

Appendix A to Board Order 2015-07 Reasons for Decision

1. Review application

On October 13, 2015, Yukon Energy Corporation (YEC) filed with the Yukon Utilities Board (Board) an Application for Review and Variance of Board Orders 2015-06 and 2015-01 (Review Application), pursuant to section 62 of the *Public Utilities Act* and section 31 of the Board's *Rules of Practice*. In its Review Application, YEC is requesting that the Board should convene a phase II review on the merits of its Review Application or proceed directly to approve the Energy Reconciliation Adjustment (ERA) as provided for in YEC's April 7, 2015 compliance filing application.

YEC alleges that the Board erred in law and jurisdiction in interpreting section 7 of Order-in-Council (OIC) 1995/90:

- in a manner which fails to ensure that the rate charged to the Yukon Electrical Company Limited (YECL) including the ERA is sufficient to enable YEC to recover its costs not recovered from other ratepayers; and
- by limiting the criteria under section 7 to YEC's "actual diesel costs", and excluding diesel-related costs made by way of payments to the Diesel Contingency Fund (DCF) as required by Board Orders 2015-01 and 2015-06.

In its Review Application, YEC made submissions on these grounds and in support of the relief requested. YEC argued that the critical point for this Review Application is that the YEC total fuel expense as approved by the Board for 2012 and subsequent fiscal years is always based on the expected or LTA diesel generation amounts as provided by YECSIM-derived estimates for actual grid load conditions.

Before making a decision on the first phase of the Review Application before it, the Board issued a process letter on October 19, 2015, affording interveners an opportunity to submit comments on the first phase of the Review Application by November 9, 2015 and YEC to reply by November 20, 2015. The Utilities Consumers' Group (UCG) and YECL submitted comments on the Review Application on November 9, 2015. YEC responded to these comments.

2. Comments and reply

In its submission, UCG contended that, in relation to the first step of the Board's two-step review test, it is not sufficient for YEC to allege error, fundamental change or a new principle. YEC must show that there is evidence on the record of the proceeding that compels such a conclusion in the absence of full hearing of the issues involved. UCG added that it was not enough to re-litigate the same arguments that were rejected in the order sought to be reviewed. UCG submitted, for the reasons set out in its submission, that YEC's Review Application did not satisfy the prima facie test set out in section 31 of the Board's *Rules of Practice*.

YECL submitted that the issues regarding the application and interpretation of OIC 1995/90 were thoroughly examined by all parties throughout the DCF-ERA proceeding. It pointed to the various components of the record of the proceeding. YECL contended that the Board definitively addressed OIC 1995/90 in Board Order 2015-01, and carefully took OIC 1995/90 into consideration in making its determinations in the DCF-ERA decisions. YECL added that the Review Application raises no new issues in respect of OIC 1995/90 that have not already been considered or addressed by the Board in the DCF-ERA decisions. YECL submitted that the Review Application does not demonstrate that the Board has committed errors in law or jurisdiction in its interpretation of OIC 1995/90 and, as a result, the Board should dismiss the Review Application.

On November 20, 2015, YEC replied to the comments of the interveners. It argued that the issues of law and jurisdiction raised in its Review Application relating the determinations in Board Orders 2015-06 and 2015-01 were not addressed in the Board Orders to date. It argued that the interveners had not addressed any of the points raised in its Review Application and reiterated that YEC cannot recover its actual costs under drought or low-water conditions. It submitted that the Board had recognized in Board Order 2015-01 that such an outcome would not be consistent with section 7 of OIC 1995/90.

3. Test for review and variance

Section 62 of the *Public Utilities Act* (Act) states:

62 The board may review, change, or cancel any decision or order made by it, and may re-hear any application or complaint before deciding it.

The Board has enacted *Rules of Practice* under section 10 of the Act which include the following provisions regarding applications for review:

31. (1) Pursuant to section 62 of the *Act*, the Board will consider the following as grounds for review:

- a) the Board has made an error in jurisdiction;
- b) the Board has made an error in fact or law;
- c) there has been a fundamental change in circumstances or facts since the decision or order;
- d) a basic principle has not been raised in the original proceedings;
- e) a new principle has arisen as a result of the decision nor order;
- f) such other grounds as the Board may determine require a review.

(2) The application for review should as a minimum set forth the following:

- a) the grounds upon which the application is based;
- b) a brief statement of facts supporting the alleged ground(s) for review;

- c) if new evidence is sought to be filed, a statement of the nature and purpose of the evidence;
- d) any further matter that the applicant believes will assist the Board in reaching a decision to grant a review.

(3) The Board will use a two-phase system for applications for review. Such a process enables certain applications to be dealt with expeditiously and economically. An application for review will be subject to an initial screening phase where the applicant must establish a prima facie case sufficient to warrant full consideration by the Board. In the first phase, the Board will assess an application having regard to some or all of the following questions:

- a) Should there be a review by the Board?
- b) If there is to be a review, should the Board hear new evidence and should the parties be given the opportunity to present evidence?
- c) If there is to be review, should it focus on the items from the application for review, a subset of those items or additional items?

(4) Upon receipt of an application for review, the Board will invite registered parties to comment on the application for review regarding the questions set out in subsection (3) for the first phase of the review and the applicant for review may respond to the comments received.

(5) In the case of an alleged error, in order to advance to the second phase of the process, the application must show that:

- a) the claim of error is substantiated on a prima facie basis; and
- b) the error has significant material implications.

(6) If there is a second phase, then the Board will hear full arguments on the merits of the application.

4. Preliminary matter

The Board notes that the Review Application relates to Board Orders 2015-01 and 2015-06. However, YEC did not seek a review and variance of Board Order 2015-01 after its issuance on February 6, 2015. Although the Board's *Rules of Practice* do not set out a timeline in which a review application is to be filed, the Board considers that YEC's Review Application of Board Order 2015-01 is out of time because of the issuance of the subsequent compliance decision. If YEC took issue with the Board's findings and directions in relation to the ERA in Board Order 2015-01 and Appendix A – Reasons for Decision, it should have acted in a timely manner. It is not reasonable to file a review application after the issuance of a subsequent Board Order, albeit that both decisions relate to the ERA. In Board Order 2015-01 Appendix A, the Board stated the following regarding the ERA:

The Board notes the concerns regarding the YECSIM model in the DCF portion of these reasons. The Board also notes that YECSIM is a planning model and does not lend “itself to retrospective verification”.

For the ERA, the OIC referred to is OIC 1995/90, Section 7. Section 7 states:

7. The Board must fix rates of Yukon Energy Corporation for the wholesale power customer in accordance with the following rate policy for Yukon:

(a) Yukon Energy Corporation shall sell electricity to The Yukon Electrical Company Limited at the same demand rate and the same energy rate throughout the Yukon and those rates must be sufficient to enable Yukon Energy Corporation to recover its costs that are not recovered from its other customers;

(b) The wholesale rate to The Yukon Electrical Company Limited shall include appropriate provisions to ensure that Yukon Energy Corporation will recover its costs for retail and major industrial power service with adoption of the rates for retail power customers and major industrial power customers as specified herein. [underlining added]

For the ERA, the Board interprets costs narrowly; to be clear, the costs are for actual diesel generation costs, not forecast or derived costs from the YECSIM model.

Based on the above interpretation of Section 7 of OIC 1995/90, the Board has the following concerns regarding the YECSIM model:

- (1) The Board is of the view that the results of the YECSIM model cannot be verified;
- (2) The YECSIM model is a planning tool and not a billing engine; and
- (3) Operational decisions of YEC can affect variables such as losses and in turn affect diesel generation requirements.

For the above reasons, the Board does not accept the ERA as proposed by YEC.

The Board is also of the view that the ERA does not need to be linked to the DCF to comply with O.I.C. 1995/90. The ERA, as determined by the Board, is a comparison of forecast and actual values and therefore the DCF calculation does not need to be completed before ERA amounts are determined.

In its compliance filing to this decision, YEC is to provide a revised ERA that is based on actual diesel costs. That is, if actual diesel costs are higher than the levels of diesel contained in YEC's latest approved forecast, then those costs which are attributable to YECL's wholesale purchases that are in excess of those in the last approved forecast will become billable to YECL. The converse is also true: a credit applies when diesel costs are lower and that reduction in cost relates to YECL wholesale loads being less than forecast. Further, in the event ERA costs are billable to YECL, YEC must provide those charges to YECL within 30 days of the close of the year to which those charges relate.

With its compliance filing, YEC is to update the Board regarding any ERA charges for the years 2012, 2013, and a forecast for 2014.

In summary, the Board finds that the ERA need not be tied to the DCF. ERA charges or credits are to be based on actual costs versus forecast costs. On a go-forward basis, ERA charges must be billed, or credited, within 30 days of the close of the year to which those charges relate.[footnotes omitted]¹

If YEC considered that the Board erred in law and jurisdiction in interpreting section 7 of OIC 1995/90, it should have filed a review application. It did not do so. The fact that the Board referred to its findings in Appendix A to Board Order 2015-01 to determine whether the compliance application met the directives set out in that decision does not mean that these findings are open to review. For these reasons, the Board denies YEC's Review Application in relation to Board Order 2015-01.

5. Views of the Board

In arriving at this decision on the screening phase of the Review Application regarding Board Order 2015-06, the Board has considered all arguments and submissions made by YEC and the comments of the UCG and YECL, the Board Order, the record of the compliance proceeding which resulted in Board Order 2015-06. References in this decision to specific arguments and submissions of YEC and comments of UCG and YECL, or specific parts of the Board Order or the record of the compliance proceeding, are intended to assist the reader in understanding the Board's reasoning relating to a particular matter and should not be taken as an indication that it did not consider all relevant portions of the arguments, submissions, comments, Board Order or record with respect to any matter.

In Appendix A to Board Order 2015-06, the Board stated regarding the ERA:

Contrary to the submissions of YEC, the Board was cognizant that the definition of "actual costs" for ERA purposes was different from that used for the DCF. On page 23 of Appendix A to Board Order 2015-01, the Board stated:

For the ERA, the Board interprets costs narrowly; to be clear, the costs are for actual diesel generation costs, not forecast or derived costs from the YECSIM model. [underlining added]

And

In its compliance filing to this decision, YEC is to provide a revised ERA that is based on actual diesel costs. That is, if actual diesel costs are higher than the levels of diesel contained in YEC's latest approved forecast, then those costs which are attributable to YECL's wholesale purchases that are

¹ Appendix A to Board Order 2015-01, pages 22 to 24

in excess of those in the last approved forecast will become billable to YECL. [underlining added]

The Board observes that in its June 3, 2015 submission (page 4) YEC stated:

Yukon Energy submits that its responses to the Board's clarifying questions in effect also address other concerns noted by AEY and the Board regarding the YECSIM model verifiability or use as a "billing engine". The actual diesel costs incurred by YEC on its income statement for LTA diesel as determined by YECSIM-derived tables approved by the Board are fully verifiable, and provide a clear basis for determination of ERA billing charges. [footnote omitted]

The Board considers that the above statement of YEC does not address the Board's concerns regarding the verifiability of YECSIM. YECL has previously noted that "... due to its proprietary nature, YECSIM cannot be independently tested or retrospectively verified ...". In addition, the concerns expressed that YECSIM has not been fully tested before the Board still stand. The Board finds that: (a) YEC has not shown that the YECSIM is verifiable for purposes of the ERA; and (b) the YECSIM has not been tested in this compliance proceeding.

Therefore, the Board is not persuaded that the definition of "actual costs" for ERA purposes as provided in Appendix A to Board Order 2015-01 should be changed. Further, as long as actual diesel generation costs are recovered, the criteria in section 7 of OIC 1995/90, are met. By utilizing the Board's definition of actual costs, the Board is of the view that the "perverse outcome" as described by YEC in Appendix B to its application, during high-water years, will not occur because YEC will recover its actual diesel generation costs. To address any "perverse outcome" which can occur during drought periods, that is, where rate payers could be charged twice (once through the DCF and a second time through the ERA), the Board directs YEC to amend Rate Schedule 42 to reflect that during drought periods, when diesel generation costs are recovered through the DCF, YEC cannot invoke the ERA.

As noted above, the Board determined in Board Order 2015-01 and reiterated in Board Order 2015-06 that for purposes of the ERA, the costs are for actual diesel generation costs, not forecast or derived costs from the YECSIM model. In Board Order 2015-06, the Board rejected YEC's interpretation that total fuel expenses are the expected or LTA diesel generation amounts as provided by YECSIM-derived estimates for actual grid load conditions. The Board determined that YEC did not comply with the direction of the Board in its compliance filing and, as a result, the Board did not approve the ERA as filed.

The Board is of the view that YEC is attempting to re-litigate the issues raised in the compliance proceeding. As noted by YEC, the material implications of the Board's determination in relation to actual diesel costs are documented in the compliance proceeding. The Board was cognizant of the implication of its decision regarding the

ERA and the recovery of actual diesel costs. The Board made its determination regarding the recovery of actual diesel costs for the reasons stated above.

The Board is not persuaded by YEC's arguments that the Board used two different definitions of actual costs and that the Board modified its prior determination of actual costs. The Board notes that in section 2.1 of Appendix A to Board Order 2015-06 it approved a funding formula for the DCF based on the YECSIM forecast and not costs. Further, the Board stated that it did not accept for purposes of the ERA deferral account that the YECSIM model was determinative for purposes of determining costs incurred by YEC because the YECSIM model is used to forecast costs and is not used to determine actual costs. The Board considers that YEC has not shown that the Board erred in its determination of diesel costs for ERA purposes.

As a result, the Board finds that YEC has not substantiated a *prima facie* case that the Board erred in its interpretation of section 7 of OIC 1995/90.

6. Conclusion

Based on the above, the Board did not need to consider the materiality threshold and dismisses YEC's Review Application.