DAVIS LLP | LEGAL ADVISORS SINCE 1892

FROM THE OFFICE OF P. John Landry
DIRECT LINE 604.643.2935
DIRECT FAX 604.605.3588
E-MAIL john_landry@davis.ca

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November 19, 2008

DELIVERED BY E-MAIL

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

Dear Ms. Shanks:

Re: YECL Letter dated November 13, 2008

Provided below are YEC's comments as requested by the Board in Ms. Lemke's November 14, 2008 memorandum relating to the above-noted matter.

YECL in its November 13, 2008 letter the Yukon Utilities Board complains that both Yukon Energy and the City of Whitehorse ("City") "inappropriately introduce new evidence into these proceedings, which was not presented on the record of the proceedings and regarding which Yukon Electrical has had no opportunity to comment." YECL also argues that, "such new evidence that was entered at the Reply Argument stage of the proceedings is not properly before the Board and cannot properly be taken into account in the Board's decision making process."

YECL submits that Yukon Energy has sought to introduce new evidence in Reply in the following instances:

1. **YECL Assertion: YECL argues that it was inappropriate to refer to the recent Northwest Territories Public Utilities Board ("NWTPUB") decision in relation to non-labour costs at Page 22 of Reply Argument, given that the decision was not available or discussed with witnesses during the hearing.**

YECL also submits that the City similarly introduced "new evidence" by references in its argument to the NWTPUB decisions issued since the oral hearing, as well as references to past two decisions of the Alberta Utilities Commission.

YECL opines 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."

YEC Response: The decision of the NWTPUB referenced by Yukon Energy[1] was not available at the time of the oral hearing, and was issued only recently, i.e., on October 27, 2008. This decision has been referenced as a precedent from another jurisdiction where a similar issue was adjudicated by a regulatory tribunal. Relying upon the decisions and precedents from other regulatory tribunals as precedents are appropriate matters for consideration in argument in that such precedents may provide guidance to the Board in its determinations.

Given the NWTPUB was issuing a decision related to YECL's sister utility NUL(YK) the decision is relevant to the current proceeding. However, the Board as "final arbiter of fact and law" may determine its relevance and afford the precedent as much weight as is deemed appropriate in its determinations.
Yukon Energy submits the same comments with regard to YECL's objection to the City's references to precedents from another jurisdiction where a similar issue was adjudicated by a regulatory tribunal.

2. YECL Assertion: YECL argues that there is no foundation on the record for Yukon Energy to present in Reply Argument at Page 29 (footnote #8) the rationale underlying Yukon Energy's adoption of ASL in 2005.

YEC Response: As noted in the City's Reply Argument (at page 1), YECL was not the only party to the proceeding providing evidence in the proceeding, and the exhibits entered by the parties also form part of the record to be considered by the Board in its deliberations, and afforded whatever weight deemed appropriate by the Board.

Contrary to YECL's assertion that there was no evidence on the record to support Yukon Energy's argument, the 2005 Depreciation Study completed by Gannett-Fleming for Yukon Energy was placed on the record of these proceedings (as an attachment to YEC-YECL II - 2(b)(iii)) and subject to review in cross-examination (transcript at pages 245-247). This document clearly notes as follows, regarding the implementation of the ASL depreciation methodology in 2005 as directed by Yukon Energy in consideration of rate stability and to thereby mitigate adverse rate impact on ratepayers:

> The management of Yukon Energy directed Gannett Fleming to calculate annual and accrued depreciation using the average service life procedure in order to ensure toll stability.

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[1] Decision 24-2008; City of Whitehorse also references Decision 25-2008 related to NUL(NWT).

> Gannett Fleming agrees that toll stability is an overall ratemaking objective that needs to be considered in the development of appropriate depreciation policies. As such, Gannett Fleming accepts the decision of Yukon Energy Corporation to convert to the average service life procedure in the calculation of the depreciation rates. (page I-5)

That Yukon Energy was away from regulation for 9 years prior to the 2005 proceeding, as noted in the footnote, is an indisputable fact.

3. YECL Assertion: YECL argues there is no foundation in the record for reference to "a new 2008 benchmark for Fortis" at page 38 of Reply Argument.

YEC Response: This assertion is incorrect in stating that any "new 2008 benchmark for Fortis" was referenced in Yukon Energy's Reply Argument, or that there was no foundation in the record for the references made by Yukon Energy on this matter. In this regard, YECL is confusing the references at page 38 of Yukon Energy's Reply Argument to the BCUC "2008 benchmark ROE of 8.62%", and to the risk premium of "40 basis points approved for Fortis BC" in earlier BCUC decisions as referenced in Order 2005-12.

The record is demonstrated by the references provided in Final Argument at page 41 (footnote 82), a reference re-asserted at page 38 of Yukon Energy's Reply Argument. Both arguments reference pages 43-45 of Board Order 2005-12 which was included as Tab 6 of Exhibit C1-11 of this proceeding, and which notes YEC accepted during the 2005 Required Revenues and Related Matters proceeding that it was less risky than PNG but more risky than Fortis BC:

> Board counsel cross-examined the YEC panel on relative risk of YEC compared to peer utilities, such as YECL, Fortis BC and PNG in an effort to understand where YEC fits into the risk premium spectrum (T5:931 to 935). YEC accepted that they are less risky than PNG but argued they are more risky than Fortis BC due to the inter-tie with other utility networks, which allows it to generate less electricity and purchase more of its demand when needed. (Order 2005-12, Appendix A at page 44)

And,

> As for the issue of risk premium, the Board agrees that YEC likely falls somewhere between PNG at 65 basis points and Fortis BC at 40 basis points.

Yukon Energy argued in that proceeding that the appropriate risk premium was 52 basis points (midway between PNG and Fortis).

Contrary to YECL's mistaken assertion, "a new benchmark for Fortis" has not been referenced by Yukon Energy in Argument. Yukon Energy has referenced in its Argument, and in its Reply Argument, the "risk premium spectrum" noted previously at the 2005 Required Revenues and Related Matters hearing, and commented on and accepted by the Board in Order 2005-12.

While the Board determined in Order 2005-12 that the 52 basis point risk premium applied for at that time by Yukon Energy was appropriate to Yukon Energy there is ample evidence on the record of this proceeding to support applying a lower risk premium to YECL (in the range of the Fortis BC risk premium noted in the 2005 decision). For instance Ms. McShane, YECL's expert on rate of return, noted in cross-examination at this proceeding that YECL is a lower risk utility than YEC. (see, Argument page 41 which references discussion at Transcript pages 205 and 206). Given this assessment, it would be inappropriate to apply the same 52 basis point risk premium applicable to Yukon Energy, and a premium commensurate with the lower risk Fortis BC premium of 40 basis points is arguably more appropriate. YECL has not objected to the 2008 BCUC benchmark ROE of 8.62%, and in Yukon Energy's submission applying a risk premium appropriate to YECL would result in an ROE of 9.02%, not 9.14%.

4. YECL Assertion: YECL argues at page 29, Footnote #7, that Yukon Energy has unfairly portrayed the oral testimony of Mr. Kennedy related to ELG, and the implementation of IFRS, as inappropriate "new" evidence.

YECL states as follows in its November 13, 2008 letter:

> Mr. Kennedy provided this response based on an inappropriate characterization of matters contained in Counsel's questioning of Yukon Electrical's panel. Furthermore, all oral testimony given during the course of a proceeding in fact constitutes new evidence, which is indeed appropriate.

The record speaks for itself as to whether the approach taken by YECL and Mr. Kennedy was in any way related to what YECL states was "an inappropriate characterization of matters contained in counsel's [YEC] questioning of Yukon Electrical's panel" or was simply a ploy to allow Mr. Kennedy to provide new evidence relating to a completely new topic, i.e. IFRS.

The additional evidence given by Mr. Kennedy (relating to ELG better complying with IFRS) was new evidence raised by YECL's witness at a stage in the proceedings (after pre-filed testimony and interrogatories) that left intervenors with little time or ability effectively to test such evidence. In this sense, and at this point in the proceeding raising entirely new evidence not previously referenced, or alluded to, anywhere on the written record, without advance notice to the Board or other intervenors that would allow other parties reasonable time to assess such evidence, was inappropriate. Typically, pre-filed testimony (and any interrogatory responses provided) provides the foundation for the oral testimony, and affords other parties with the

fundamentals of the applicant's case necessary to prepare for cross-examination and test the evidence presented.

Further, the Board's Rules of Practice and Procedure note (Rule 23(1)) with regard to the Applicant's evidence that:

> The information contained in an application and all other information submitted by an applicant to the Board constitutes the written evidence of the applicant and the applicant shall not, except with leave of the Board, be at liberty to submit additional written evidence or oral evidence.

Further, and generally, Rule 28 (3) provides "a party may update or revise their evidence with leave of the Board".

Where new evidence is presented in oral testimony, without notice, other parties are essentially prejudiced with regard to preparing their cases. Both rules are designed to ensure that new evidence is introduced in an orderly fashion, and that such introduction does not prejudice any party in advancing their case. It was free to YECL at any time prior to cross-examination of Mr. Kennedy to seek leave of the Board to revise the written testimony to include reference to IFRS, and such an application would have afforded the Board and intervenors with at least advance notice of this new evidence. Similar issues of prejudice are raised with regard to the introduction of new evidence related to the Carcross diesels on the afternoon of the last day of oral testimony.

Yours truly,
DAVIS LLP
Per:

P. John Landry
PJL/sas

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