2005-3

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

and

An Application by Yukon Energy Corporation
for Approval of 2005 Revenue Requirements

BEFORE:	B. Morris, Chair	)	February 10, 2005
	W. Shanks	)	
	R. Hancock	)	
	M. Phillips	)	

BOARD ORDER 2005-3

WHEREAS:

A. On December 13, 2004, Yukon Energy Corporation ("YEC", "the Company") filed with the Yukon Utilities Board ("the Board"), pursuant to the *Public Utilities Act* ("the Act"), and *Order-In-Council 1995/90*, an Application requesting an Order granting new rates for Secondary (interruptible) Energy and the Faro Mine site, on an interim refundable basis, effective with consumption January 1, 2005 ("the Application"); and

B. The Application proposes the creation of a new Income Stabilization Trust and does not request any increase in firm rates charged to residential and commercial customers in 2005; and

C. The Application proposes for Secondary (interruptible) Energy, a new quarterly rate-setting mechanism to maintain the retail rate at 70 percent of the customers' avoided cost of fuel oil. This will result in a retail rate of 5.5 cents per kW.h. as of January 1, 2005; and

D. The Application also proposes for the Faro mine site, to change the current rate schedule to the normal General Service - Government rate; and

E. By Order 2004-1, the Board approved an interim refundable increase in rates to Secondary (interruptible) Energy customers and to the Faro mine site as requested in the Application. Board Order 2004-1 further scheduled a Workshop into the Application for January 13, 2005 and a Pre-hearing Conference for January 14, 2005; and

F. By Order 2005-2, the Board scheduled an oral public hearing into the YEC Application for April 18, 2005 in Whitehorse, Yukon and issued a regulatory timetable and a final issues list; and

G. On January 22, 2005 the Utilities Consumers' Group ("UCG") filed a Notice of Motion requesting that the Board order a suspension of the Application until such time as YEC pays to the UCG $100,000 as an interim cost award; and

H. The Board has reviewed the Notice of Motion from UCG and the related submissions.

NOW THEREFORE the Board orders with Reasons for Decision attached as Appendix A that the UCG Notice of Motion be dismissed.

DATED at the City of Whitehorse, in the Yukon Territory, this 15th day of February 2005.

BY ORDER

Brian Morris
Chair

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

and

An Application by Yukon Energy Corporation for Approval of 2005 Revenue Requirements

Reasons for Decision

1.0 Background

On December 13, 2004, Yukon Energy Corporation ("YEC", "the Company") filed with the Yukon Utilities Board ("the Board"), pursuant to the Act and *Order-In-Council 1995/90*, an Application requesting an Order granting new rates for Secondary (interruptible) Energy and the Faro Mine site, on an interim refundable basis, effective with consumption January 1, 2005 ("the Application").

By Order 2004-1, the Board approved for YEC the requested interim refundable rate increases and set the current firm rates charged to residential and commercial customers as interim effective January 1, 2005. Order 2004-1 also scheduled a Workshop and a Pre-hearing Conference into the Application for January 13, 2005, and January 14, 2005, respectively.

2.0 Notice of Motion, Submission and Reply to Notice of Motion

By Notice of Motion dated January 22, 2005, the Utilities Consumers' Group ("UCG") filed a motion requesting that the Board order a suspension of the Application until such time as YEC pays to the UCG $100,000 as an interim cost award.

The main reasons put forth by the UCG in its motion are that:

- Section 56 of the Act permits the payment of costs
- The Board has not reviewed its Rules of Practice as they may relate to costs
- Without funds, stakeholders are denied access to natural justice

Submissions with respect to the motion were received from the Yukon Electrical Company Limited ("YECL"), YEC, and Patrick McMahon.

In its submission with respect to the UCG motion, YECL states that it is sympathetic to some measure of intervenor funding, but does not accept UCG's requested amount as being reasonable. The YECL submission does not address the Board's jurisdiction to award interim costs.

In its submission with respect to the motion, YEC opposes the request to suspend the hearing and the request to award interim costs. YEC argues that the Board lacks jurisdiction to award interim costs prior to the hearing of the matter. In addition, YEC argues that it would be inconsistent with past practice for the Board to award such costs and inconsistent with the Board's own Rules of Practice and the practice of the utilities boards across Canada.

Mr. McMahon, in his submission, states that Section 56 of the Act does not restrict the timing on which costs can be awarded. He further states, however, that the Board's Rules of Practice imply that an award of costs may be made after they have already been incurred. Mr. McMahon suggests that consideration be given to the UCG request but that more evidence be obtained about its financial needs and efforts before determining an amount for interim costs. Mc. McMahon's submission also suggests that certain conditions be attached to any award for interim costs that the Board might award.

A reply was received from UCG on the submissions made by the other parties.

3.0 Analysis and Conclusion

The UCG refers to the judgment of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R 371 ("*Okanagan Indian Band*") in support of its motion. In particular, UCG refers to paragraph 17 of that case. In fact, that paragraph is a reference to the decision of Newbury JA in the British Columbia Court of Appeal.

The UCG also refers to paragraph 77 of the *Okanagan Indian Band* case, again attributing the words in that paragraph to Newbury JA of the British Columbia Court of Appeal. In fact, that paragraph was written by Major J. who wrote the dissenting reasons in the Supreme Court of Canada.

As noted above, s. 56 of the *Act* states that the Board may order to whom or by whom any costs incidental to any proceeding before the Board are to be paid and may set the costs to be paid. This legislative authority does not confer on the Board the explicit power to award "interim" costs. In the absence of this explicit power, does the Board have an implicit power to grant such costs? As pointed out by YEC, *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985) 19 D.L R. (4th) 356 (Ont. Div. Crt.) deals with this issue.

In that case, the Court stated at p. 365 that the characteristics of costs were as follows:

1. Costs are an award to be made in favour of a successful or deserving litigant, payable by the loser.
2. The award of costs must await conclusion of the proceeding, as success or entitlement cannot be determined before that time.
3. Costs are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

4. Costs are not payable for the purpose of assuring participation in the proceedings.

As noted by Mr. McMahon in his submission, the Board's Rules of Practice reflect the philosophy of an award of costs being granted at the conclusion of a proceeding.

On the strict interpretation of the criteria set out in the *Hamilton-Wentworth* case and the Board's Rules of Practice, the motion by the UCG should be dismissed, as historically there has been no authority to grant an award of interim costs in the absence of express statutory authority to do so.

The UCG, however, argues that the Supreme Court of Canada decision in the *Okanagan Indian Band* case in essence now allows the Board to award interim costs.

The issue for this Board to decide is whether the decision in *Okanagan Indian Band* case empowers this Board to award interim costs in the absence of a statutory provision. The case is clear that the historical view of the power of a superior court (emphasis added) to award interim costs could be altered in certain circumstances. What are those circumstances? Can the altered circumstances considered by a superior court also be applicable to an administrative tribunal such as the Yukon Utilities Board?

Mr. McMahon has circulated a copy of the *Okanagan Indian Band* case to all parties. Accordingly, the Board will not deal with the background to the case.

In that case, Lebel J. provided the majority reasons for the Court, although the Board notes that Major J. delivered dissenting reasons on behalf of himself and Iacobucci and Bastarache JJ. Lebel J. recognized that the courts in certain circumstances have an inherent jurisdiction to award interim costs. In matters before a court (emphasis added) certain conditions must be present in order for a court to consider an interim costs award. He set forth the conditions at paragraph 36:

- The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case.
- The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit.
- There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

Lebel J. did not provide a definition of "special circumstances." However, he did consider interim costs in public interest litigation, or cases of public importance, such as constitutional matters.

Lebel J. states at paragraph 38 of the judgment that "...the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance."

Lebel J. then set out at paragraph 40 the circumstances that must be present to justify an award of interim costs in public interest litigation, as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interest of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual intent of the particular litigant, are of public importance and have not been resolved in previous court cases.

Lebel J. went on to state at paragraph 41 that even if the above conditions are met, it is not necessarily sufficient to establish that an award of interim costs should be made. The final determination is within the court's discretion.

The Board is of the opinion that the *Okanagan Indian Band* case stands for the proposition that a court in certain circumstances has an inherent jurisdiction to award interim costs. The Board is not convinced that this inherent jurisdiction applies to it. It fact, there is nothing in the reasons of the majority decision that indicates that an administrative tribunal such as this Board would have the same inherent jurisdiction as a court.

This Board has not been given an explicit power under the provisions of the *Public Utilities Act* to award interim costs. Accordingly, the Board finds that it lacks the jurisdiction to award interim costs in a proceeding before it and, therefore, dismisses the applicant's motion.

In the event that the Board has erred in its decision with respect to its ability to award interim costs, the Board has considered how the *Okanagan Indian Band* case might otherwise affect its decision. If the principles set out in that case were applicable to the Yukon Utilities Board, the Board finds that the UCG has put forward no evidence whatsoever of its inability to pay for its participation. There is no evidence before this Board of the group's budget, its membership numbers, membership fees or attempts to raise funds to participate in the proceedings. Nor is there any clear evidence before the Board at this point in time as to the UCG's overall position with respect to Yukon Energy's application. Its application for intervenor status simply states: "Our objective is to represent the interests of residential and small business ratepayers."

Finally, the Application before the Board is not a case of special circumstances. It is simply an application by a utility seeking some increases in rates, among other things, to meet its revenue requirements. The Application may or may not have merit. That however does not make it a case of special circumstances. No constitutional issues have been raised. While ratepayers may genuinely be interested in the outcome of the Application, the Board finds that this is not a public interest case special enough to rise to the level where the unusual measure of ordering interim costs would be appropriate.

For the above reasons, even if the principles set out in the *Okanagan Indian Band* case are applicable to this Board, the Board finds that the UCG has not met the thresholds set forth in that case.

For the above reasons, the Applicant's motion is dismissed.