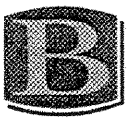

B R O W N L E E
L L P
Barristers & Solicitors

November 19, 2008

Yukon Utilities Board
Box 31728
Whitehorse, Yukon, Canada
Y1A 6L3

Attention: Ms. Wendy Shanks, Chair

Dear Ms. Shanks:

Re: CW Response to YECL Letter to YUB dated November 13, 2008

Yukon Electrical filed a letter with the Yukon Utilities Board ("YUB") dated November 13, 2008 stating, among other things, that the City of Whitehorse ("CW" or "the City") inappropriately introduced evidence in its Reply argument and asserted the position that this "new evidence" cannot appropriately be taken into account by the Board in its decision making process. By memorandum dated November 14, 2008 YUB invited the City to comment on the YECL submission.

CW has examined this letter and finds that the allegations regarding CW's reply are without foundation. CW submits that it acted responsibly and with procedural correctness in referring the Board to the most current authorities on issues that had been raised before the Board. As an answer to all of the issues concerning CW raised by YECL, CW submits that they arise from YECL's apparently fundamentally flawed understanding of the difference between the introduction of new evidence, which CW agrees would be inappropriate in argument, and the referral to authority, which is perfectly proper.

In Canada, a tribunal must decide issues of fact on the basis of the evidence that has been put before it in the particular hearing. In reaching a conclusion about whether or not or how to apply a particular principle to a given set of facts, or whether a particular approach to a certain set of facts is the correct or desired approach in applying the legal principles that guide the particular tribunal, the tribunal is not forced to decide all such issues of principle in isolation. Rather it is entitled to consider what other tribunals or courts have done when faced with similar issues or a similar set of facts. Thus a tribunal is free to consider and parties are free to direct the tribunal to the tribunal's own past decisions as well decisions made by other tribunals or courts. In most cases, the decisions made by those other bodies may be of persuasive force only, that is, they are not binding on the tribunal[1]. In those circumstances, the tribunal is free to consider whether the authority it has been referred to is sufficiently similar on its facts to the one before it, and whether the explanation of the

[1] A decision by the Supreme Court of Canada or a superior court within the tribunal's own provincial or territorial jurisdiction may be binding on the tribunal, if the underlying facts are sufficiently similar.

rationale for the conclusion on law or principle contained within the decision is sufficiently persuasive, so as to guide the tribunal in its own decision making. The matter is not one of evidence, but of argument and of the Tribunal's own judgment.

CW notes that YECL took issue with three matters raised in CW's reply. CW will address these matters separately.

Trend Lines and AUC Decision 2007-094

YECL states that,

> "the City discusses the Alberta Utilities Commission's use of trend lines when no such evidence is on the record of these proceedings."

CW disagrees and wishes to make three points on this matter.

First, a dialogue regarding trend lines is clearly on the record in this proceeding,[2] and YECL's comments in argument[3] on this dialogue prompted CW's response in reply. The YECL Argument implied that the extension of trend lines is not a standard practice. It is open to CW to refute such an implication by reference to authority. Accordingly CW referred to AUC Decision 2007-094 to provide one example of a Western Canadian utilities board approving usage forecasts based on the use of trend lines. It is for the Board to consider whether or not it is important to its decision to know that such an approach has been approved by another tribunal

Second, as referenced above, YECL states that, "the City discusses" the AUC use of trend lines in its argument. This implies that CW debated the merits of the AUC use of trend lines in its reply argument. CW submits that it did no such thing. CW merely pointed to the existence of this AUC-approved forecasting method as an instance where the method of extending trend lines is currently in practice. CW did not discuss the advantages or disadvantages of the trend line forecasting method for that particular utility.

Third, and as discussed above, CW takes issue with YECL's description of CW's reference to Decision 2007-094 as "new evidence." A decision of another Utilities Board or Tribunal is not "evidence"; it is an "authority." The Board is free to consider decisions of other tribunals or Boards including the stated rationale contained within them and to draw its own conclusions as to the applicability of that rationale to the facts as the Board has found them. It is entirely within the scope of proper argument to refer to relevant authorities.

Harvest Hills and AUC Decision 2007-101

YECL states that a reference made by CW to AUC Decision 2007-101 is new evidence and that the decision,

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[2] e.g. Tr.p.295, line 18 – p.296, line 8, YEC-YECL-2 (j)
[3] YECL Argument p.7

> "...was never introduced on the record and no opportunity was provided to the witnesses to comment on the relevance or applicability of this Decision to the circumstances experienced in the Yukon Electrical context."

Again, CW notes that this is a reference to authority and not new evidence. CW rejects the position taken by YECL with respect to the necessity of putting authorities to witnesses as elaborated upon below.

PUBNWT Decisions 24-2008 and 25-2008

Counsel for YECL objects to the introduction of these two PUBNWT decisions on the basis that

> "In order for a decision of another tribunal to be part of the record, even during the proceeding (not following it), the subject decision must be put to the witnesses, their familiarity with the subject matter confirmed and questions relating to its relevance and applicability to the present case posed."

Counsel for YECL does not document any authority for this principle and CW considers that it is simply incorrect. CW has already addressed the appropriateness of citing other regulatory decisions in argument and reply. Argument, including the authorities cited in argument, are not considered part of the evidentiary record, nor should they be. Witnesses are at a hearing to provide factual evidence, not opinions on whether the facts or circumstances in another case are similar to the case before the Tribunal. Such a determination is a matter of law for the Board to decide. Experts can provide opinion evidence but cannot be taken to usurp the Board's jurisdiction. With respect, it is ludicrous to assert that an authority cannot be referred to unless the witnesses "confirm their familiarity with the subject matter." CW considers that to be an astonishing proposition, which if adopted, would have the effect of limiting the authorities permitted to be raised in argument, to those the utility's witnesses choose to acknowledge.

CW suggests that the overarching principle in a regulatory proceeding is that all the relevant facts and authorities be made available to the regulatory tribunal. These two relevant decisions were published the same day as argument was due in these proceedings. CW would have failed in its duty to provide the most currently available authority on the issues discussed in the hearing had it not alerted the Board to the PUBNWT's findings in these two decisions.

Yours truly,

BROWNLEE LLP
PER:

THOMAS D. MARRIOTT
TDM/rd