



PUBLIC INTEREST ADVOCACY CENTRE
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March 21, 2007

Yukon Utilities Board
Box 31728
Whitehorse, Yukon
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Attention: Deana Lemke, Board Secretary

Re: YEC / Minto Power Purchase Agreement – Utilities Consumers' Group Motion

Dear Ms. Lemke:

The Utilities Consumers' Group is in receipt of two responses on its motion dated March 12, 2007. The UCG thanks Mr. Percival for his support and submits the following comments with respect to the response by Yukon Energy Corporation.

Confidentiality Issues

The current regulatory proceeding of the Board is one in which the Board is carrying out a public interest function. The UCG respectfully submits that what YEC has put on the public record is not enough to allow the Board to make a fully informed decision in the public interest.

YEC submits that it does not have the legal ability to release Minto and Macquarie Bank's confidential information because it received the information in accordance with the terms of a confidential agreement. The UCG notes that

- a) the confidentiality agreement has not been produced to the YUB, such that the precise terms of the agreement are not known to the Board or the other parties,
- b) YEC does not dispute the Board's authority to require disclosure of the confidential information; YEC only states that the confidentiality agreement ". . . does not permit YEC to **voluntarily** disclose information provided to YEC by Minto and Macquarie Bank. . ." (emphasis added).

- c) YEC implicitly admits the Board's authority to require production of the records when it argues in the alternative that "if the Board is inclined to order that the confidential information be disclosed, it should be disclosed only to the Board in confidence".

The UCG submits that YEC's undertaking to not voluntarily disclose confidential information has no impact on the Board's power to require production of relevant material; the apparently confidential nature of the material requires only a consideration of whether the material, once produced, will be subject to measures to protect the confidentiality by, for example, requiring the parties to enter into confidentiality agreements in order to review the documents.

YEC submits that the entire PPA and all the evidence it submitted to the Board in support of the PPA is available to all the parties, including summaries of the confidential documents, and that accordingly production of the requested documents is unnecessary.

The UCG submits that one of the critical issues for the Board to determine is whether the terms of the PPA adequately protect ratepayers from the risks inherent in undertaking construction and financing of a project like the CS Transmission Line when the economics of such a project rely entirely on the feasibility of a third party mining operation. The UCG respectfully submits that the Board cannot responsibly make any determination with respect to the adequacy of the PPA to address those risks without having reviewed first hand the information which establishes the nature and extent of those risks, namely the Mine Feasibility Study and the Macquarie Bank, MRI, PLF, and the SF agreements.

YEC refers to the Supreme Court of Canada decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 in support of its request that the Board balance the competing aspects of the public interest.

With respect, the only issue in that decision was whether confidential information should be subject to confidentiality terms when submitted to the court, or whether the public interest in freedom of expression required any such information placed on the record to become public. In that decision the party in possession of the confidential documents from a third party sought to add them to the record in confidence to support their case. The party opposing the confidential filing of the records took the position, assuming the court refused to allow the documents to be filed under a confidentiality order and that accordingly the party in possession of the records would not file them, that the affidavit evidence which relied on the underlying confidential documents should be afforded very little weight.¹ Accordingly the decision does not speak to the power of an adjudicative body to require production of confidential material, it only speaks to the test to be applied when a party seeks to file material subject to terms of confidentiality. The Court decided that the request for a confidentiality order restricting access to the information to the court and the parties was appropriate, making the following observations:

As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to

¹ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paragraph 9.

the public interest in the search for truth in this case. **However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions.** Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.² (Emphasis added)

Again it must be understood that no party was seeking an order compelling production; the only issue was whether, if filed, a confidentiality order would be provided.

Similar to the situation in the *Sierra* decision, the UCG submits that the filing of the third party documents from Minto, Macquarie Bank, MRI, PLF and SF in this case will be of great assistance in probing the truth of the YEC risk assessment process, and would in turn assist the Board in reaching accurate factual conclusions. In the present case UCG wants the material to be filed by YEC, and in accordance with its notice of motion is prepared to enter in a confidentiality agreement if the Board determines that an order maintaining the confidentiality of the documents is warranted. With respect to YEC's alternative submission that the materials be submitted only to the Board, UCG submits that with properly executed non-disclosure agreements restricting access only to the parties that sign, YEC's proposed restriction is unwarranted, particularly since it would create a situation where the Board would be deciding the issues based on information unavailable to all the parties, contrary to the rules of natural justice.

Pursuant to the foregoing, the UCG submits the following reply comments with respect to its specific information requests:

UCG-YEC-2-13

In this information request, UCG requested a copy of the Mine Feasibility Study that was released in July 2006. In response, YEC simply stated that "the full Mine Feasibility Study is confidential and not available for release". At the time of its response, YEC made no mention of why the Mine Feasibility Study should be regarded as confidential. YEC has now indicated in its response to UCG's motion that the Mine Feasibility Study contains "commercially sensitive information" without going into any detail as to what businesses the information is sensitive.

The UCG understands that the requested Mine Feasibility Study was prepared by a third party but it appears to be a crucial component of the information used by YEC to make decisions to date on the proposed power purchase agreement. While it is understandable that YEC would state that this study proves that the mine has a reasonable life expectancy upon which to base a long-term power purchase agreement, the UCG submits that the Board and interested parties should be allowed to review the details of the study and make arguments regarding its specific determinations.

² *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paragraph 78.

As was stated in UCG's motion, anyone who directly or indirectly contracts with YEC should be understood to accept the risk that information pertaining to their direct or indirect relationships with the utility is subject to examination on the public record. YEC is a publicly-owned utility that is subject to regulation by a statutory regulator. That the PPA specifically acknowledges in various sections that the agreement between YEC and Minto is subject to the approval of the YUB is evidence that Minto was specifically aware of the special obligations that may arise when negotiating with a regulated utility. The UCG submits that while the Mine Feasibility Study may be the property of Minto Explorations and the Macquarie Bank, as one of the cornerstones for YEC's proposed operations and so should be put on the record of this proceeding.

If Minto and Macquarie have concerns about the information being released to the public, then the UCG submits that this can be addressed by using the non-disclosure agreement and conducting any related oral examination in camera.

The UCG would like to note that any new information submitted to the record of this proceeding should be open to information requests and/or witness cross-examination to ensure that the Board and interested parties fully understand what has been submitted.

UCG-YEC-2-24

In this information request, UCG requested all information and documents that set out:

- (i) the amount of the Macquarie Financing "generally" related security obligation that ranks ahead of the YEC Security;
- (ii) the amount of the MRI security obligation that ranks ahead of the YEC Security with respect to the Copper Concentrate;
- (iii) the amount of the YEC Security obligation;
- (iv) the value of the assets to which the Macquarie Financing "generally" related security obligation and the YEC Security attach; and
- (v) the value of the Copper Concentrate assets to which the Macquarie Financing "generally" related security obligation, MRI security obligation, and the YEC Security.

In response, YEC simply stated "due to confidentiality agreements, copies of the Macquarie Bank and MRI documents cannot be released". It is assumed that YEC is now claiming that, similar to the Mine Feasibility Study, the requested documentation contains "commercially sensitive information" without going into any detail as to what businesses the information is sensitive.

The UCG submits that any business dealing with a publicly-owned and regulated utility will know that sooner or later, projects and their business cases will be scrutinized in detail in a public forum before the utility will be allowed to recover any related expenses in rates. It would be irresponsible for any utility to allow third party business partners to think any other way.

The UCG submits that the Board is entitled to and should review any document upon which YEC relied on in drafting the proposed PPA.

The UCG submits that YEC has not provided any reasons why the requested documents should not be provided to the Board and interested parties in this proceeding. The UCG

submits that the requested information as well as the referenced confidentiality agreements entered into by YEC should be submitted to the record of this proceeding.

UCG-YEC-3-20 and UCG-YEC-3-21

In these information requests, UCG requested copies of the PLF Agreement and the SF Agreement (both dated October 24, 2006) that YEC references in the Direct Agreement to which YEC is a party. In response, YEC stated that the agreements were “subject to a confidentiality agreement and cannot be released”.

Again, YEC has not provided any details of the confidentiality agreement that it relies on to avoid putting the agreements on the record of this proceeding.

The UCG submits that YEC has not provided any reason why the requested agreements cannot be put on the record of this proceeding.

Insufficient Responses to Information Requests

UCG-YEC-2-4

In its response, YEC states that the requested information has nothing to do with the issues that are relevant to the PPA application.

The UCG submits that anything associated with the costs of the project to which the proposed power purchase agreement applies is relevant to the current proceeding, as information concerning costs quantifies the risks which the PPA is purportedly design to mitigate.

As noted in the UCG’s Notice of Motion, the Auditor General raised concerns in its review of YEC’s last major capital project (Mayo-Dawson transmission line) regarding the adequacy of YEC’s internal processes including the qualification process for bidders.

45. Construction contract. *In October 2000, the YEC applied a set of criteria it developed to pre-qualify six firms to bid for the construction of the project. We found that the criteria were not specifically tailored to the requirements of a design-build project. Furthermore, we could not determine whether the values assigned to certain criteria were reasonable or appropriate and whether the Corporation had obtained sufficient information on the firms to make an informed decision.*

50. *In summary, we identified significant deficiencies in contracting for construction and services. The Corporation had no established contracting policy and no clear contracting procedures to provide for transparency and competition and ensure best value. It awarded many contracts on a non-competitive basis. We found that the contract for project engineering services was not properly planned for and authorized. In addition, the contracts for the project manager and project engineering services did not include adequate safeguards to protect the interests of the Corporation³.*

³ Office of the Auditor General of Canada, February 2005 Report on Mayo-Dawson City Transmission System Project.

While YEC indicated in the Auditor General's report that new contracting policies and guidelines had been developed and approved by its board of directors. However, these policies and guidelines have not been tested in a major project environment.

The UCG submits that the Board and intervenors need the requested details of the prequalification process in order to ensure that adequate procedures were followed and that ratepayers won't be left watching more court proceedings addressing contracting issues.

UCG-YEC-2-6 and UCG-YEC-2-10

In its response, YEC indicates that every bit of the analysis it has completed related to cost allocation and rate design for the proposed rates has been provided. If that truly is the case, then the UCG submits that YEC has not done an adequate and reasonable job to ensure that the proposed rates adhere to existing rate setting policies in the Yukon.

The UCG can only assume that YEC has not used any spreadsheet analysis that incorporates the assumptions contained in the last cost of service analysis (1996/97) performed by YEC. Without treating the Yukon as a single rate zone and using a comprehensive cost allocation and rate design approach, YEC has not ensured that the resulting rates will follow the guidelines established in OIC 1995/90.

UCG-YEC-2-28

In its response to the motion, YEC repeats its original response to the information request that it does not currently have in its possession the requested information on Minto's affiliates.

The UCG questions whether any business entering agreements involving significant amounts of money and risk would not take the time to do due diligence research on the other contracting company, including its affiliates. Without a good understanding of the governance of all parties involved in this project, the UCG submits that the Board will not be able to make fully informed decisions on the costs and risks of the project.

Affiliate transactions and cost transfers have become a significant issue in most jurisdictions since regulators want assurances that related companies are charging competitive rates for exchanged services. The UCG wants to ensure that affiliates of Minto Explorations are not being significantly and unjustly enriched at the expense of YEC's ratepayers. The UCG submits that full disclosure is needed in order for the Board to fully understand the implications of the YEC / Minto relationship.

The UCG submits that without knowing the connected parties to the proposed power purchase agreement, it is not possible to ensure that YEC's contracting policies are effective and it is difficult to adequately test the risk involved in the proposed transactions.

UCG-YEC-3-1

In its response to the motion, YEC indicates that it does not understand the issue being raised by the motion related to this information request.

YEC's original response to this information requests states (in its entirety): "The written approval received by Minto from Macquarie Bank is outlined in the terms and conditions of the Direct Agreement including section 2.2".

The UCG's reading of this response is that the components of the written approval received by Minto from Macquarie Bank is sprinkled throughout the entire Direct Agreement. The UCG submits that it was looking for a copy of the letter or memo from Macquarie Bank that specifically provides the approval in question.

It appears from YEC's response to the motion that Macquarie Bank never actually provided Minto with any written approval. Instead, parties are left with a Direct Agreement that is to be considered the required written approval.

UCG-YEC-3-2

In its information request, the UCG was looking for confirmation from YEC that despite the interpretations that could be made of the wording in the Direct Agreement, an Order by the Yukon Utilities Board or the Yukon government could overrule any condition of the Direct Agreement.

The UCG understands YEC's response to the motion as confirming this understanding.

UCG-YEC-3-6

The UCG motion on this question sought to understand what YEC meant when it stated that it "cannot confirm" that money that would normally have gone to YEC to pay for Minto's power bill, separate from any payment for assets, could be redirected to the Finance parties.

The UCG does not understand what YEC has implied by its response.

UCG-YEC-3-10, UCG-YEC-3-11 and UCG-YEC-3-14

YEC's response to the motion indicates that there will be costs associated with the duplication of invoices and statements, notices to lenders and notification services. However, YEC has not provided assurance that the additional costs will be directly assigned to the party responsible for them.

The UCG maintains its position that this assurance and confirmation is still required to ensure that other ratepayers are not held responsible for any directly-assignable costs.

UCG-YEC-3-17

YEC's response to the motion confirms that the referenced clause effectively puts YEC, Yukon electricity ratepayers and Yukon taxpayers at risk of having to pay Minto's liabilities should Minto be unable to pay.

Should you have any questions on this submission, please do not hesitate to contact me.

Yours very truly,



Michael Buonaguro
Counsel for UCG
CC: all parties