1997-4

YUKON UTILITIES BOARD

DECISION 1997 - 4

February 14, 1997

IN THE MATTER OF the Public Utilities Act
Revised Statutes, 1986, c. 143, as amended

and

An Application by Anvil Range Mining Corporation

AN ORDER IN THE MATTER OF the Public Utilities Act
Revised Statutes, 1986, c. 143, as amended

and

An Application by Anvil Range Mining Corporation

BEFORE: B. Morris, Chair)
G. Duncan) February 14, 1996

ORDER 1997-4

WHEREAS:

A. On December 20, 1996, the Yukon Utilities Board issued Order #1996-11 with respect to the recovery of revenues previously denied to Yukon Energy Corporation and the Yukon Electrical Company Limited (the "Companies"); and

B. Anvil Range Mining Corporation ("Anvil") submitted a request on December 30, 1996, for the Yukon Utilities Board to reconsider and vary it's decision. That request was copied to all interested parties on December 31, 1996.

C. The Board issued Board Order #1997-1 on January 8, 1997 requesting all interested parties to make submissions on whether the Board should review its previous decision and to make further submissions on whether the Board should vary its decision in the event that it determined to grant a review of the decision.

D. Submissions were received from the Association of Yukon Communities, The City of Whitehorse, the Companies, the Utilities Consumers' Group and from Anvil.

E. All submissions with respect to the request for a review and variance were considered by the Board.

NOW THEREFORE the Board orders as follows:

1. For the reasons set forth in the Reasons for Decision attached hereto as Appendix A, the Board hereby agrees to review Board Order #1996-11.

2. For the reasons set forth in the Reasons for Decision attached hereto as Appendix A, the application to vary Board Order #1996-11 is hereby denied.

Dated at the City of Whitehorse, in the Yukon Territory, this 14th day of February, 1997.

BY ORDER

Brian Morris
Chair

YUKON UTILITIES BOARD
P.O. Box 6070, 19 - 1114 First Avenue,
Whitehorse, Yukon Y1A 5L7
Telephone (403) 667-5058, Fax (403) 667-5059

February 14, 1997

Eleven pages by fax and mail

K. Forgaard	Anvil Range Mining Corporation		668 6518
J. Carroll	Yukon Electrical Company Ltd.		668 3965
R. McWilliam	Yukon Energy Corporation		393 6327
B. Ravenhill	Association of Yukon Communities	(403)	536 7622
D. Raines	City of Whitehorse		668 8639
R. Clarkson	New Era Electric Corporation		668 3978
R. Rondeau	Utilities Consumers' Group		633 6361
J. Ellis	Yukon Conservation Society		668 6637
N. Poushinsky	United Keno Hill Mines Ltd.		668 6743
S. Alwarid			667 4073
P. Percival			667 2647
L. Brassard	Whitehorse Chamber of Commerce		667 4507

Re: Anvil Range Mining's Request for a Review of Order #1996-11

I attach, for your information, Board Order #1997-4 with respect to Anvil Range's request for the Board to review and vary Order #1996-11.

Yours truly,

Jim Slater

Attachment

With the exception of the UCG, all submissions with respect to the variance requested that the Appeal Revenue be collected from the Diesel Contingency Fund. UCG argued that the Appeal Revenue should be collected by way of the rate rider previously ordered by the Board.

In considering this matter the Board must firstly consider whether it should review its Order #1996-11. By letter dated November 7, 1996, which letter was circulated to all participants of the 1996/97 GRA, the Board established certain guidelines with respect to review and variance applications to the Board.

The guidelines stated that the Board would consider the following as grounds for review under Section 62 of the *Public Utilities Act* (the Act).

i) the Board has made an error in jurisdiction;

ii) the Board has made an error in fact or law;

iii) there has been a fundamental change in circumstances or facts since the decision or order;

iv) a basic principle has not been not been raised in the original proceedings; and

v) a new principle has arisen as a result of the decision or order.

In its undated letter to the Board (received December 30, 1996) Anvil states that "not to reconsider your previous decision will certainly add an additional burden to Anvil Range's current circumstances and increase the possibility that the Faro mine will not restart in the near term." Further, Anvil states that "Any additional add-ons to our cost for electric power will certainly deter us or any future operator of the Faro mine to restart."

Anvil's submissions indicate that if the rider applies to Anvil, then Anvil will have to pay approximately $700,000 of the Appeal Revenue. Anvil submits that this is unfair and that the rate increase may make it impossible for it to restart its mine at Faro, Yukon.

In addition, the Utilities state in their submission that they are convinced that the rate increase may make it impossible for Anvil to restart the mine.

In essence, the Board is being asked to consider the economic impact on one customer alone, rather than the entire rate class (although the Board acknowledges that Anvil is the only customer in the class at this time). The Board is unaware of any statutory authority authorizing the Board to do so.

Appendix A

YUKON UTILITIES BOARD

REASONS FOR DECISION

ANVIL RANGE MINING CORPORATION APPLICATION TO REVIEW AND VARY BOARD ORDER #1996-11

The Yukon Utilities Board, (the "Board") by Board Order #1993-8, dated November 23, 1993, determined that Yukon Energy Corporation and Yukon Electrical Company Limited (the "Utilities") were to be allowed to charge certain rates for the test years 1993 and 1994.

The Utilities appealed, in part, this decision and on April 9, 1996, the Yukon Court of Appeal remitted certain decisions back to the Board for reconsideration.

Following reconsideration of its decision, pursuant to the direction of the Court of Appeal, the Board concluded that the Utilities were entitled to recover an additional $1,952,912 in revenue (the "Appeal Revenue"). Before determining the method of collection of this sum of money, the Board requested the Utilities to set forth the various options available to the Board.

The Utilities responded to this request by letter dated November 14, 1996. The options outlined were sent to most participants of the 1993/94 and the 1996/97 General Rate Applications ("GRA") hearings for review and written comment to the Board.

Three submissions were received from participants. The Utilities Consumers' Group ("UCG") recommended that the Board collect the Appeal Revenue by way of a rate rider surcharge. Anvil Range Mining Corporation ("Anvil") and the City of Whitehorse (the "City") both in late submissions recommended that the Board collect the Appeal Revenue by using funds from the Diesel Contingency Fund ("DCF" or the "Fund").

After consideration of all of the submissions the Board issued Order #1996-11 pursuant to which the Utilities were directed to determine a percentage increase in rates that would be charged to all customers of all classes, sufficient for the Utilities to recover the Appeal Revenue in approximately one year.

On December 30, 1996, Anvil requested that the Board review and vary its decision, Order #1996-11. Anvil was supported in this request by the Utilities, the Association of Yukon Communities ("AYC"), and the City. The UCG opposed both a review and a variance.

However, the Board is aware, through evidence led at previous General Rate Applications, of the very serious consequences to all consumers of electricity when the Faro mine is shut down. The potential for increased rates to all consumers rises dramatically when the mine is not in operation.

With the increasing possibility that the mine may not reopen, the Board has decided to review its decision of December 20, 1996.

Anvil submits in its argument that "there is an open legal issue .... of whether the Board has the legal right or authority under the PUA to make an order requiring customers in the rate years 1997 and 1998 to pay in their rates to recover costs incurred in the rate years 1993 and 1994. Putting it differently, there is an open issue about whether the Board has power to order the Utilities to recover costs retroactively."

The Utilities, on the other hand, in their submission dated January 20, 1997, state that ". . . the Companies reject Anvil's suggestion that the Board does not have the necessary jurisdiction to order collection in 1997 of the appeal amount by way of a rate rider. The Companies submit the Board has the necessary jurisdiction under the Act to make either of the Orders being debated."

The Board's jurisdiction and powers, with respect to the matter before it, are derived from several sources.

Section 27 (1) (a) of the *Public Utilities Act* provides, in part, as follows:

> "The Board may make orders . . . fixing rates of a public utility."

Section 1 of the Act defines "rate" in the following manner:

> ""rate" includes a general, individual or joint rate, fare, toll, charge, rental or other compensation charged or chargeable by a public utility, any rule, regulation, practice, measurement, classification or contract of a public utility relating to a rate, and any schedule or tariff respecting a rate." (emphasis added)

In other words, the Board has the power and the jurisdiction to fix rates, which includes other compensation chargeable by the Utilities. When setting those rates the Board may consider those matters set out in Section 29 (a), (b), and (c) of the Act.

In addition, when establishing rates, Section 32 of the Act requires the Board to determine a rate base for a utility and to set a fair return on that rate base. In other words, rates must allow the Utilities to recover their costs and to receive a fair rate of return.

The Yukon Court of Appeal in *Yukon Energy Corporation et al v. Yukon Utilities Board* (April 9, 1996) B.C.C.A. at page 11, paragraph 31 affirmed the principle that utilities

have a common law right to reasonable and fair compensation for providing service the Act requires them to provide. The Act does not deprive the utility of that right.

The Court of Appeal in *Yukon Energy Corporation* (supra) concluded that the Board had erred in certain respects when it determined the rates in Order #1993-8.

When considering the request for a variance the Board must adhere to the law and to the conclusions and directions of the Yukon Court of Appeal.

Anvil in its argument submits that the Board has no jurisdiction to deal with retroactive costs.

In *City of Edmonton, et al v. Northwestern Utilities Limited,* [1961] S.C.R. 392 the Utility wished to recover certain losses incurred before the date of the application. The Court commented that such a recovery is retroactive because it recovers past costs from current customers (emphasis added).

The Board finds that this case is not inconsistent with the Board's Order #1996-11. The Board's Order deals with costs incurred by the Utility after the 1993/94 general rate application. The costs are therefore not retroactive.

Again, in *Northwestern Utilities Limited, et al v. The City of Edmonton,* [1979] 1 S.C.R. 684, the issue was recovery of costs incurred before the date of the application. The facts of the present matter are quite different. The costs before the Board are in fact costs the Court of Appeal has directed the Board to allow the Utilities to recover with respect to their 1993/94 rate application.

Anvil has also cited in its authorities *Regina v. Board of Commissioners of Public Utilities,*(1967), 60 D.L.R. (2d) 703 (N.B.S.C.-A.D.) and *City of Calgary et al v. Madison Natural Gas Co. Ltd. et al*(1959), 19 D.L.R. (2d) 655 (A.S.C.-A.D.).

In the former case certain intervenors wanted the Board to order a decrease in rates to apply to past rates where the past rates were final rates. The Court upheld the Board's conclusion that it could not go back and retroactively change final rates. The facts of this case are not similar to the facts of the matter before the Board.

The *City of Calgary* case, again, is not similar to the facts of the matter before the Board.

The Board is of the view that the rates sought to be collected in this matter do not amount to retroactive rate making. The Board is not changing the rates paid by consumers before the date of Order #1996-11 or the Order #1993-8. In fact the Board in its Order changed the rates to be paid by customers as of February 1, 1997, that is, future rates, not past rates.

If the arguments advanced by Anvil are correct then the Court of Appeal decision is rendered meaningless. It would mean that the Utilities could not recover the revenue the Court of Appeal concluded they were entitled to recover, since the Board had no jurisdiction to order customers to pay those costs. Put another way, Anvil argues that even though the Board erred in the original application, it has no jurisdiction to correct that error, despite the fact that the Court of Appeal directed the Board to reconsider its decision. The Board is unable to accept this proposition.

Anvil has also argued that it is unfair to require current customers to pay costs incurred in the past, particularly if the customer did not exist when the costs were incurred. The Board does not accept this argument.

In *Peter Percival v. Yukon Energy Corporation et al*, Unreported (March 27, 1992) B.C.C.A., the Utilities had been ordered to repay an excess of revenue to its customers. The Utilities, however, erred and paid too much to the customers. As a result, the Utilities requested permission from the Board to recover the overpayment from ratepayers. The Board agreed and added a rate rider similar to the rider that the Board imposed in Order #1996-11. The rider was intended to recover the overpayment from existing and future customers, not from customers who actually received the refund when it was made.

Percival sought leave to appeal the Board's decision on the basis that it did not have jurisdiction to order the repayment. McEachern, C.J.B.C. referred to the problem as an "intergenerational problem" in that customers that would pay the excess would not necessarily be the same customers that received the refund.

The Court noted that the Board considered the practicality of making the same persons who received refunds pay back their part of the refund. The Court at page 4 stated "(t)he Board recognized that minor intergenerational disparities are common with refunds and surcharges."

The Court refused leave to appeal.

The Board is of the view that it was within its power and jurisdiction to make Order #1996-11. There is nothing in the Act specifically prohibiting the use of an "Appeal Rider." The Court of Appeal specifically in *Percival* determined that the use of a "rider" was within the jurisdiction of the Board.

Having concluded that the Board had jurisdiction to render Order #1996-11, the Board must now decide if it should vary that decision.

Section 29 (d) of the Act provides:

> "the board shall by order approve the method by which and the period during which any excess revenue received or deficiency incurred is to be used or dealt with."

Negotiated Settlement Package placed into evidence (Exhibit #142) before the Board in the 1996/97 GRA and in the transcripts of the hearing with respect to the GRA.

The transcripts reveal certain statements with respect to the fund.

Mr. Kerslake stated at the GRA hearing:

> "Just prior to this we had another fund called the low water reserve fund. The low water reserve fund was a fund that really just attempted to smooth out year-to-year fluctuations during the forecast period of rates, but it did not really help the customer out, because you would be still on the roller coaster availability of hydro.
>
> So that's why we are proposing this diesel contingency fund. It is independent of government bill relief. It is based on long-term average hydro, rather than what is available over the next two years. So it is a long-term number that we are comfortable with. And there was a ceiling identified really as the present excess revenue, and that excess revenue is detailed in the application of where it is coming from and what the amounts are, with a few updates from the time the application was made.
>
> Now, continuing on with the diesel contingency fund, the group felt -- and they were very strong on this point -- that the fund could only be used for offsetting diesel generation. There would be no other use for that fund." (emphasis added) [Hearing Transcript, p 41- 42, lines 18 - 26 and 1 - 16]

Mr. Kerslake further states:

> "One of the things on this fund is that it would only operate, it would only be active when diesel is on the margin." [Hearing Transcript, p 155, lines 2 - 4]

The Board notes that no one disputed H. Kerslake's submissions and all accepted the negotiated settlement package with respect to the DCF.

The Board notes the following comments made by Mr. Kerslake at the GRA hearing:

> "Now, what I had used, Mr. Chairman, prior and when we talked workshops, I was discussing rate stabilization fund. You can see now that the name has been changed to something that the group felt was more appropriate, and that was diesel contingency fund. The basis for the creation of this fund is that it smoothes customer's rates and the changes, and offsets diesel costs. So it tends to smooth the rates." [Hearing Transcript, p 41, lines 8 - 16]

The Board is aware that power demand greatly increases when the Faro mine is in operation. The increased demand cannot be met by existing hydro electric capacity thereby requiring the use of diesel generated power. The Board is cognizant, through evidence led in other matters before it, that diesel is more expensive with the result that when diesel is on the margin, the Utilities' costs increase.

The statements referred to by Mr. Kerslake in the transcript, in the Board's opinion, support the UCG's interpretation of the purpose of the DCF.

The fact that the name of the fund was changed from the Rate Stabilization Fund to the Diesel Contingency Fund also is strongly indicative that the fund's purpose was not just a rate stabilization fund. The name "Diesel Contingency Fund" strongly suggests that the purpose of the Fund was directly related to the cost of diesel power generation.

Based on the submissions of the parties, the Settlement Package and the transcripts of evidence from the GRA, the Board finds as a matter of fact that the purpose of the Fund was to offset costs when the Utilities had to rely on diesel generation. It was not intended to pay for costs incurred in the past. In fact, the Diesel Contingency Fund was established before the Court of Appeal decision had been rendered. The Board is of the view that the parties to the 1996/97 GRA did not anticipate the Fund to be used to recover the Appeal revenue.

Having concluded that it is inappropriate to collect the appeal revenue from the DCF, the Board hereby ratifies its decision to collect the said revenue by way of rate rider applicable to all customers of all classes.

Order-in-Council 1995/90 states that:

> "6.(1) The Board must ensure that the rates charged to major industrial power customers, whether pursuant to contracts or otherwise, are sufficient to recover the costs of service to that customer class; those costs must be determined by treating the whole Yukon as a single rate zone and the rates charged by both utilities must be the same."

The Appeal Revenue is cost of service to the Utilities. The Board has been directed to ensure that industrial customers pay the full cost of service. Until such time as that O-I-C is changed, the Board has no jurisdiction to order that an industrial customer pay something other than the full cost of service.