

Appendix A to Board Order 2017-11

Reasons for Decision

A. Background

On August 24, 2017, the Yukon Utilities Board (Board) issued Board Order 2017-07 (Decision) awarding costs to the interveners and applicant for the Yukon Electrical Company Limited (AEY) General Rate Application (Proceeding). In the Decision, the Board reduced costs claimed by the Utilities Consumers Group (UCG) for its consultant, Pat McMahon and for Roger Rondeau. The reasons for the reduction are set out in the Decision as follows:

The Board notes that Mr. McMahon is presented as a consultant with extensive knowledge of and experience in utility proceedings in the Yukon. The Board further notes that in previous proceedings, UCG requested a rate of \$125.00 for Mr. McMahon and it is now claiming a rate of \$200.00 per hour; no explanation is provided for the increase in Mr. McMahon's hourly rate. An increase in a consultant's hourly rate appears to suggest that the consultant's experience has increased to such an extent to warrant a \$75.00 per hour increase in the consultant's hourly rate. Although the \$200.00 claimed is within the Scale of Costs, the Scale of Costs emphasizes that the maximum allowable hourly rate will not be awarded as a matter of course. The Board considers that the additional experience gained by Mr. McMahon in utility proceedings in the Yukon since UCG's last cost claim does not warrant the requested hourly rate. As a result, the Board has chosen to exercise its discretion and award an hourly rate of \$150.00 per hour.

Considering Mr. McMahon's expertise, the 118 hours claimed for preparation and 51 hours argument and reply are excessive considering that Mr. McMahon has been retained by UCG in previous AEY proceedings, and the issues are similar to those raised in past proceedings and are no more complex. Also, UCG did not file evidence or present witnesses. Further, although Mr. McMahon is not a lawyer, he is claiming for providing advice on the Board's process. As such advice is not within Mr. McMahon's area of expertise, the fees claimed are reduced. In addition, the Board considers that the numerous hours claimed for discussions and correspondence between Mr. McMahon and UCG is not reasonable. The Board also observed that the total number of hours claimed for Mr. McMahon is much higher than those of other consultants for other interveners. For these reasons, the Board exercises its discretion by reducing the hours claimed by 35 percent and awarding fees in the amount of \$16,477.50 plus HST of \$2,142.07.

With respect to UCG's claim for Mr. Rondeau, the only detail provided is that \$100.00 per hour is being claimed for attendance and participation in the hearing, including cross-examination of panels. The Board notes that

Mr. Rondeau is the president of UCG, as stated on the Consultant Services Agreement between Mr. McMahon and UCG, submitted as part of the cost claim. Sections 4.3 and 4.4 of the Scale of Costs state:

4.3 Fees and Honorarium of Unrepresented Intervener

An intervener who has not hired legal counsel or a consultant may claim for the number of hours spent in preparing its evidence and submissions in a proceeding. The hourly rate of an intervener shall not exceed \$100 per hour and will be determined by the Board when assessing the costs claim.

4.4 Attendance Honorarium

An unrepresented intervener may claim an honorarium of \$50 for each half day of attendance at an oral hearing.

The Board is of the view that Mr. Rondeau as president of UCG is acting as the unrepresented intervener. Since UCG was represented by a consultant, accordingly, Mr. Rondeau is only eligible for an attendance honorarium of \$300.00.¹

B. UCG’s Review and Variance Application

On September 1, 2017, 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 or law in determining the amount of costs awarded to UCG for fees claimed for its consultant, Mr. McMahon, and for Roger Rondeau. It argued that the reduction in the fees claimed by UCG 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). UCG relied on the record of the Proceeding, its materials previously filed in its costs application, and the facts and submissions contained in its review request.

With regard to the fees claimed for Mr. McMahon, UCG argued that the reduction in Mr. McMahon’s hourly fee from \$200.00 to \$150.00 and the reduction in the number of hours claimed were wrong in fact. UCG also argued that the Board failed to consider that the requested rate for Mr. McMahon was within Scale of Costs for a consultant with Mr. McMahon’s many years of experience in rate reviews. It also submitted that the Board granted the hourly rate of \$200.00 per hour to other consultants for other parties who had less experience. Respecting the number of hours claimed for Mr. McMahon, UCG stated that it had to rely more heavily on Mr. McMahon’s expertise and time because it did not have legal counsel. UCG further argued that legal counsel and the consultant for the City of Whitehorse performed the same tasks and duties as Mr. McMahon, and the City of Whitehorse was awarded its fees as claimed.

With respect to the fees claimed for Mr. Rondeau, UCG stated that it had included an explanation regarding his claim in its affidavit. UCG contended that Mr. Rondeau was its representative and performed all the same tasks as the

¹ Board Order 2017-07 PDF pages 4 and 5

lawyers for the City of Whitehorse and AEY. UCG stated that the Board's reasons for finding that the claim for Mr. Rondeau was unreasonable were not clear. It alleged that the Board erred in fact when it did not consider the cost savings achieved by UCG by utilizing in-house personnel when it denied the costs claimed for Mr. Rondeau.

UCG submitted that the Board should grant the review and variance application and vary its award by granting Mr. McMahon the hourly rate claimed of \$200.00 per hour and reduce his fees by 15% rather than 35% and award the fees claimed for Mr. Rondeau of \$1800.00.

No comments were received from other parties regarding the UCG review and variance application in response to the Board's letter of September 6, 2017 seeking comments on the request.

C. Legal Framework for Review and Variance Applications

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.

In the Board's *Rules of Practice*, section 31 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.

D. Decision on Review and Variance Application

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 a better understanding of the issues before the Board.

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 has reviewed all the costs claims and comments of the participants;

K. 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

L. 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, 2013-08 and 2014-11.

The Board has considered the submissions of UCG contained in its review and variance application. In determining whether the review and variance application has met the test for phase 1 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.

In determining the UCG costs award, the Board applied the Scale of Costs and the criteria set out in section 6 of Schedule 1. In accordance with Schedule 1, the Board exercises its discretion on a case-by-case basis and considers 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.

More specifically, with respect to the reduction in the hourly fee of Mr. McMahon, the Board acknowledged that the hourly fee claimed was within the Scale of Costs, but that in previous proceedings UCG had claimed per hourly rate of \$125.00 for Mr. McMahon. No explanation was submitted for the increase of \$75.00 per hour and such an increase appeared to suggest that Mr. McMahon’s experience had increased to such an extent to warrant such an additional amount. The Board reduced the hourly fee to \$150.00 because the additional

experience gained by Mr. McMahon in utility proceedings in the Yukon since UCG's last costs claim did not warrant the requested hourly rate.

The Board gave a number of reasons for finding that the 118 hours claimed for preparation and 51 hours for argument and reply were excessive, and for reducing Mr. McMahon's hours. The Board considered Mr. McMahon's expertise in relation to previous AEY proceedings, and that the issues were similar to those raised in previous proceedings and no more complex than those in previous proceedings. The Board also took into account that UCG did not file evidence or present witnesses. The Board also reduced the fees claimed because Mr. McMahon was not a lawyer and could not claim fees for giving advice on the Board's process. In addition, the Board considered that the number of hours claimed for discussions and correspondence between UCG and Mr. McMahon was unreasonable. The fact that UCG was not represented by legal counsel during the proceeding or that other parties were represented by legal counsel and a consultant is not a consideration in assessing the hours claimed for Mr. McMahon. This is because consultants and legal counsel have different roles in a proceeding and have different expertise.

In relation to the fees claimed for Mr. Rondeau, the Board was aware of the role undertaken by Mr. Rondeau in the oral hearing. However, Mr. Rondeau was only eligible for an attendance honorarium because Mr. Rondeau is the president of UCG. Furthermore, under sections 4.3 and 4.4 of the Scale of Costs, UCG was acting as an unrepresented intervener that had retained a consultant. The Board did not make a finding on the reasonableness of Mr. Rondeau's fees because Mr. Rondeau was only eligible for an attendance honorarium. Although UCG submitted that Mr. Rondeau performed all the same tasks necessary as the lawyers for the City of Whitehorse and AEY, he is not a lawyer and he was acting in his capacity as the president of UCG.

Based on the above, the Board is of the opinion that UCG has not shown that the Board committed an error in law or fact 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 denies the UCG review and variance application of Board Order 2017-07.