should Item 1 of Appendix A to Exhibit A-2 (the Ministry’s June 20, 2008 letter to the Chair of the Commission) be accepted as evidence in this proceeding?
- J. The Commission has received submissions from Strata Plan BCS776 Seascapes, the Ministry, and Superior on the two questions sought and finds it necessary to make findings on its jurisdiction and inclusion of evidence.

NOW THEREFORE, for the reasons attached to this order, the British Columbia Utilities Commission determines as follows:

1. The Commission has the jurisdiction to continue this proceeding and act on the complaints previously submitted.
2. The Ministry Letter shall not form part of the evidence in this proceeding.
3. Items 2 through 9 of Appendix A to Exhibit A-2 will be admitted as evidence in this proceeding.
4. The regulatory review of the Application and evidence shall proceed according to the timetable set out in Appendix B to this order.

DATED at the City of Vancouver, in the Province of British Columbia, this 22nd April, 2015.

BY ORDER

Original signed by:

L. A. O’Hara
Panel Chair / Commissioner

Attachments

Orders/G-60-15_Superior_Reg Timetable and Reasons

Superior Propane
Status as Public Utility in British Columbia for the Operation
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REASONS FOR DECISION

By Order G-47-15, dated March 25, 2015, the Commission confirmed the intervener status of the Ministry of Energy and Mines (Ministry) and also requested that registered parties file submissions on two main issues:

1. Having set aside its previous order determining that Superior was a “public utility,” does the Commission retain jurisdiction to continue with this proceeding in the absence of a new complaint being made by Seascapes or another party to the Commission?
2. Should Item 1 of Appendix A to Exhibit A-2 (the Ministry’s June 20, 2008 letter to the Chair of the Commission) be accepted as evidence in this proceeding?

QUESTION 1

The first issue was raised initially by Superior Propane in its letter dated February 18, 2015 (Exhibit B-1). Superior Propane states, in part:

...in spite of the substantive finding of the Commission in Order G-11-15, the Commission is of the view that it may initiate a second proceeding beginning at some point prior to Order G-91-14 having been issued, essentially providing Seascapes with a second opportunity to have its complaint heard.

Reference is made in your letter to the fact that the complaints “initiated a proceeding which culminated in Order G-91-14...” Again, with respect, the Seascapes’ complaints did not in fact culminate in Order G-91-14, but rather in Order G-11-15. That decision, in our respectful submission, exhausted the Commission’s authority in respect of the Seascapes’ complaints, as well as the proceeding they initiated.

Superior Propane addressed this issue again in its letter dated February 24, 2015 (Exhibit B-2). It submits:

Superior maintains its concerns regarding the jurisdiction of the Commission to continue its review of the Seascapes complaints, whether in a new proceeding or at all. Superior’s participation going forward is undertaken under reserve of its rights to make further submissions in this regard at the appropriate time.

It is understood from the February 12, 2015 letter that the Commission has appointed Commissioner O’Hara to review “this proceeding” or the “prior proceedings.” Superior understands the prior proceedings to mean the proceeding in which Order G-91-14 was issued and which culminated in Order G-11-15. It is the position of Superior that the effect of Order G-11-15 was to set aside Order G-81-14 and the complaints on which it was based. As such, Superior is of the view that in order for the Commission to undertake a new proceeding involving Seascapes and Superior, new complaints must first be made. Certainly, this would resolve and make transparent the basis of any Commission proceeding.

Superior Propane elaborated on its submissions in its letter dated March 31, 2015 (Exhibit B-5). It states:

The basis of Order G-11-15 was the Commission's determination that there had been a breach of procedural fairness. Specifically, that a letter of the Deputy Minister of Energy, Mines and Petroleum Resources dated June 20, 2008 ("Ministry Letter") was considered by the Commission when making its decision in Order G-91-14 but was not disclosed to either party to the original proceeding.

In the circumstances, the question of any continuing jurisdiction of the Commission rests on the effect of Order G-11-15. Superior submits that Order G-11-15 precludes the Commission from continuing the complaint proceeding on the basis that "the complaints remain outstanding, [and thus] the Panel needs to set a process to determine the complaints".

The consequences of a breach of procedural fairness, such as that found by the Commission in its reasons for decision for Order G-11-15, should not be underestimated. In *Newfoundland Telephone Company Ltd. v. The Board of Commissioners of Public Utilities* the Supreme Court of Canada found that where there has been a denial of a right to a fair hearing, that denial cannot be cured by a subsequent decision of the tribunal, and that in such circumstances, the hearing, and any subsequent order resulting from it, is void.

As applied to this case, Superior submits that while Order G-91-14 is void due to the breach of procedural fairness, the original complaint proceeding leading to Order G-91-14 must also be void, for the same reason. In the result, there is no longer a "proceeding" to continue, as the first question of the Commission in Order G-47-15 assumes.

Superior Propane also submits:

The fact that the Commission set aside Order G-91-14 of its own volition rather than it being set aside on appeal or judicial review is immaterial....

Order G-11-15 is clear in that it neither confirmed Order G-91-14 nor varied it, but rather rescinded it, as contemplated in section 99, thereby rendering that order and the proceeding leading to it void.

If it is being suggested that setting aside Order G-91-14 of its "own volition" somehow gives the Commission a continuing jurisdiction that it would not have if that outcome had been the result of a statutory appeal, Superior respectfully disagrees. As set out above, it is the effect of the breach of procedural fairness that is the important consideration, and not the body who made that determination.

By letter dated April 7, 2015 (Exhibit C1-5) the Ministry submits that the Commission has the jurisdiction to continue to adjudicate the Seascapes complaints that were filed in 2014. The Ministry states:

While the Commission reconsidered its previous order under which it determined that Superior was a "public utility," this does not render the complaints void. The law is clear in this regard.

As Sarah Blake states in *Administrative Law in Canada* 5th ed. (Markham:LexisNexis, 2011), at page 229,

An order quashing a decision or order...does not preclude a tribunal from dealing with the matter...Even where all steps in a proceeding are quashed, the tribunal may continue the proceeding, although it must start at the beginning.

...We agree with Superior that there is no material difference between the Commission and a court rendering a decision of the commission void. In either case, the original complaints remain outstanding and the Commission can and should continue to consider and make a decision on the complaints.

Therefore, the Ministry sees no reason why the complainants should have to re-submit their complaints. If it is not already obvious, the complainants could at most be asked by the Commission to confirm that they wish to proceed with the original complaints.

By letter dated April 7, 2015 (Exhibit C2-3) Seascapes states:

Seascapes is perplexed by this question as we fail to see the relevance of whether there has been a complaint made by Seascapes or another party to the Commission. As we understand it, the Commission is responsible for the general supervision of public utilities. This has been clearly laid out in section 23 of the Utilities Commission Act (UCA) which states "The commission has general supervision of all public utilities" and this section goes on to state that the Commission may make orders about a variety of items which are then listed. Further, section 24 states "In its supervision of public utilities, the commission must make examinations and conduct inquiries necessary to keep itself informed about

- (a) the conduct of public utility business,
- (b) compliance by public utilities with this Act, regulations or any other law, and
- (c) any other matter in the commission's jurisdiction."

There is no reference to the need for an active complaint to be made prior to the commission undertaking to examine any issue covered under this Act nor, in our view, should there be. The Commission has by legislation been clearly charged with responsibility for the supervision of ALL public utilities and has the jurisdiction to make examinations and conduct inquiries to determine whether a public utility is in compliance with the Act. This would not preclude such examinations or inquiries from determining whether Superior Propane (Superior) is operating as a public utility regardless of whether there has been a complaint.

Seascapes notes that it filed its initial complaint in February of 2014. We consider this complaint to be as active today as what it was when originally filed. However, if the Commission determines it does not have jurisdiction in the absence of a current complaint, Seascapes would like to affirm that our original complaint can be considered to be current and active.

Superior Propane responded to the submissions of the Ministry and Seascapes by letter dated April 10, 2015 (Exhibit B-6). Superior Propane states:

Seascapes states that it is "perplexed" by Question 1. If Seascapes is confused, it is perhaps because of its apparent assumption, given the references to sections 23 and 24 of the UCA, that Superior is today engaged in the public utility business at Seascapes, which is of course not the

case. The question of the Commission's jurisdiction cannot be answered by simply referring to sections of the legislation which presumes such authority.

While the Supreme Court of Canada decision in *Newfoundland Telephone* focused on the practical consequences of a breach of procedural fairness, the Ministry prefers a somewhat more academic view. It bears noting that the Commission did not merely reconsider G-91-14, it specifically found that the proceeding leading to that order was not fair, and that in the result, the order should be set aside. Superior submits that the effect of Order G-11-15 was to vitiate not just the original order, but the proceeding leading to it.

In the circumstances of this case, there is accordingly no proceeding to continue, and to paraphrase Ms. Blake "...the tribunal...must start again at the beginning." Whether that may occur by a new complaint as suggested in Question 1 is a different question but it is clear that a new start is required.

Commission determination

The Panel finds that it has jurisdiction to continue this proceeding and act on the complaints submitted even though the Commission set aside its previous order for lack of procedural fairness.

Superior Propane relies upon *Newfoundland Telephone* for the principle that where there has been a denial of a right to a fair hearing, that denial cannot be cured by a subsequent decision of the tribunal, and that in such circumstances, the hearing, and any subsequent order resulting from it, is void. The Panel agrees with this statement in the context of what was being decided in that case but does not agree that the principle applies in the circumstances of this proceeding.

In *Newfoundland Telephone*, there were two separate approvals sought in the same proceeding. The first approval sought was for wage increases and the second approval was for pension plan increases. The board had approved the request for wage increases but refused the request for pension plan increases. The board's proceeding was challenged by the utility on the basis of the bias of one of the commissioners arising from multiple statements made by him both before and during the hearing. The Court of Appeal found that the board had complete jurisdiction to determine its own procedures and all questions of fact and law and that it declined to exercise its jurisdiction when it refused to remove the commissioner from the panel. Although the court concluded that there was a reasonable apprehension of bias, it held that the board's decision was merely voidable and that, given that the commissioner's mind was not closed to argument as shown by his decision on the approval for wage increases, the Board's order was valid.

The Supreme Court of Canada disagreed. It found that the statements made by the commissioner, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. The Supreme Court of Canada's comments regarding the denial of a fair proceeding not being cured by a subsequent decision of the tribunal must be read in the context of a response to the Court of Appeal's finding that the decision on wage increases by the commissioner was able to cure the defect arising from the bias that still tainted the decision on pension plan increases.

The Panel finds that it adopts the passage from Blake, in *Administrative Law In Canada*, as the correct statement of the law. An order quashing a decision does not preclude a tribunal from dealing with the matter, although it must start at the beginning.

The Panel also finds that it has started this proceeding at the beginning. The Commission's previous order has been set aside as a result of the lack of procedural fairness. A proceeding based on the complaints previously received has been commenced. A new commissioner has been appointed to conduct the proceeding. The Commission has sought and received agreement from the parties on the evidence (other than the Ministry's letter of June 20, 2008) from the prior proceeding that can be introduced into evidence in this proceeding. The Commission has allowed for new parties to intervene in the proceeding and will provide the parties with an opportunity to introduce further evidence to supplement the existing evidence in this proceeding. The Commission will allow the parties to make new submissions before a decision is made by the Panel.

QUESTION 2

Superior Propane submits the Ministry letter is dated June 20, 2008, which bears on the issue of its relevance, necessity and appropriateness. First, the original Seascapes complaints were made in February and March 2014. Second, the issue in the original proceeding, and on which Superior was asked to make submissions in the Commission's letters of April 25, 2014 and June 3, 2014, was whether, pursuant to the definitions in section 1 of the UCA, Superior was a public utility at Seascapes. Specifically, such analysis requires consideration of the definition of "petroleum products" in that section of the UCA, a definition which was amended in 2012. Superior submits that the Ministry's 2008 letter is not relevant to this proceeding because the subject of the letter is legislation that was not in place at the time of the original proceeding (Exhibit B-5).

Superior Propane also submits the Ministry letter itself makes clear, that while signed by the then Deputy Minister and purporting to set out the Ministry's position on the legislation of the day, the letter is in sum and substance a legal opinion and should be treated as such rather than evidence (Exhibit B-5).

The Ministry submits that the Ministry letter is not evidence in the usual sense (Exhibit C1-5):

It does not set out a set of facts that directly relate to the present matter. Certainly, it would not properly be the subject of information requests or cross examination, which are mechanisms used to test evidence in proceedings like the current one. Rather, as it notes in its second paragraph, it merely sets out the government's position of what the relevant provisions of the Utilities Commission Act meant at that time. In this regard, the assertions in the letter may be useful to the participants herein, including the Ministry, in making argument in the current proceeding, to the extent they remain relevant. That is something that can wait for argument.

Superior states that the letter is in substance a legal opinion. This is incorrect. As noted above, the letter states the Ministry's position on the meaning of the legislation in force at that time. Any legal opinion, if any, that the Ministry may have on this issue is privileged.

Seascapes submits (Exhibit C2-3):

...that it would be helpful to accept the aforementioned letter as evidence in this proceeding. Superior questions the "relevance, necessity and appropriateness of this letter pointing out that the "subject of the letter is legislation that was not in place at the time of the original proceeding." Seascapes submits that while this is true, the letter was written to clarify the position of the Ministry and goes to the intent of the legislation which was in place at the time it was written. As Seascapes understands it, the purpose of legislation amendment in 2012 was to clarify any ambiguity which may have existed in the previous legislation, not to re write the legislation itself.

Given that the letter addresses the intent of the original legislation and speaks to the area which was amended, we consider the 2008 Ministry letter to be relevant to these proceedings and recommend the Commission accept this evidence.

Superior Propane submits by way of reply (Exhibit B-6):

The 2008 letter was evidently written to respond to a specific question about the Commission's legal authority to regulate. The 7 page letter addresses in some detail the legislative provisions then in place, the "ordinary meaning" of those provisions in the context of the "purpose" and "object" of the legislation, includes Hansard excerpts and cites case law, including from the leading case on statutory interpretation from the Supreme Court of Canada. While, the letter set out the position of government, it did not "merely" do so, as counsel suggest, as the bulk of the 7 pages was given over to the legal arguments, opinion and rationale for that position. Argument is not evidence.

Whether for that reason or some other, counsel then suggest that if the letter is accepted as evidence, then it would be improper to allow it to be the subject of information requests or cross-examination. If that is the case, then whatever may be the character of the letter, it should clearly not be accepted as evidence, because doing so on those terms would, respectfully, again raise the spectre of a breach of procedural fairness.

Finally, counsel for the Ministry suggest that the "assertions" in the letter might be useful to the parties in this proceeding (assuming there is a proceeding) in making argument. Whether that may be so or not, Superior submits that the statement of position and legal arguments comprising the 2008 letter are not "relevant, necessary and appropriate" so as to warrant the letter being accepted as evidence by the Commission, as contemplated by subsection 40(1) of the *Administrative Tribunals Act*.

These comments apply with equal force to the substantive submission of Seascapes on Question 2. In the last paragraph of the Seascapes letter, the gratuitous comment is made that Superior "is doing whatever it can to draw out the process." By Superior's estimate, this is at least the fourth occasion on which Seascapes has alluded to delays, albeit the first in which it has made such a direct accusation concerning Superior. Throughout the original complaint and reconsideration processes to date, Superior has fully complied with all of the Commission's procedural directions. The Seascapes claim is spurious and without any foundation.

Commission determination

The Panel agrees with Superior Propane that the Ministry letter should not form part of the evidence in this proceeding. First, the letter addresses legislation that pre-dates the legislation that is to be applied in this proceeding to determine if Superior Propane is a "public utility" under the UCA. Further, the Ministry letter is better characterized as a submission rather than evidence. The content of the Ministry letter is not amenable to information requests as evidence is expected to be.

Further Process

By agreement, items 2 through 9 of Appendix A to Exhibit A-2 will be admitted as evidence in this proceeding. The interveners shall advise the Commission no later than April 24, 2015, if they require the opportunity to ask any information requests on this evidence.

Parties are requested to advise the Commission in advance, by April 24, 2015, if they intend to file any further evidence in this proceeding. Superior Propane is to file any additional evidence with the Commission no later than April 30, 2015. The interveners are to file any further evidence no later than May 6, 2015. Superior Propane is to file any rebuttal evidence to any additional evidence filed by the interveners no later than May 13, 2015. If any of the parties files additional evidence, then the Commission will set a timeline for information requests and responses. If neither Superior Propane nor the interveners file any additional evidence, the Panel will seek submissions from the parties regarding further process before setting a timeline for receipt of submissions.

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REGULATORY TIMETABLE

ACTION	DATE (2015)
Notification to the Commission for intent to file additional evidence and of a requirement for opportunity to ask information requests on items 2 through 9 of Appendix A to Exhibit A-2	Friday, April 24
Superior file additional evidence (if any)	Thursday, April 30
Intervenors file additional evidence (if any)	Wednesday, May 6
Superior file rebuttal evidence (if any)	Wednesday, May 13