

# YUKON UTILITIES BOARD

## Reasons for Decision

### Board Order 2008-1

#### A. BACKGROUND

On September 25, 2007, the Yukon Utilities Board (Board) issued Board Order 2007-07 respecting costs claimed in the application by Yukon Energy Corporation (YEC) for review of its 20-Year Resource Plan, 2006-2025 (Resource Plan Application) and the application by YEC for approval of the Power Purchase Agreement (PPA) between YEC and Minto Exploration Ltd. (PPA Application). Also on September 25, 2007, the Board issued Board Order 2007-08 respecting costs claimed in the application by YEC for an Energy Project Certificate and an Energy Operation Certificate regarding the proposed Carmacks-Stewart Transmission Project (CSTP Application). On October 2, 2007, the Board issued Board Order 2007-09, amending Board Order 2007-07 in certain limited respects.

All references in these reasons to Order 2007-07 are to Board Order 2007-07 as amended by Board Order 2007-09, unless otherwise distinguished. Board Orders 2007-07 and 2007-08 are referred to collectively in these reasons as “the Cost Orders”, unless otherwise distinguished.

By way of letter and attachments dated October 26, 2007, from the Public Interest Advocacy Centre (PIAC) on behalf of the Utilities Consumers’ Group (UCG) requested that the Board review and vary the Cost Orders in the following respects:

- arm’s-length consultant fees
- reduction of fees for apparent duplication
- reduction of fees related to case management
- Intervenor attendance fees
- UCG claims for reductions to the costs claimed by YEC

pursuant to Section 62 of the *Public Utilities Act* (Act) and according to seven specific enumerated requests for relief (Review Application).

#### B. THE REVIEW APPLICATION

Section 62 of the Act provides the Board with the discretion to determine whether it will review a decision or order as follows:

The Board **may** review, change or cancel any decision or order made by it, and may rehear any application or complaint before deciding it. [Emphasis added.]

On November 7, 1996, the Board issued guidelines for review and variance applications (R&V Applications) pursuant to Section 62 of the Act (R&V Guidelines). The R&V Guidelines set out the following grounds for review that the Board will consider in R&V Applications:

- 1) the Board has made an error in jurisdiction;
- 2) the Board has made an error in fact or law;
- 3) there has been a fundamental change in circumstances or facts since the decision or order;
- 4) a basic principle has not been raised in the original proceedings;
- 5) a new principle has arisen as a result of the decision or order; and
- 6) such other grounds as the Board determines require a review.<sup>1</sup>

According to the R&V Guidelines, a R&V Application is subject to an initial screening phase in which the applicant must establish a *prima facie* case with significant material implications in order to warrant review by the Board of the decision or order in question.<sup>2</sup>

In its Review Application, the UCG submits that the Cost Orders are reviewable on the following grounds:

1. the Board has made an error in jurisdiction;
2. the Board had made an error in fact or law;
3. a new principle has arisen as a result of the decision or order; and
4. the Board violated principles of natural justice.

UCG alleged five specific areas in which the Board erred in the Cost Orders according to these four criteria:

- arm's-length consultant fees
- reduction of fees for apparent duplication
- reduction of fees related to case management
- Intervenor attendance fees
- UCG claims for reductions to the costs claimed by YEC

The Board has considered the Review Application on the basis of these alleged errors according to the criteria alleged by the UCG.

In the course of considering the Review Application, the Board also discovered a clerical error with respect to YEC's Hearing Reserve Account (HRA) and has taken the present opportunity to correct that error.

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<sup>1</sup> R&V Guidelines, Section A, "Grounds for Review".

<sup>2</sup> R&V Guidelines, Section C, "Procedure".

## **C. DISCUSSION**

### **(1) Cost Awards in the Resource Plan, PPA and CSTP Applications**

Section 56 of the Act provides the Board with the discretion to award costs of its proceedings as follows:

The board may order to whom or by whom any costs incidental to any proceeding before the board are to be paid, and may set the costs to be paid.

Section 33 of the Board's Rules of Practice (Rules)<sup>3</sup> establishes Schedule 1 to the Rules as the Scale of Costs for cost awards in matters before the Board (Scale of Costs). The Scale of Costs recognizes the statutory discretion of the Board to award costs and sets out the matters that the Board will consider prior to exercising its statutory discretion.

On June 3, 2005, the Board also established an Intervenor Costs Award Policy (Costs Policy).

At the Pre-Hearing Conference for the Resource Plan, PPA and CSTP Applications on August 30, 2006 (PHC), the Board distributed a Hearing Cost Process document, which outlined the process in which the Board would seek comments from all parties on all cost claims in relation to the three Applications before it. In Board Order 2006-7 issued on September 2, 2006, following the PHC, among other things, the Board clarified its policy with respect to considering cost claims in relation to professional and attendance fees for Intervenor. Board Order 2006-7 has neither been varied by the Board nor set aside by the Court of Appeal. Order 2006-7 is reproduced in Appendix B to this Order.

### **(2) Alleged Errors in the Cost Orders**

The Scale of Costs makes very clear why the Board carefully assesses cost claims and does not approve them when they have not been adequately and clearly justified as reasonable and prudent in relation to the matters raised in the proceeding and in light of the scope and quality of the party's contribution to the proceeding:

The Board's objective in prescribing the scale of costs is to ensure that the costs of hearings are reasonable, relative to the matters involved. Costs are generally awarded against the utility and charged to the customers of the utility throughout the utility's rates. For this reason, the Board considers [that] the costs claimed by parties to a proceeding must be subject to stringent scrutiny.

The fees and disbursements in the scale of costs are not intended to prescribe the fees which any party may wish to pay when choosing to retain council [sic] or counsel consultants. The scale of costs represents what is, in the opinion of the Board, a fair and reasonable contribution by consumers to provide interested parties with adequate, competent and professional assistance in making an effective submission to the Board. In cases where a party can advance persuasive argument

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<sup>3</sup> Board Order 1995-2, dated November 10, 1995.

that the level of consumer contribution is inadequate given the complexity of the case, the Board may adjust the scale to meet unique circumstances.

This scale sets general principles and amounts, which are to apply to the awarding of costs. Costs are in the discretion of the Board and claims will be assessed particularly on the usefulness of the party's participation in testing the utility's case and thereby helping the Board discharge its basic mandate to fix just and reasonable rates for all customers.<sup>4</sup>

Having regard to the Review Application, Sections 56 and 62 of the Act, Section 33 of the Rules, the Scale of Costs, the Costs Policy, the Hearing Cost Process document provided at the Pre-Hearing Conference, and Order 2006-7, the Board has reached the following conclusions with respect to the specific grounds of review alleged by the UCG in relation to the relief requested in the Review Application (Requests for Relief). The Board has organized its discussion according to the five areas of alleged error, to which the Board has related the corresponding Requests for Relief, of which there are seven.

*a) Arm's-Length Consultant Costs*

The Board's cost award in respect of the hourly rate of Mr McMahon, the UCG's external consultant, is consistent with the Board's previous cost awards to Mr McMahon in previous proceedings before the Board, as referred to in Order 2006-7, and consistent with the Board's further guidelines respecting Intervenor costs, which are clarified in Order 2006-7. In exercising its discretion to consider and award costs, the Board found that it had not been satisfied by evidence in the UCG's cost claim that the value of Mr. McMahon's participation justified an award of more than \$35/hour, having regard to the issues in the proceedings, the nature of Mr. McMahon's expertise, and the nature and extent of his participation in the proceedings. Therefore, in the Board's view, the UCG has not established a *prima facie* case that the Board erred in jurisdiction, law or fact in relation to item (i) of the Requests for Relief.

*(b) Reduction of Fees for Apparent Duplication*

In the Cost Orders, the Board reduced the hours claimed by both Mr. McMahon and Mr. Rondeau because the Board found that the supporting information in the UCG's cost claims did not clearly establish that the two individuals had not duplicated each other's work. Here, the UCG contends that the Board violated principles of natural justice in failing to seek further information from the UCG if the Board was of the view that the material in the cost claim was insufficient to establish to the Board's satisfaction that Mr. McMahon and Mr. Rondeau did not duplicate each other's work. This ground of review relates to item (ii) and, in part, to item (iii) of the Requests for Relief. Under this ground, the UCG objects to the reduction of the awarded hours of both Mr. McMahon and Mr. Rondeau from those claimed. UCG seeks 100% of the hours claimed for both individuals. Item (iii) of the Requests for Relief also relates to the next ground of review (case management) and is discussed under the next subheading.

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<sup>4</sup> Scale of Costs, page 2.

The Board made its findings and determinations in the Cost Orders on the basis of the information submitted by the UCG in its cost claims. The UCG now claims that the Board should have considered the information presented in Schedule A of the Review Application, which the UCG considers to establish that, while it may have appeared superficially that Messrs. McMahon and Rondeau were duplicating work, each was, in fact, dealing with different aspects of the work.

Neither the Act, the Rules, the Scale of Costs nor the Costs Policy provide for an iterative process in which parties have an unlimited opportunity to justify their cost claims. The reverse is true: the Scale of Costs, the Costs Policy and Order 2006-7, in which the question of evidentiary burden on parties was drawn expressly to their attention for purposes of the three substantive Applications before the Board, all make it very clear to parties that they must, ***in the first instance***, provide sufficient supporting information to justify their cost claims as “reasonably and prudently incurred, and whether the party has been diligent in the efficient presentation of its position.”<sup>5</sup> The UCG not having done so, and the Board having found on the evidence before it at the time that the UCG had not justified the hours billed by Messrs. McMahon and Rondeau on the basis of apparent duplication, the Board does not consider that natural justice or fairness requires it to seek further information from the UCG. The Board is not obliged to “make the case” for any party seeking costs.

Therefore, the Board is not persuaded that the UCG has established a *prima facie* case on the grounds of an error of jurisdiction, law, fact or natural justice in relation to either items (ii) or (iii) of the Requests for Relief.

The Board encourages parties not to rely on generic time descriptions in the material supporting their costs claims, particularly where more than one consultant or lawyer (or both) is working on the same issue.

(c) *Reduction of Fees Related to Case Management*

In the Cost Orders, the Board found that Mr. Rondeau’s costs would be considered under Section 3 of the Scale of Costs as an Intervenor’s own costs, as distinguished from professional fees claimed on behalf of external consultants, such as Mr. McMahon, which are dealt with in Section 1 of the Scale of Costs. The Board was not persuaded by the “retainer letter” submitted on behalf of Mr. Rondeau as UCG President that he should reasonably be considered an outside consultant. As the Board also noted in the Cost Orders, there is no provision in Section 3 of the Scale of Costs for costs to an Intervenor itself for “case management hours”. In any event, the Board reasonably concluded that it was inappropriate for Mr. Rondeau to advance an alternative cost claim involving “case management hours” in the event that the Board did not accept the primary claim with fewer hours but a greater hourly rate.

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<sup>5</sup> Costs Policy, page 1. The Scale of Costs does provide for the Board to request further information from a party claiming certain disbursements.

Therefore, in the Board's view, the UCG has not established a *prima facie* case on the ground of an error of jurisdiction, law or fact in relation to item (iii) of the Requests for Relief.

(d) *Intervenor Attendance Fees*

In the Cost Orders, the Board found that Mr. Rondeau was not a professional consultant, but an Intervenor, and his costs would be considered under Section 3 of the Scale of Costs. Section 3 of the Scale of Costs clearly states that for costs awarded under that Section that "The Board will not approve an attendance allowance." The UCG has not provided any further basis in the Review Application for the Board to reconsider Mr. Rondeau's characterization for cost purposes.

Therefore, in the Board's view, the UCG has not established a *prima facie* case on the ground of an error of jurisdiction, law or fact in relation to item (iv) of the Requests for Relief.

(e) *UCG Claims for Reductions to the Costs Claimed by YEC*

This area of alleged error relates to items (v) to (vii) of the Request for Relief, which request that the Board disallow certain travel costs, miscellaneous costs and legal fees approved for YEC by the Board in the Cost Orders. Each of these items is dealt with separately below.

(i) *YEC Travel Costs*

In the Cost Orders, the Board approved travel costs claimed by YEC in relation to preparation of the Resources Plan, PPA and CSTP Applications. The Scale of Costs expressly provides for reasonable disbursements for economy (or less) airfare to and from a hearing when attendance is required. It does not expressly provide for travel costs in relation to preparation of an application by a utility subject to the Board's jurisdiction. The UCG submits that YEC's travel costs for application preparation should be disallowed because they are not expressly provided for in the Scale of Costs.

As Section 56 of the Act and the Scale of Costs itself make clear, costs are ultimately at the discretion of the Board, which may approve more or less than provided for in the Scale of Costs, depending on the circumstances. In an appropriate case, the Board has the discretion to approve costs related to the preparation and filing of a utility's application. The Board was satisfied that YEC had not made provision for these costs in its revenue requirement, which was last approved by the Board on March 30, 2006. In this sense, the pre-application travel costs are incremental to YEC's current revenue requirement and, having been prudently incurred by YEC, in the Board's view, ought to be recoverable by YEC from customers through its HRA. In Board Order 2007-07, the Board directed YEC to include in its next general rate application (GRA) a proposal for the allocation of the HRA balance to YEC's different customer rate classes.

Therefore, in the Board's view, the UCG has not established a *prima facie* case on the ground of an error of jurisdiction, law or fact in relation to item (v) of the Requests for Relief.

In the course of considering the Review Application, however, the Board noted that, while YEC was directed to include the costs approved in Order 2007-07 in its HRA, a similar direction was not made in Order 2007-08. The Board considered this to be a clerical error and, accordingly, varied Order 2007-08 by way of Board Order 2008-1.

(ii) *YEC Miscellaneous Costs*

There are two components embedded in item (vi) of the Requests for Relief, namely an objection to the Board's approval of YEC's photocopying costs and an objection to the Board's approval of certain miscellaneous costs claimed by YEC. In neither case did YEC provide supporting material to substantiate the costs claimed. UCG properly notes that the Board denied UCG's minor claims for miscellaneous expenses, which were also unsubstantiated by the UCG.<sup>6</sup>

Section 2 of the Scale of Costs addresses disbursements not expressly authorized by the Scale, as well as authorized disbursements that have not been properly substantiated:

(d) All disbursements not identified under 2(a), 2(b) or 2(c) above will be deemed to be normal overhead costs recovered in the fee for services prescribed in 1 above.

If the scale requires disbursement vouchers and either no vouchers or inadequate vouchers are submitted, the claimant will be notified by a deficiency letter issued by the Board. If the claimant fails to respond by the date specified in the deficiency letter, the claim will be regarded as withdrawn.

(A) *Photocopying Costs*

Section 2(c)(1) of the Scale of Costs provides for certain photocopying costs "at claimant's costs [or] \$.10/copy whichever is the lesser." YEC's photocopying costs for the three Applications approved in the Cost Orders total \$7,775.54.

In the Review Application, UCG characterized the photocopying costs approved for YEC by the Board as "internal photocopying costs," suggesting that they were costs internal to YEC itself. However, from a review of YEC's cost claims, it appears to the Board that these photocopying costs are, in fact, internal costs of YEC's legal counsel and consultants. It does not appear to the Board from the Review Application that the UCG was questioning the disbursements paid by YEC to its external professionals, including any of their photocopying costs.

In approving these photocopying costs in the Cost Orders, the Board determined that they were, like the other disbursements approved for YEC's external professionals, reasonable

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<sup>6</sup> In Order 2007-07, the Board deducted unsubstantiated UCG disbursements of \$32.25; in Order 2007-08, the Board deducted unsubstantiated UCG disbursements of \$71.13.

and necessarily incurred in the proceeding. Therefore, the Board is not persuaded that there is a real error in the Cost Orders in this respect. However, as these facts and determinations are not readily apparent from the Cost Orders, the Board considers it appropriate to review the Cost Orders in this respect in order to clarify them. Therefore, the Board will review the Cost Orders according to item (vi) of the Requests for Relief in respect of photocopying costs.

In the review proceeding, the Board will request that YEC clarify its cost claims with respect to photocopying costs, specifically to confirm that the costs are those of YEC's external professionals and not internal to YEC. The Board will also request that the UCG clarify whether it continues to object to the award of these costs in the Cost Orders and, if so, on what grounds.

*(B) Other Miscellaneous Costs*

With respect to the miscellaneous costs totalling \$7,054.62 awarded to YEC in the Cost Orders, on consideration of the Review Application and review of YEC's cost claims themselves, it now appears to the Board that either:

1. they are disbursements that are not identified under Sections 2(a), 2(b) or 2(c) of the Scale of Costs, in which case they would be deemed to be part of the normal overhead component of the professional fees awarded to YEC under Section 1 of the Scale of Costs; or
2. if they are within the disbursements identified in Sections 2(a)-(c) of the Scale of Costs, they were not properly substantiated by YEC. In addition, the Board did not issue a deficiency letter to YEC in respect of these costs as the Scale of Costs would require in such a case.

In either case, the Board is satisfied that the UCG has established a *prima facie* case for review of the Cost Orders on this basis. Therefore, the Board will review the Cost Orders according to item (vi) of the Requests for Relief in respect of YEC's miscellaneous costs.

*(iii) YEC Legal Fees*

In both Cost Orders, the Board responded as follows to the Intervenors' request that YEC's legal fees be capped at the \$225/hour prescribed by the Scale of Costs:

Intervenors have expressed that for this proceeding "legal counsel and consultants used by the Applicant should be subject to the maximum fee of \$225/hr as per Schedule 1."

Intervenors made no such request in previous cost claim processes. The Board finds the request to be appropriate and adjusted the YEC application to make no allowance for the extra unclaimable fees in present or future revenue requirement.

In Board Order 2007-07, YEC's legal fees were awarded only at \$225/hour. However, the same reduction was not made in Board Order 2007-08. The Board agrees that this was a clerical and mathematical error. Therefore, in Board Order 2008-1 varied Board Order 2007-08 in this respect by reducing YEC's fees by \$17,705.00.



#### **D. OTHER CLERICAL ERRORS**

In Board Order 2007-07, the Board ordered the costs approved in that Order to be dealt with as follows:

Yukon Energy Corporation shall pay the following amounts to parties identified and that such payments shall be forthcoming within 30 days of the issuance of this Order. All hearing costs shall be recorded in a Hearing Reserve Account. YEC shall include in its next GRA a proposal as to the appropriate dispensation of the Hearing Reserve Account and a proper allocation of the costs in the account to the different rate classes.

The Board intended to make the same direction in Board Order 2007-08, but this language was omitted from that Order, which the Board considered to be a clerical omission requiring correction following its review of the Review Application. Therefore, in Board Order 2008-1, the Board varied Board Order 2007-08 by substituting the text on page 6 of that Order reading “Yukon Energy Corporation shall pay the following amounts to parties identified:” with the following text:

Yukon Energy Corporation shall pay the following amounts to parties identified and that such payments shall be forthcoming within 30 days of the issuance of this Order. All hearing costs shall be recorded in a Hearing Reserve Account. YEC shall include in its next GRA a proposal as to the appropriate dispensation of the Hearing Reserve Account and a proper allocation of the costs in the account to the different rate classes.

#### **E. CONCLUSION**

For the foregoing reasons, the Board granted the Review Application in respect of the following:

- a. the fees awarded to YEC in Board Order 2007-08;
- b. photocopying costs awarded to YEC in the Cost Orders; and
- c. miscellaneous service and supply costs awarded to YEC in the Cost Orders.

In all other respects, the Review Application was denied.