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file number: 84813-00071

Ms. Wendy Shanks, Acting Chair  
Yukon Utilities Board  
Box 31728  
Whitehorse, Yukon Y1A 6L3

Dear Ms. Shanks:

Re: UCG Request for Disclosure of Confidential Third Party Information

In its March 13<sup>th</sup> letter to the Board YEC has already provided detailed responses to the allegations raised in relation to each of the IRs set out in UCG's March 12<sup>th</sup> Notice of Motion. For the purposes of YEC's Reply YEC relies on those responses and provides the following additional submissions regarding UCG's request for disclosure of confidential third party information.

***YEC has no legal ability to release Minto and Macquarie Bank's confidential information***

As noted in our March 13, 2007 letter, the further information sought by UCG in relation to information requests UCG-YEC-2-13, UCG-YEC-2-24, UCG-YEC-3-20, UCG-YEC-3-21, and YUB-YEC-1-29 is Minto and Macquarie Bank's confidential information which does not belong to YEC. Accordingly, YEC has no legal ability to release the information sought by UCG.

YEC received access to the information sought under a confidentiality agreement, the terms of which do not permit YEC to voluntarily disclose information provided to YEC by Minto and Macquarie Bank pursuant to that agreement. Without YEC's agreement to keep the information in confidence, YEC's ability to complete a comprehensive due diligence of Minto would have been significantly impaired.

***PPA fully disclosed to all parties***

It is important to keep in mind that this is not an instance where YEC has sought to keep a portion of the Power Purchase Agreement which is subject to review confidential from the parties to and participants in the proceeding; YEC has made that entire agreement public.

Nor has YEC filed information which it has sought to keep confidential from the parties to and participants in the proceeding; the entire record available for review by the Board is also available for review and comment by the other parties to the proceeding, including UCG.

In this respect, these circumstances are distinct from those raised in much of the jurisprudence, and are different from those contemplated by Rule 11 of the Board's Rules of Practice, which Rule deals with information filed with the Board, and the ability of the Board to receive that information in confidence.

Further, this is not an instance in which YEC has refused to disclose the nature of the information which it seeks to keep confidential; YEC has provided extensive summaries of the nature of these documents and of the information contained therein, to the extent permitted by the confidentiality agreement signed by YEC.

In any event, once the summaries are carefully reviewed it is evident that there is no compelling need to force disclosure of commercially sensitive confidential documents in order for the Board to fully consider the issues of relevance in this proceeding.

***Appropriate balance between competing aspects of the public interest***

YEC's approach strikes an appropriate balance between the competing aspects of the public interest present here: the principle of openness of public proceedings and the need for confidentiality of commercially-sensitive information, particularly where a third party has a reasonable expectation of privacy in respect of that commercially-sensitive information.

That Minto and Macquarie reasonably expect their information to be kept private is evident from the fact that YEC was required to sign a confidentiality agreement before YEC was permitted access to that information. Further, under the terms of that agreement, YEC's access to and ability to use that information are limited in scope. There is no indication that, in providing YEC with temporary and limited access to its confidential information, Minto and Macquarie intended to give up or in any way diminish their reasonable expectations of privacy over that information. On the contrary, under the terms of the confidentiality agreement, YEC acknowledged the ongoing proprietary interests in the information and that the law provides no adequate remedy for the breach of the agreement through the disclosure of the information.

The Supreme Court of Canada has confirmed that such commercial and proprietary interests must be considered in determining whether information ought to be made public or should be kept confidential: see *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, where in those circumstances the issue was whether a confidentiality order should be granted as opposed to whether disclosure should be granted at all. In that context, the Court noted that "the

preservation of commercial and contractual relations” favoured such a confidentiality order (at para. 51).

Further, Courts have recognized that third party information is deserving of special protection over and above the protection of information belonging to the parties to the proceeding, particularly where the third party has a reasonable expectation of privacy in respect of that information: see *Sierra Club*.

***YEC needs to be able to enter commercial agreements which require commercially-sensitive information to be exchanged***

YEC accepts that openness and transparency of proceedings and public utility operations are, to a large extent, in the public interest. However, in order to serve the public interest in securing and supplying reliable energy for Yukon residents, YEC must also be able to enter into commercial arrangements with third parties that are not public utilities.

Ordering the disclosure of the information sought by UCG here would hamper YEC’s ability to negotiate such commercial arrangements in the future, as private third parties may be unwilling to take the risk that commercially-sensitive information that is exclusively theirs (and not YEC’s) will be publicly disclosed. Unduly limiting the number of companies which may be willing to do business with YEC would clearly not be in the public interest.

For these reasons, YEC submits that the request of UCG for the disclosure of the third party confidential information should be denied.

In the alternative, if the Board is inclined to order that the confidential information be disclosed, it should be disclosed only to the Board in confidence, and only after Minto and Macquarie Bank are notified so that they may have an opportunity to deal with and respond to such an order.

Yours truly,

**DAVIS & COMPANY LLP**

Per:



P. John Landry  
PJL/sas