

## Appendix A to Board Order 2014-14 Reasons for Decision

### A. Background

1. On August 5, 2014, the Yukon Utilities Board (Board) issued Board Order 2014-11 (Decision) awarding costs to the interveners and applicant for the Yukon Electrical Company Limited application for approval of a forecast revenue requirement for the 2013, 2014 and 2015 test years (Proceeding). In the Decision, the Board reduced costs claimed by Utilities Consumers' Group (UCG) for its legal counsel. The reasons for the reduction are set out in the Decision as follows:

The Board has considered the legal fees claimed for Mr. Janigan and considers that the total number of hours claimed is not reasonable in light of the tasks performed by Mr. McMahon. The Board notes that 76.66 hours were claimed for preparation, attendance and argument and reply as well as 23.24 hours of travel time. The Board also took note of the hours claimed by other counsel in this proceeding to perform similar legal tasks and the effectiveness of their participation and UCG's participation. As a result, the Board reduces the legal fees claimed by 25% and travel time by 50%, and awards legal fees in the amount of \$20,123.25 plus travel time in the amount of 2,033.50 and HST of 13%, in the amount of \$2,880.37.<sup>1</sup>

### B. UCG Review and Variance Application

2. On August 25, 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 50% of the travel time from 23.24 to 12 hours and the reduction of 25% of the total hours claimed for legal counsel 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 preparation, attendance, and argument and reply, UCG argued that the total hours claimed by legal counsel was reasonable in light of the UCG intervention. It noted that UCG asked 72 interrogatories including follow-up information requests, its cross-examination resulted in 289 pages of transcript, claimed 25 hours for attendance, and its argument consisted of 70 pages. It contended that the only other intervener that the UCG costs claim could be compared with was the City of Whitehorse. It noted that the City of Whitehorse asked 35 interrogatories including follow-up information requests, its cross-examination resulted in 77 pages of transcript, it claimed 18.5 hours for attendance and filed

---

<sup>1</sup> Board Order 2014-11 page 6

22 pages of argument. It further argued that the UCG cross-examination was the result of additional testing and challenging of the evidence of Yukon Electrical Company Limited and that the Board had not stated otherwise in Board Order 2014-05 or Board Order 2014-11. UCG also compared the legal counsel and consultant time awarded to the City of Whitehorse and to UCG in Board Order 2013-08 related to the YEC 2012-13 GRA costs awards.

4. UCG added that the Board reduced legal counsel time because the UCG consultant did a lot of the work but the Board also reduced the consultant's time by 40%. As a result, UCG was allowed less recoverable time for both its legal counsel and its consultant than the City of Whitehorse. UCG submitted that the reduction of 25% of legal counsel time was not reasonable when compared to work done by other participants in the Proceeding. It contended that the 25% reduction did not achieve the goal set out in section 2.2 of Schedule 1.
5. UCG adopted in this review and variance application its submissions regarding the reduction of travel time made in its review and variance application of Board Order 2014-12. It argued that a claim for travel time should only be reduced if it exceeded 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 there were significant errors of fact associated with the assessment of travel time. It referred to the airline invoices submitted with the UCG costs claim which establish the actual travel time and attached to its review and variance application a copy of the itinerary. It contended that, if it was the intention of the Board to cap travel time, the Board should have set a cap in Schedule 1 and that the reduction in travel time did not achieve the goal set out in section 2.2 of Schedule 1.
6. It 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.
7. No comments were received from other parties regarding the UCG review and variance application in response to the Board's letter seeking comments.

#### **E. Legal Framework for Review and Variance Applications**

8. 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.

9. 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.

...

(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?

...

(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 Application**

10. For purposes of the UCG review and variance application, 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.

...

#### **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.**

...

#### **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 better understanding of the issues before the Board.

**11.** 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”;

...

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

L. 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

M. 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.

12. 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 which are set out above.
13. In deciding the UCG 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. The Board has explained in the Decision the reasons for the reductions in the UCG 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.
14. 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 UCG legal counsel in light of the hours claimed by other counsel participating in the Proceeding. The Board considered that legal counsel for the City of Whitehorse claimed a total of 80.45 hours, which included travel time, and was awarded 78.15. Although two legal counsel claimed costs, the Board considered that there was no duplication in the services. Also, most of the hours claimed for legal services by the City of Whitehorse were for counsel with five years of experience while legal counsel for UCG has over 20 years of experience. Counsel for UCG claimed a total of 76.66 hours for legal services plus 23.24 for travel and was awarded 57.49 hours for legal services and 11.62 hours of travel time for a total of 69.11 hours. Considering UCG's submission in the costs claim that its consultant took the lead in preparing UCG's information requests, the UCG motion for more complete information responses, UCG's cross-examination questions and book of cross-examination materials, and final argument and reply, and the submission by UCG that such an approach reduced the regulatory costs, the Board reduced the costs claimed by the UCG legal counsel. No such submissions were made in relation to the costs claimed by the City of Whitehorse for its legal counsel and consultant. Further, the total hours awarded to the consultant for the City of Whitehorse were 113.25, which included 13 hours in attendance and those to the UCG consultant were 103.8, which did not include any attendance hours.

15. 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 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 11.62 hours from 23.24 hours because it considered that the legal fees for travel compensated legal counsel for time spent travelling to and from the hearing. 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 section 6 of Schedule 1 and in accordance with the scale set out in Schedule 1.
16. Based on the above, the Board is of the opinion that UCG has not shown that the Board committed an error in the Decision. UCG 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.