

In the Yukon Utilities Board

IN THE MATTER OF the *Public Utilities Act*, Revised Statutes of the Yukon 2002, C.186 as amended;

And an

Application by Yukon Energy Corporation for an Energy Project Certificate

And an

Energy Operation Certificate regarding the Proposed Whitehorse Diesel – Natural Gas Conversion Project;

And

In the Matter of Yukon Utilities Board Order 2014-12

APPLICATION FOR REVIEW AND VARIANCE OF BOARD ORDER 2014-12 BY THE YUKON CONSERVATION SOCIETY AND LEADING EDGE PROJECTS INC.

1. The Yukon Conservation Society (“YCS”) and Leading Edge Projects Inc. (“LE”) (together “YCS-LE”) seek a review and variance of the Yukon Utilities Board (“Board”) Order 2014-12 issued August 8, 2014 pursuant to section (S) 62 of the *Public Utilities Act* (“Act”) made pursuant to the Yukon Energy Corporation (“YEC”) Whitehorse Diesel – Natural Gas Conversion Project (LNG) proceeding convened under Board Order 2014-01.
2. The grounds for the application are pursuant to S 31(1) of the Yukon Utilities Board Rules of Practice (“Rules of Practice”) in that YCS-LE submits:
 - a) The Board made an error of fact and law in the determination of the amounts to be paid to YCS-LE pursuant to S 56 of the *Act*;
 - b) The Board’s Order 2014-12 is not consistent with S 2.2 of Schedule 1 Scale of Costs pursuant to the Rules of Practice, and not consistent with the rules of natural justice; and
 - c) Such other grounds as the Board may determine require a review.
3. YCS-LE submits that if, pursuant to the Rules of Practice, the Board finds the claim of error is substantiated on a prima facie basis, and the error has significant material implications, that the Board may proceed to determine the merits of this application without the necessity of a full argument on the merits.
4. YCS-LE seeks a variance of Board Order 2014-12 in accordance with the material previously filed by YCS-LE and the facts stated herein.

5. In support of its application, YCS-LE relies upon the record of this proceeding, the materials previously submitted in support of its application for costs, and the Brief Statement of Facts herein.

Brief Statement of Facts

1. Pursuant to S 56 of the *Act*, the Board may award costs in accordance with Schedule 1 Scale of Costs pursuant to the Rules of Practice.
2. Following the issuance of the Board's Report to the Yukon Minister of Justice on YEC's Application for an Energy Project Certificate and an Energy Operation Certificate Regarding the Whitehorse Diesel to Natural Gas Conversion Project ("Application") the Board received cost claims from parties participating in the proceeding and by Order 2014-12 determined the amount of costs to be paid out to each claiming party.
3. With respect to YCS-LE, the Board made the following determinations which are the subject matter of this request for review and variance:
 - a) The reduction of 35% in the hours claimed for Mr. Austin, legal counsel for YCS-LE;
 - b) The reduction of more than 58% in the hours claimed for Mr. Maissan, including an apparent error in the calculations, and the hourly fees awarded to Mr. Maissan; and
 - c) The reduction of more than 68% in the hours claimed for Dr. Pinard and the hourly fees awarded to Dr. Pinard.
4. YCS-LE contends that these determinations, other than the error in the calculations for Mr. Maissan, are contrary to the rules of natural justice as they are inconsistent with other Board cost decisions over the past 10 years, are inconsistent between parties within this Board Order 2014-12, and do not meet the test of "fair and reasonable tariff" required in S 2.2 of Schedule 1 Scale of Costs pursuant to the Board's Rules of Practice.
5. YCS-LE notes the following with respect to Board's cost orders for non-utility interveners over the past 10 years:
 - a) 2005 YEC Revenue Requirement Proceeding: no non-utility legal counsel;
 - b) 2007 YEC CSTP Proceeding: Yukon Utilities Consumers' Group (UCG) ~35 hours, 0% denied;
 - c) 2007 Minto PPA and 2006 YEC 20 Year Resource Plan Proceedings: UCG 40.7 and 95.1 hours respectively, both 0% denied;
 - d) 2008 YECL GRA: City of Whitehorse 146 hours, 3% denied;
 - e) 2008 YEC GRA: UCG 55 hours, 0% denied; City of Whitehorse Marriott 162 hours, 12% denied, second legal counsel 19 hours, 100% denied;
 - f) 2008-2009 Phase II GRA: UCG 35 hours, 0% denied; City of Whitehorse (2 legal counsel) 155 hours, 17% denied;
 - g) 2010 Mayo B Proceeding: UCG 38.8 hours, 0% denied; City of Whitehorse 75.3 hours, 40% denied (City generally supported project);
 - h) 2010 Alexco PPA Proceeding: no non-utility counsel;

- i) YEC 2012 GRA: UCG 74 hours, 0% denied; City of Whitehorse (2 legal counsel) 118 hours, 5% denied; and
 - j) YECL 2013 GRA: UCG 76.66 hours, 25% denied and travel time 23.24 hours, 50% denied; City of Whitehorse (2 legal counsel) 69.85 hours, 4% denied.
6. With respect to Mr. Austin, YCS-LE legal counsel, he has never before been involved in a Board proceeding and was thus unfamiliar with the Yukon's electrical infrastructure and the system operations. Although he has considerable experience dealing with system infrastructure and operations in other jurisdictions no two systems are identical. He thus had to spend the time getting familiar with the YEC system through reading appropriate documents and through briefings and discussions with Mr. Maissan; all in addition to reading the application, assisting with the preparation of information requests ("IRs"), writing IRs, doing LNG related research related to the Application, and preparing cross examination. All this was accomplished in 87.4 hours of preparation time. Mr. Austin claimed only 20 hours of hearing attendance time compared to 29 hours of hearing hours (recorded by Mr. Janigan – see Utilities Consumers Group ("UCG") request for review and variance). Mr. Austin claimed 12 hours for the preparation of YCS-LE's final argument ("Argument") and did not claim any travel time. The time spent in the hearing and in the preparation of the Argument cannot be refuted by anyone – he was there and prepared a very thorough argument.
7. For the Board to disallow 35% of all of Mr. Austin's hours (effectively a denial of more than 50% of the preparation time) is to say that all of the preparation prior to the hearing described above could have been accomplished in 45 hours by any reasonable legal counsel. This is not reasonable or fair. It is also inconsistent with Board cost decisions over the past 10 years as outlined in paragraph 5 above, and is thus contrary to the rules of natural justice as well as S 2.2 of Schedule 1 Scale of Costs which requires "a fair and reasonable tariff".
8. Within Board Order 2014-12 there is also an inconsistency. The Board, on page 8 of 14, states:

*"The Board considers that the number of hours [claimed by Mr. Austin] is not reasonable in light of the nature of the Application, the issues raised by the intervener, **the number of hours claimed by other counsel for similar tasks**, and that no evidence was filed on behalf of the intervener"* emphasis added.

In fact the counsel for the Applicant claimed for more hours for preparation (94) and more hours in total (125) than Mr. Austin, despite the fact that counsel for the applicant was already very familiar with Yukon's power system having represented the Applicant for more than 25 years, did not have to do any research, did not have to prepare IRs, and did not have to prepare cross-examination. The Board accepted 100% of the Applicant's counsel's fees. YCS-LE submits that Mr. Austin and counsel for the Applicant were

treated inconsistently and that by comparison to the treatment of the Applicant's legal fees Mr. Austin's treatment was unfair and contrary to the rules of natural justice and contrary to S 2.2 of Schedule 1 Scale of Costs.

9. YCS-LE submits that, all matters described above considered, all of Mr. Austin's hours should have been accepted by the Board. Alternatively, similar to the Board's treatment of UCG's legal fees, a maximum of 20% should have been denied.
10. As well as being a co-intervener, Mr. Maissan performed duties of a technical consultant; a consultant with his experience could claim \$270 per hour. The Board denied about 62% of Mr. Maissan's time in allowing only 41.25 hours of preparation time out of 108.25 documented hours spent. The Board allowed Mr. Maissan only \$75 per hour for fees. In addition to the normal duties of studying the Application, doing research, IR preparation, and assisting in the preparation of cross examination and Argument, Mr. Maissan also had to spend time with legal counsel briefing him on the details and the nature of Yukon's power system, its generating and transmission facilities, and its operations.
11. By comparison, the Board only denied 30% of the hours spent by UCG's consultant and awarded consultant fees of \$125 per hour. Mr. Maissan is at least as competent and knowledgeable as UCG's technical consultant, so fees for him should be no less. YCS-LE submits that the Board's treatment of Mr. Maissan's hours and fees is inconsistent with the treatment of UCG's consultant hours and fees and unfair by comparison. Furthermore, YCS-LE submits Mr. Maissan's treatment is contrary to S 2.2 of Schedule 1 Scale of Costs, and contrary to the rules of natural justice. YCS-LE submits that the denial of time spent should not exceed 30% and fees should be no less than \$125 per hour.
12. YCS-LE also submits that a mathematical error was made by the Board in its calculations of fees owing with respect to Mr. Maissan's time as allowed by the Board. The Board allowed 41.25 hours of preparation time but then failed to add the 5.75 hours of Argument preparation time to the calculations. The allowed fees should have been 47.00 hours X \$75 = \$3,525 (plus GST).
13. Dr. Pinard had 68% of his documented time denied, 26 out of 38 hours. The Board allowed Dr. Pinard fees of only \$75 per hour. Similar to Mr. Maissan's treatment compared to UCG's Consultant, the treatment of Dr. Pinard is inconsistent and unfair compared to the treatment of UCG's consultant, contrary to S 2.2 of Schedule 1 Scale of Costs, and contrary to the rules of natural justice. YCS-LE submits that the denial of time spent should not exceed 30% and fees should be no less than \$125 per hour.
14. YCS-LE notes that a total of 93.5 documented hours worked by Ms. Middler of YCS have been denied as Ms. Middler is an YCS employee, and not considered by the Board

to be a consultant, analyst, expert or support staff whose professional fees can be claimed according to 4.1 of the Scale of Costs. The denial of these hours makes the severe reduction of YCS/LE's other expert consultants' hours more difficult to understand.

15. YCS-LE submits that decisions which allows YCS-LE fewer consultant hours than UCG, despite having spent considerably more time in making the YCS-LE intervention the most effective in this proceeding, and an hourly fee substantially lower than UCG's allowed consulting hourly fee is inconsistent, discriminatory, and unfair.
16. YCS-LE submits that Board Order 2014-12 is contrary to S 2.2 of Schedule 1 Scale of Costs, and provides a very substantial financial burden on YCS-LE, neither party of which has retained legal counsel in Board proceedings in the past. The effect of Board Order 2014-12 is to send a message to YCS-LE and all future potential interveners that interventions, particularly serious interventions, are unwelcome and will be strongly discouraged. YCS-LE submits that this is contrary to the intent of S 2.2 of Schedule 1 Scale of Costs and contrary to the Board's intent.
17. The Board showed leadership by holding a community session as part of the public hearing. Public awareness and engagement in this project and process is high as displayed by the participation in that session. In its recommendation and punitive cost award, the Board risks public perception becoming that the regulatory process is biased, ineffective and/or has a foregone conclusion.
18. The essence of regulating monopolies is to bring into the hearing process the competitive market forces that a regulated monopoly, in this case an electric utility, is insulated from. The job of interveners who are the substitute for these forces is to critically analyze and test the efficacy of the position being advanced by the utility. These efforts can lead the intervener to support or oppose the utility's position. There is a winnowing process that all experienced interveners go through to reduce the number of matters that interveners pursue but it takes time and effort to do this and is included in the preparation time. It improves the efficiency of the hearing process.
19. The Board is the decision maker or body that makes recommendations to the decision maker, and not an active substitute for a market participant, this is the interveners' job.
20. To be fair and reasonable, if the Board wanted to limit interveners' participation, it could have asked interveners to submit hearing budgets for advance approval subject to the condition that the interveners carry out the work contained in the budget. The interveners could have then decided whether they can do the job expected of them within the confines of the advance-approved budget.
21. It is not fair and reasonable to arbitrarily reduce cost claims on a retrospective basis where there is no absolutely no evidence of misfeasance or extravagance.

22. YCS-LE supports UCG's application for Review and Request for Variance.

23. YCS-LE believes that it has met the requirements laid out in S 31 of the Board's Rules of Practice for a phase one review of Board Order 2014-12. YCS-LE requests that the Board review and vary Board Order 2014-12 in accordance with the requests outlined above.

Dated at Whitehorse, this 29th day of August 2014

Christina Macdonald

Christina Macdonald
Executive Director
Yukon Conservation Society