

Appendix A to Board Order 2014-13 Reasons for Decision

A. Background

1. On August 8, 2014, the Yukon Utilities Board (Board) issued Board Order 2014-12 (Decision) awarding costs to the interveners and applicant for the Yukon Energy Corporation Application for an Energy Project Certificate and an Energy Operation Certificate regarding the Whitehorse Diesel to Natural Gas Conversion Project (Proceeding). In the Decision, the Board reduced and, in certain instances, disallowed costs claimed by parties in the proceeding including Utilities Consumers Group (UCG) and the Yukon Conservation Society and Leading Edge Projects Inc. (YCS-LE). The reasons for the reduction or disallowance of costs are set out in the Decision.

B. UCG Review and Variance Application

2. On August 14, 2014, the Board received an application from UCG requesting a review and variance of the Decision. UCG alleged that the Board made an error of fact and law in determining the amount of costs awarded to UCG for legal fees. It argued that the reduction of travel time from 26 hours to 12 hours and the reduction of 20% of the hours claimed for attendance and argument were wrong in fact and failed to achieve the goal set out in section 2.2 of Schedule 1, Scale of Costs, to the Board's *Rules of Practice* (Schedule 1).
3. With respect to the reduction in the hours claimed by legal counsel for attendance, argument and reply, UCG stated that its total claim for legal counsel including preparation was 60.25 hours, the hours for attendance, argument and reply were 36.30, and the 20% reduction should have been taken from the 36.30 hours. UCG argued that the total hours claimed by legal counsel were not excessive considering the reduction made to the hours claimed by the UCG consultant. It contended that the total time claimed by UCG legal counsel compares favourably to other legal counsel in the Proceeding and was in line with the goal set out in section 2.2 of Schedule 1.
4. UCG argued that a claim for travel time should only be determined to be excessive if it exceeds the actual time spent travelling or represents an itinerary that differs from that which reasonable legal counsel or other professional might travel in the representation of a participant. It contended that the "inference that the amount claimed by UCG counsel was excessive is not borne out by the facts"¹ set out in its costs claim and the review and variance application. It referred to the airline invoices submitted with the UCG costs claim which establish the actual travel time of 11 hours and 21 minutes for travel to Whitehorse and 15 hours and 27 minutes for travel from Whitehorse. It

¹ Application for review page 5

contended that, if it was the intention of the Board to cap travel time, the Board should have set a cap in Schedule 1.

5. UCG submitted that it met the first stage of a review and variance and that no further process was needed to vary the Decision in the second phase of the process.
6. No comments were received from other parties in response to the Board's letter seeking comments. However, as noted below, YCS-LE in its review and variance application stated its support for the UCG review and variance application.

C. YCS-LE Review and Variance Application

7. On August 29, 2014, the Board received an application from YCS-LE also requesting a review and variance of the Decision. The grounds on which the review and variance request is based are as follows. YCS-LE alleged that the Board made an error in fact and law in its determination of its costs award and that the Decision is not consistent with section 2.2 of Schedule 1.
8. YCS-LE is seeking a review and variance of the 35-percent reduction of the hours claimed for its legal counsel, the reduction of more than 58% in the hours claimed for Mr. Maissan and the hourly rate awarded, and the reduction of 68% in the hours claimed for Mr. Pinard and the hourly rate awarded. It contended that these reductions are contrary to natural justice as the reductions are inconsistent with previous Board Orders, inconsistent among the parties within the Decision, and do not meet the test of fair and reasonable tariff required in section 2.2 of Schedule 1.
9. YCS-LE argued that its legal counsel had not been previously involved in Board proceedings and as a result was not familiar with the Yukon's electrical infrastructure and the system operations. Although he had experience in other jurisdictions, he had to spend the time to become familiar with the YEC system. In addition, legal counsel read the application, assisted with the preparation of information requests, wrote information requests, conducted LNG research and prepared cross-examination. He only claimed 20 hours of attendance in comparison to counsel for UCG who claimed 29 hours. He only claimed 12 hours for argument and did not claim travel time. YCS-LE contends that the 35-percent reduction is equivalent to a 50-percent reduction in the preparation time as the attendance hours and those for argument cannot be refuted. It further argued that the treatment afforded to the fees claimed by legal counsel for the applicant was inconsistent with that afforded to its legal counsel. Also, its legal counsel should have only been reduced by 20% as was legal counsel for UCG.
10. Regarding costs claimed for Mr. Maissan, YCS-LE contends that Mr. Maissan, in addition to being a co-intervener, performed the duties of a technical consultant. The Board denied 62% of Mr. Maissan hours claimed and only awarded him

\$75.00 an hour. It stated that Mr. Maissan spent time studying the application, doing research, preparing information requests, assisting in the preparation of cross-examination and argument, as well as briefing legal counsel on the Yukon power system. It argued that, in comparison, the UCG consultant was only reduced by 30% and was awarded \$125.00 an hour, and Mr. Maissan should have been awarded the same fees and hours as the UCG consultant. It contended that the Board made an error in not allowing 5.75 hours to Mr. Maissan for argument. It made similar submissions with respect to the hours claimed by Mr. Pinard.

11. YCS-LE submitted that the costs awarded to it have the effect of sending “ a message to YCS-LE and all future potential interveners that interventions, particularly serious ones, are unwelcomed and will be strongly discouraged.”² It added that it was not fair or reasonable to arbitrarily reduce costs claims on a retrospective basis where there was no evidence of misfeasance or extravagance. YCS-LE stated that it supported the UCG review and variance application. It submitted that it met the first stage of the review and variance test and that the Decision should be varied as requested in the second phase of the process without the need for a further review process.

D. Comments on YCS-LE Review and Variance Application

12. On September 10, 2014, UCG filed comments regarding the YCS-LE review and variance application. It stated that the reasonableness of the costs incurred by counsel for an intervener must be considered in light of the of the challenge of attempting to alter the recommendations of the regulated utilities to be congruent with the positions advanced by their clients on key value-for-money or environmental concerns. Also, counsel for an intervener must tailor the intervention to within realistic regulatory cost expectations and, at the same time, do what has to be done to do a reasonable job. It added that the main thrust of representation must be a testing of the company’s evidence and use the cross-examination and the company’s own evidence to draw different conclusions.
13. UCG contended that while there was the possibility of eliciting opposing independent expert evidence, the costs and risk of obtaining expert evidence are almost always prohibitive. UCG was not arguing that costs claims of counsel for an intervener or the counsel team should not be scrutinized, but comparisons of work done by counsel should be carefully applied and butcher-block cost reductions avoided. Any reductions should allow the time required by reasonable counsel of equivalent experience or the counsel team.
14. As noted in the Decision, UCG took a different position in its comments on the YCS-LE costs claim and made submissions that that costs claim should be reduced substantially.

² Application for review page 6

E. Legal Framework for Review and Variance Applications

15. Section 62 of the *Public Utilities Act* addresses review and variance applications. It 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.

16. The Board has adopted section 31 of the Board's *Rules of Practice*, which states in part:

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 or order;
- f) such other grounds as the Board may determine require a review.

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(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?

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(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.

F. Decision on Review and Variance Applications

17. For purposes of these review and variance requests, the following provisions from Schedule 1 are of note :

2. Application of Scale of Costs and Purpose

2.1 This Scale of Costs applies to applicants and interveners participating in a proceeding commenced after April 1, 2012.

2.2 This Scale of Costs represents a fair and reasonable tariff to provide any participant with adequate, competent, and professional assistance in making an effective submission before the Board. In a case where a participant can advance persuasive argument that the scale is inadequate given the complexity of the case, the Board may award an amount greater than stated in this scale to address such unique circumstances.

2.3 The onus is on the eligible claimant to provide sufficient information for the Board to effectively assess its claim and must address the specifics of the proceeding.

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4.1 Professional fees

This scale of costs provides a sliding scale for professional fees; as the professional's experience increases, so will his or her value and wage. The Board emphasizes that the maximum allowable hourly rates will not be awarded as a matter of course. Rather, the Board will assess each claim upon its individual merits and will only approve the maximum fee when it has been demonstrated that such a charge is warranted by the work performed. **The Board allows professionals only half of their hourly rate for travel time.**

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6. Costs Award

6.1 In exercising its discretion to award costs, the Board may award costs, in accordance with the Scale of Costs, to a participant if the Board is of the opinion that:

- (a) the costs are reasonable, prudent, and directly and necessarily related to the proceeding, and
- (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

18. The Board notes the following statements from the Decision which apply to the costs awarded to the interveners and the applicant:

A. Pursuant to Section 56 of the *Public Utilities Act* (Act), the Yukon Utilities Board (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";

...

J. The Board heard oral argument and reply argument at the end of the evidentiary portion of the oral hearing;

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O. The Board has reviewed all the costs claims and comments of the participants;

P. Costs claimed by parties are subject to stringent scrutiny by the Board, as costs awarded are charged to the customers of the utility through the utility's rates; and

Q. After careful consideration, the Board has exercised its discretion, and has made the adjustments set out below based on the criteria set out in the Scale of Costs, Schedule 1 to the Board's Rules of Practice, as well as the principles relating to cost awards set out in previous Board Orders — in particular, Appendix A to Order 2007-06, and Board Orders 2005-16, 2005-17, 2007-07, 2007-08, 2007-09, 2009-6, 2009-11, 2010-09, 2011-08 and 2013-08.

F.1 Board Decision on the UCG Review and Variance Application

19. The Board has considered the submissions of UCG in this application. In determining whether the review and variance application has met the test for phase one set out in section 31 of the Board's *Rules of Practice*, the Board referred to its findings in the Decision.

20. With regard to preparation time of legal counsel, the Board is of the opinion that it is evident from the following statements in the Decision that the Board intended to reduce 20% from the hours claimed for attendance and argument and reply:

Further, the Board considers the hours claimed for attendance and argument and reply of 61.40 hours are not reasonable in light of the fact that the length of the hearing was three days, including oral argument and reply argument, and in light of the tasks performed by Mr. Janigan. As a result, the Board reduces these fees by 20% and awards 29.12 hours at \$350.00 an hour.

21. The reduction of 20% resulted in the awarding of 29.12 hours for attendance and argument and reply. The 25 hours claimed for preparation were awarded by the Board without reduction, but these hours were not included in the calculation of the costs award. Therefore, UCG has made a *prima facie* case that the Decision contains a calculation error and that this error has significant material implications. The total amount of legal fees should have included the 25 hours of preparation at \$350.00 an hour plus HST on this amount. As a result, the Board varies the costs award to UCG for legal fees in the amount of \$8,750.00, plus

\$1,137.50, for a total of \$9,887.50. The Board orders YEC to pay the amount of \$9,887.50 to UCG and directs YEC to amortize these hearing-related costs.

22. In relation to the travel time claimed, the Board considers that no new information was brought forward. The Board had before it the invoices and travel itinerary of legal counsel. In light of the fact that costs awards are charged to the customers of the utility through the utility's rates, the Board exercised its discretion as to whether the costs for travel time were reasonable. The Board considered section 4.1 of Schedule 1 which states that the Board will assess each claim upon its individual merits and that the Board allows professionals only half of their hourly rate for travel time. This section does not state that all travel time will be reimbursed. The Board reduced travel time to 12 hours from 26 hours because it considered the quantum of time excessive. The Board awarded legal fees for travel to compensate legal counsel for time spent travelling to and from the hearing, and this travel time was awarded at \$175.00 an hour (one-half the hourly rate) consistent with the treatment of other professionals. The Board further considers that section 2.2 of Schedule 1 is not a goal to be met in awarding costs. The Board makes its costs award by using the criteria in section 6 of Schedule 1 and in accordance with the scale set out in Schedule 1. The Board considers that UCG has not shown that the Board committed an error in reducing travel time for legal counsel.

F.2 Board Decision on YCS-LE Review and Variance application

23. The Board has considered the submissions of YCS-LE and the comments of UCG on this application. In determining whether the review and variance application has met the test for phase one set out in section 31 of the Board's *Rules of Practice*, the Board took note of the following parts of the Decision:

The Board notes that 119.4 hours in total were claimed for Mr. Austin. The Board considers that the number of hours is not reasonable in light of the nature of the Application, the issues raised by the intervener, the number of hours claimed by other counsel for similar tasks, and that no evidence was filed on behalf of the intervener. The Board reduces the total hours claimed for Mr. Austin by 35%, for a total number of hours of 77.61. The Board awards fees in the amount of \$27,163.50 plus GST of 5% in the amount of \$1,358.17. No fees were claimed for Ms. Lane.

The Board reviewed the costs claimed for Mr. Maissan, Ms. Middler, and Mr. Pinard in light of the Scale of Costs. Section 4.3 of the Scale of Costs states that an intervener who has not hired legal counsel or a consultant may claim fees for preparing its evidence and submissions. The Board considers that Section 4.3 of Scale of Costs only allows the payment of

costs to an intervener who is not represented by legal counsel or a consultant.

YCS/Maissan hired legal counsel to represent them in the proceeding. Ms. Middler is a staff member of YCS, Mr. Pinard is a member of YCS, and Mr. Maissan is a ratepayer.

Ms. Middler is an employee of YCS and she provided instructions to legal counsel during the proceeding. The Board agrees with UCG that it is not appropriate to allow Ms. Middler, as an YCS employee, to receive compensation. Ms. Middler is therefore not entitled to recovery of costs under Section 4.3 of the Scale of Costs and the Board denies all costs claimed for Ms. Middler. The Board grants Ms. Middler an honorarium of \$300.00 for attendance at the hearing.

Mr. Pinard and Mr. Maissan, as interveners, are also subject to Section 4.3 of the Scale of Costs. They did provide some technical support in preparation of YCS/Maissan's joint intervention. The extent of Mr. Pinard and Mr. Maissan's involvement as technical support is not clear to the Board based on the costs invoices received. However, Mr. Pinard and Mr. Maissan's hours claimed include hours for preparing IRs and reviewing information responses. Under Section 56 of the Act, the Board has discretion to consider to whom and by whom any costs incidental to a proceeding before the Board are to be paid, and the Board may set the costs to be paid.

The Board is prepared to exercise its discretion under Section 56 of the Act, as an exceptional circumstance, because the representations of YCS/Maissan in the proceeding on the risks and costs of the project, and the intervention on the alternatives available to YEC other than the LNG conversion, warrant an award for Mr. Pinard's and Mr. Maissan's preparation time. Accordingly, the Board will allow costs for Mr. Pinard and Mr. Maissan for hearing preparation time on a one-time basis.

Mr. Pinard spent 12 hours reviewing the Application, preparing IRs and reviewing information responses. Mr. Pinard's hourly rate is reduced from \$140.00 to \$75.00 per hour for preparation time, for a total of \$900.00. The additional 26 hours related to meetings or review of the hearing transcript are denied. The Board also grants Mr. Pinard an honorarium of \$300.00 for attendance at the hearing.

With respect to the hours of Mr. Maissan, the Board is of the view that the 114 hours claimed for the hearing is not reasonable. Mr. Maissan's hours for activities, including review of the Application, drafting IRs, and reviewing information responses are excessive. As a result, the Board reduces Mr. Maissan's preparation time to 41.25 hours, and the hourly rate is reduced from \$140.00 to \$75.00 per hour. The Board awards fees in the amount of \$3,093.75 plus GST of 5%, for a total of \$3,248.44. The Board also grants Mr. Maissan an honorarium of \$300.00 for attendance at the hearing.

The Board considers that exercising its discretion for YCS/Maissan does not affect the application of the Scale of Costs to interveners participating in future proceedings. Intervenors represented by legal counsel will be subject to the recovery of their costs in accordance with the Scale of Costs.

24. In deciding the YCS-LE costs award, the Board took into account the principles set out in the Decision and those set out in Schedule 1. The Board exercises its discretion on a case-by-case basis. Therefore, comparing costs awards in other applications to those in this case is not useful, as the Board has to consider in each case whether the costs claimed are reasonable, prudent, and directly and necessarily related to the proceeding, and whether the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board. Further, regarding the YCS-LE contention that the Decision is contrary to the rules of natural justice, YCS-LE had the opportunity to make its case regarding its costs claim. YCS-LE has not indicated which rules of natural justice it believes were contravened. The Board has explained in the Decision the reasons for the reductions in the YCS-LE costs claim. The Board further considers that section 2.2 of Schedule 1 is not a goal to be met in awarding costs. The Board awards costs using the criteria set out in section 6 of Schedule 1 and in accordance with the scale set out in Schedule 1.
25. More specifically, with respect to the reduction in the hours claimed by legal counsel, the Board notes that in the Decision, the Board considered the hours claimed by the YCS-LE legal counsel in light of the hours claimed by other counsel participating in the Proceeding. The Board considered that counsel for the City of Whitehorse claimed 20.25 for preparation, counsel for UCG claimed 25 hours for preparation, and counsel for YEC claimed 94 hours for preparation, while counsel for YCS-LE claimed 87.4 hours for preparation. In comparison to other intervener counsel, the hours claimed for preparation by YCS-LE counsel were over three times those of other interveners' counsel. The Board notes that counsel for an applicant assists the applicant in the preparation of its application in addition to the other tasks in the Proceeding. Further, the Board also assessed the legal costs claimed in light of the nature of the application and the issues raised by the intervener.

26. With respect to Mr. Maissan and Mr. Pinard, in the Decision, the Board did not accept Mr. Maissan and Mr. Pinard as consultants for the reasons given. However, the Board exercised its discretion and awarded costs because the representations of YCS-LE in the Proceeding on the risks and costs of the project and the intervention on the alternatives available to YEC other than the LNG conversion warrant an award for Mr. Pinard's and Mr. Maissan's preparation time. Accordingly, the Board allowed costs for Mr. Pinard and Mr. Maissan for preparation time on a one-time basis. The Board also set the rate for these interveners. No error was made regarding the hours awarded for Mr. Maissan as only preparation time was considered.
27. Based on the above, the Board is of the opinion that YCS-LE has not shown that the Board committed an error in the Decision. YCS-LE failed to establish a *prima facie* case sufficient to warrant full consideration by the Board on the merits of the review and variance application. Accordingly, the Board dismisses the YCS-LE review and variance application.