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November 20, 2014

Yukon Utilities Board  
Box 31728  
Whitehorse, Yukon Y1A 6L3

Attention: Mr. Bruce McLennan, Chair

**Re: Yukon Electrical Company Limited – Request for Review & Variance of Order 2014-06  
UCG Comments**

Dear Mr. McLennan:

Our client, the Utilities Consumers' Group ("UCG") hereby submits its comments regarding the application of Yukon Electrical Company Limited ("YECL") to review and vary the Board's Order 2014-06 dated April 23, 2014 regarding YECL's 2013-2015 General Rate Application – Phase 1.

YECL claims that the Board committed errors of fact, law and/or jurisdiction which raise substantial doubt as to the correctness of the Board's GRA Rulings and YECL claims that there have been fundamental changes in circumstances and/or facts since Board Order 2014-06 that could lead the Board to alter the Board's determinations in the following areas:

- (a) denial of YECL's proposals to include in rate base the capital costs of its proposed Watson Lake bi-fuel project and associated operations and maintenance costs and to make related changes to the Rider F methodology (the "Bi-Fuel Ruling");
- (b) directing YECL to reduce the cost of living adjustment component of its defined benefit pension expense from 100 to 50 percent of CPI (up to 3%) (the "COLA Ruling");
- (c) denial of YECL's request for a 46 basis point equity risk premium on top of the British Columbia Utilities Commission benchmark return on equity (the "ROE Ruling"); and
- (d) denial of YECL's request for a 4% increase to its common equity ratio (the "Equity Ratio Ruling").

The process associated with the Board's exercise of its powers to review an order of the Board has been codified in Rule 31 of the Rules of Practice. Specifically, Rule 31(1) sets out the grounds for the initiating a review by a party applicant:

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.

The Rules of Practice also provide for a two-step process where the applicant must establish a prima facie case sufficient to warrant full consideration by the Board procedure that contemplates that an application for review will be subject to an initial screening phase.

UCG suggests that it is important to recognize that in the Board's two step test, the first step is not simply to allege error, fundamental change, or a new principle, but to show that there is evidence upon the record of proceeding that compels such a conclusion in the absence of full hearing of the issues involved. UCG submits that it is not enough to raise conjecture about the impugned provisions of the Board's order. Neither is it enough to simply re-litigate the same arguments that were rejected in the order sought to be reviewed. UCG will discuss below how the YECL application falls short of the standard of proof sufficient to satisfy the prima facie test established under Rule 31, and that, accordingly, this application fails the initial threshold test.

Given that final rates were established for the 2013-2015 test period as a result of Board Order 2014-06, UCG questions the Board's authority to go back and retroactively change final rates upon which Yukon ratepayers have been basing their electricity consumption decisions.

### **The Bi-Fuel Ruling**

In its Order 2014-06, the Board denied YECL's request to add the proposed bi-fuel project to rate base because it was a first-of-its-kind project to be proven through demonstration on a single unit before proceeding to conversion of the remaining units while ensuring that a reliable supply of natural gas is available and the performance of the entire facility is acceptable. YECL's business case for this project states that the project's purpose is to verify that LNG injection into the engine provides reliable electricity generation for a utility power system along with the environmental benefit to reduce emissions.

The only reason submitted by YECL to justify reconsideration by the Board of the Bi-Fuel Ruling is that there has been a perceived "fundamental change in circumstances or facts" since the Board Order related to the ongoing development of the LNG market.

YECL claims that there has been an "evolution of the LNG supply infrastructure market in Western Canada" that has enabled YECL to conduct a robust competitive tender process in 2014 to evaluate alternatives to the lease option for the Bi-Fuel Project. The results of the competitive tender process show that purchasing the equipment from an affiliate (ATCO Gas) is the most economic option available for YECL to obtain the storage and vaporization services (versus the lease option originally proposed in its GRA).

UCG questions how an "evolution of the LNG supply infrastructure market in Western Canada" could actually trigger the tendering process undertaken by YECL. YECL does not offer any explanation in its application and UCG submits that it could just have easily undertaken the tendering process as a result of discussions within the ATCO family of companies on how to optimize costs being incurred for this project.

UCG notes that none of this "new evidence" has been tested for validity or prudence other than by YECL and its ATCO affiliates. UCG also questions how much of an evolution of the LNG supply infrastructure has taken place between arguments made by YECL in December 2013 and the current review & variance application. The fundamental change appears more to be internal deliberation on how best to capitalize on services available within the ATCO family of companies.

YECL has also provided an updated economic model for the Bi-Fuel Project allegedly using the same assumptions that were used by Yukon Energy for the YEC Project to replace diesel-fuelled generators with LNG-fuelled units. UCG notes that the Yukon Energy application related to the review of its LNG

project was already in the Board's hands in December 2013 so would have already been known by the Board well before making its April 2014 decision on the YECL application. UCG also notes that these were completely different projects since YEC was not looking into a dual fuel system.

Given that YECL remains committed to its Bi-Fuel Project and continues to believe that the Bi-Fuel Project will result in material environmental benefits for the community of Watson Lake as well as economic benefits for ratepayers, UCG submits that YECL and its shareholders should continue doing what it feels is best to prove that the benefits are in fact realized before applying for any type of recovery from Yukon ratepayers in a future general rates application.

### **The COLA Ruling**

YECL submits that the Board should reconsider the COLA Ruling because it was premised on errors of fact, law and/or jurisdiction which raise substantial doubt as to the correctness of the COLA Ruling. Specifically, YECL submits that in denying the COLA Costs:

- (a) the Board committed errors of law or jurisdiction by failing to consider the prudence of those costs and the presumption of prudence;
- (b) the Board committed an error of law or jurisdiction by failing to assess the prudence of the COLA Costs independently of the potential impact on ratepayers; and
- (c) the Board committed an error of law by overlooking the New Pension Evidence.

YECL submits that the COLA Ruling was made without regard for principles established by Canadian regulatory authorities of utilities regarding the recovery of prudently incurred costs. UCG notes that while the YUB is most likely aware of the obligation to consider principles established elsewhere, references were made to this obligation in various parts of arguments submitted during the review of YECL's 2013-2015 rates application. UCG submits that to suggest that not mentioning the consideration of principles in other jurisdictions is grounds to vary the decision are without merit.

YECL argues that Board Order 2014-06 did not include discussion of the presumption of prudence and made no determination or finding that would allow for the Board to disregard that presumption. YECL argues that before disallowing any portion of the COLA Costs, the Board was legally required to consider the prudence of those costs and was also required to apply the presumption of prudence to those costs. UCG submits that while there are jurisdictions (including Alberta) that deem costs to be prudent unless an interested party satisfies the regulator that the costs are unreasonable, that appears to be the case here as the City of Whitehorse clearly brought updated information to the Board's attention prior to it making a decision on the COLA Costs.

UCG submits that the law does not require the Board to specifically discuss all record evidence within a Board decision that both supports and detracts from its conclusions.

While YECL indicates that Board Order 2014-06 does not discuss its New Pension Evidence and there was no indication in the Board Order that the New Pension Evidence was specifically considered by the Board, UCG submits that it has always been assumed that when the Board indicates that it has "considered all relevant materials of which the record of this proceeding is comprised", it generally means that any evidence on the record has been considered and informed the Board's decision. If YECL wanted to ensure that the New Pension Evidence was front and centre for the Board's consideration, it had an opportunity in its final and reply arguments to raise its profile.

In its application, YECL makes note of the fact that based on current forecasts of pension funding requirements, the COLA Ruling will have a material impact on YECL since it would result in a disallowance of \$1,937,000 of YECL's costs over the 2013-2015 test period. UCG submits that this information was already included in YECL's compliance filing of May 23, 2014 (page 9) and that there has been no proof provided in this current review & variance application that any of these applied-for

costs were being incurred as originally forecast.

Assuming that the YUB was not aware, YECL has provided its interpretation of the context of AUC Decision 2011-391 upon which the YUB relied to make its COLA Ruling. Given that the YUB provided no detail on exactly how it interpreted the AUC Decision nor how it used its interpretation to make its decision in the YECL proceeding, UCG submits that YECL's interpretation does nothing to advance a prima facie case that an error has been made by the YUB.

### **The ROE and Equity Ratio Rulings**

YECL challenge of the correctness of the Board's decisions associated with the setting of the ROE and equity ratio for YECL in Board Order 2014-06 are largely based on a selective reading of the record of decision making on these issues at the British Columbia Utilities Commission ("BCUC") and the YUB by YECL. Where the results of older decisions such as YUB Orders 2009-2 and 2009-8 based on BCUC Generic Cost of Capital Orders of similar vintage are accorded status as providing continuing governing importance in setting YECL's ROE and equity thickness, other more recent Decisions in the YUB, British Columbia and Alberta are given short shrift by YECL.

The fact is the YUB used the most up to date information available to it in Order 2014-06, and while it modelled its efforts on the formulaic results in the BCUC, the YUB modified the same in favour of YECL, by comparison to, and in equivalence with, YEC. Where the YUB determined to follow its previous direction, for example, with respect to the use of the stand-alone principle, it did so in conformance with the existence of facts that existed at the time of Board Order 2009-02 and continued to exist in the proceeding leading up to Order 2014-06.

UCG will briefly discuss the specific grounds alleged by YECL that justify review.

- (a) Errors of law and jurisdiction by failing to set a fair return for YECL; and
- (b) Error of law by applying the wrong test for a fair return.

YECL takes a rather convoluted route to get to these conclusions. While it ostensibly accepts the decision of the YUB to adopt the BCUC GCC model to set its capital structure, it argues that there was a failure to allow the company a fair return similar to that earned by investments of comparable risk<sup>1</sup>. YECL attempts to make the case that any adjustments flowing out of the 2008-2009 GRA should similarly flow through to the benchmark utility value expressed by the BCUC in its March 2013 decision. This is despite the fact that the YUB found no evidence that the benchmark utility values of the BCUC March 2013 decision apply to YECL<sup>2</sup>. And despite the fact that the overall lower riskiness of YECL compared to YEC was not contested, the Board's 2013 YEC decision is alleged to have no value because of the failures of YEC to request a thicker equity structure and to substantiate a risk premium over the AUC's benchmark<sup>3</sup>. The capital structure and rate of return of the utility that operates in the same business environment of YECL is thus to be ignored according to YECL, and instead it is suggested that the Fair Return Standard requires mechanical adjustments to the BCUC benchmark utility based on historic considerations and comparisons with Fortis British Columbia (FBC).

The fact is that the BCUC itself in its March 25, 2014 Decision rejected the historical approach as the preferred method of making adjustments to the benchmark utility values, and it conducted a detailed risk assessment of FBC. What YECL neglects to mention is that the BCUC rejected the

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<sup>1</sup> YECL R&V Application, paragraph 114

<sup>2</sup> Board Order 2014-06, Appendix A – Reasons for Decision, page 51

<sup>3</sup> YECL R&V Application, paragraphs 93-96 - YECL did not comment, however, in the 2012 YEC GRA on the merits of the YEC requests

use of the 2009 Company assessments with respect to the potential adjustments to the benchmark utility values arrived at in Stage 1 of the BCUC's Generic Cost of Capital proceeding:

*"As noted earlier in this Section, the Stage 1 proceeding determined the cost of capital for the Benchmark. The Stage 2 proceeding is designed to have utilities other than FEI provide evidence comparing their business risks to those of the Benchmark for which a comprehensive cost of capital proceeding has only recently been concluded. It seems illogical that the Commission Panel would choose to minimize the importance of evidence in the most recently completed cost of capital proceeding and choose to put more weight on the results of a proceeding which was conducted four years previously and was based on evidence which is not part of this evidentiary record."*<sup>4</sup>

YECL submits that failure to use past comparisons to adjust for differences in risk for Yukon utilities constitutes some deviation from the Fair Return Standard. In fact, the YUB chose not to apply the 38.5% benchmark utility equity ratio to YECL and instead provided for its replacement by the YEC ratio of 40%. Any adjustments coincident with what was requested by YECL required much more evidence of differences in risk particularly touching upon the business risk associated with the British Columbia forestry industry.

A cursory scrutiny of the BCUC decision of March 25, 2014 discloses an analysis contained in a document of some 164 pages that, with the aid of utility and intervenor evidence offered at the extensive proceeding, carefully examines issues of risk for the remaining BCUC-regulated companies as compared to the benchmark utility. The YECL target company of FBC was studied and a focus on its business risk concentrated upon its reliance on the cyclical forestry industry and the ameliorating effects on its diversity by the acquisition of Kelowna electricity distribution assets.<sup>5</sup>

While YECL clamours for beneficial adjustments, no careful assessment attempting to compare the parameters of the up to date BC benchmark utility with YECL was ever presented to the Board.

(c) Error in fact in overlooking "extensive" evidence regarding its business risk to utilities other than YECL

There was no extensive evidence offered by YECL as to its business risk. YECL witnesses expressed their views that the business risk was increasing but no independent expert evidence on business risk was ever introduced. The evidence largely consisted of dated expert testimony coupled with in-house opinions from line employees of YECL or hearsay from employees of the CU companies as to the riskiness of YECL. To that end, the evidence of Katherine McShane offered in YECL's 2009 GRA proceeding was cited extensively by YECL. From a probative standpoint, this was less than satisfactory in that her report was largely unaccepted by the YUB in the making of Board Order 2009-2. Yet, YECL submitted that the McShane evidence was still relevant with updates derived from the repetition of second-hand in-house opinions:

*(Q. MR JANIGAN) But unlike in the previous proceeding, you're not offering any business risk testimony, are you? You're not a business risk expert, I take it, Mr. Grattan?*

*A. MR. GRATTAN: So we are relying on what Kathy McShane put forth last time. What we've done is we've updated what she put forth on the record last time around, just to ensure that everybody appreciates and understands, because it would be a logical question to ask and it has been asked, what's changed since 2008-2009 and we've detailed that."*<sup>6</sup>

The business risk evidence of YECL, such as it was, was far from uncontroverted as it was

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<sup>4</sup> BCUC GCC Decision, page 14

<sup>5</sup> BCUC GCC Decision, page 67 (no adjustment was subsequently made to the benchmark equity thickness)

<sup>6</sup> YECL 2013-2015 GRA, Transcript Volume 2, page 241

simply self-serving, and much of it based on opinions from individuals who were either not expert in the field or were not called to testify.

(d) Error in fact or law in failing to apply the stand-alone principle

The stand-alone principle has been generally used to try to prevent individual utilities from being affected by the machinations of a parent company that is a major risk. YECL wants the YUB to pretend that YECL raises its own capital and its access to capital markets is linked to the way the revenue-to-cost ratios are maintained. In Order 2009-2, the Board noted the opposition to rewarding YECL for risk issues that it didn't possess with respect to access to capital because of the method chosen to obtain access:

*"In response to YUB-YECL-33(c), YECL responded:*

*Yes, in principle Yukon Electrical would contribute to the size of CU Inc., and thus provide some small contribution to the size and diversification of the entity which provides its debt?*

*The Board interprets this response to mean that YECL also contributes (albeit in a small way) to the size, diversification and capital structure on AE. Given that capital in the form of either debt or equity flows to YECL through AE (or through CU), and that there is a strong management influence<sup>68</sup> on YECL through AE, and given the significant affiliated transactions and contracts between YECL, AE and other ATCO companies, this Board rejects the stand-alone principle in determining capital structure.*

*Responses to YUB-YECL-38(a) whereby YECL stated that YECL does not face a higher regulatory risk than a typical electricity distribution company in Canada and to YUB-YECL-34(e) where YECL stated that the ability to earn the allowed return is not a financial risk but a business regulatory risk give credence to the argument that YECL is not a high-risk utility."<sup>7</sup>*

Here, the application of the stand-alone principle would simply allow the parent company shareholder to use the benefits of the larger entity (made large in part by its ownership of YECL) to obtain financing at lower rates while collecting higher returns based on a corporate structure devised out of fiction.

(e) Board error by unfairly deviating from other capital structure rulings

There should be no expectation that the assessment and approval of capital structure is unrelated to the current market conditions. The fact that YECL's case is dependent on its expectation that the YUB will implement past rulings and adjustments based on conditions in commercial and financial markets that have changed. And where the YUB has aligned its decision with a previous order such as that emanating from the YEC 2012 GRA, YECL urges that the decision be given no precedential weight. And while YECL recites the key decisions associated with the judicial review of exercise of the Board responsibility to set the cost of capital, it misses the central theme of balance as stated in the passage quoting from the Bluefield case:

*"The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."<sup>8</sup>*

UCG submits that there is no evidence that the YUB erred in its fashioning of Order 2014-06, and in particular failed in any duty of fairness towards the applicant.

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<sup>7</sup> Appendix A to Board Order 2009-2 – Reasons for Decision, page 26

<sup>8</sup> Bluefield Waterworks & Improvement Company v. Public Service Commission of the State of West Virginia, 262 U.S. 679 (1923) [Bluefield] p. 902

### Conclusion

The YECL theories of meeting the Fair Return Standard by mixing and matching historical BCUC Decisions and ignoring the capital structure and ROE of YEC established by Board Order are simply repetitive of the position advanced by YECL at the close of the hearing giving rise to the Order that is being challenged herein. YECL attempted to both use the BCUC benchmark utility decision that was in place at the time of the Board Order 2014-6 based on the careful review that took place in that jurisdiction, then fashion amendments to the benchmark capital structure and the ROE that are simply cherry-picked from favourable parts of other decisions. If it wished to do so, YECL should have presented independent expert business risk evidence to substantiate the same. It cannot now come forward and attempt to give its view of the state of the facts and law as the uncontroverted understanding of the same based on the record of the proceeding. Given its status as a less risky company than YEC, YECL, in fact, has fared well in achieving a similar equity structure and ROE as YEC. Accordingly, YECL's review & variance application associated with these issues should be dismissed.

### Costs

UCG requests that the costs of its participation in this review & variance process be reimbursed in accordance with YUB cost award policy. As a registered intervenor in the review of YECL's 2013-2015 General Rates Application, UCG determined that YECL's request for review & variance had potentially significant impact on Yukon ratepayers who had been relying on the determinations in Board Order 2014-06. Given the issues being debated and the level of argument required, UCG retained its legal and regulatory consultants to counter YECL's pleadings. While its consultant costs have been kept to a minimum, UCG feels that its submissions have been made in a responsible manner and should be of assistance to the Board in this matter.

If there are any questions concerning the contents of this submission, I would ask that they be directed to me by email at [mjanigan@piac.ca](mailto:mjanigan@piac.ca) or by phone at (613) 562-4002 ext 26.

Yours truly,



Michael Janigan  
Counsel for UCG

cc (by email): Yukon Electrical Company Limited  
Registered Intervenors (YECL 2013-2015 GRA)