

2005-7

**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        )  
W. Shanks                )  
R. Hancock               )  
M. Phillips               )

March 22, 2005

**YUKON UTILITIES BOARD**

**EXHIBIT**     *A - 23*

**BOARD ORDER 2005-7**

DAY

ENTERED BY

DATE

*Shenke*

*March 23/05*

**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 March 7, 2005, Mr. McMahon filed a Notice of Motion which requested that the Board issue an order requiring YEC to provide all materials requested by the Board and intervenors by way of information requests that YEC has refused to provide based on claims of confidentiality or privilege ("the March 7 Motion"); and
- H. On March 8, 2005, Mr. McMahon filed a Notice of Motion which requested that the Board issue an order which marks the evidence before the Public Accounts Committee on February 8, 2005, as well as the Auditor General's Report on the Energy Solutions Centre dated February 7, 2005 ("the Report"), as Board exhibits in this proceeding ("the March 8 Motion"); and
- I. On March 14, 2005, the Utilities Consumers' Group, Yukon Electric Company Limited and YEC submitted comments on the Motions; and
- J. On March 16, 2005, Mr. McMahon filed his reply and provided additional information on the relevancy of YEC's unanswered information requests and the relevancy of the Report and the transcripts of the Public Accounts Committee session of February 8, 2005; and
- K. On March 18, 2005, YEC responded to Mr. McMahon's reply; and
- L. The Board has reviewed the March 7 and 8 Motions and the related submissions.

**NOW THEREFORE** the Board orders with Reasons for Decision attached as Appendix A that:

- 1. With regard to the March 7 Motion:
  - a) For questions that involve customer confidentiality, the YEC is to provide the requested customer-specific information by a generic identification of Customer A, Customer B, etc. and the total for the group. If the information provided would result in the identity of an individual customer being determinable then the information for that particular customer should not be provided.
  - b) The March 7 Motion is otherwise dismissed.
- 2. The March 8 Motion is dismissed.

**DATED** at the City of Whitehorse, in the Yukon Territory, this *23rd* day of March 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 *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").

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 Notices of Motion and Submissions**

By Notice of Motion dated March 7, 2005, Mr. McMahon requested that the Board issue an order requiring YEC to provide all materials requested by the Board and intervenors by way of information requests that YEC had refused to provide based on claims of confidentiality or privilege ("the March 7 Motion").

In support of the March 7 Motion, Mr. McMahon's submissions included the following points:

- YEC had not responded to 57 questions for various reasons including a claim that some of the information requested is confidential or privileged;
- YEC has made a claim of confidentiality for certain materials provided to the Board of Directors and minutes of Board of Directors meetings at which the concept of the Income Stabilization Trust and Mayo-Dawson Transmission Line project has been discussed;
- The requested information is indispensable in the consideration of the issues in this proceeding and unless the most compelling reasons can be advanced by YEC in support of its claim for confidentiality, an overarching public interest in disclosure should prevail; and

- As a publicly-owned entity, any information associated with the operation of YEC should be readily provided to a public review process.

Mr. McMahon also made submissions on the need for transparency of process. The Board considers those submissions to form part of the third point listed above.

By Notice of Motion dated March 8, 2005, Mr. McMahon requested that the Board issue an order which marks the evidence before the Public Accounts Committee on February 8, 2005, as well as the Auditor General's Report on the Energy Solutions Centre dated February 7, 2005 ("the Report"), as Board exhibits in this proceeding ("the March 8 Motion").

In support of the March 8 Motion, Mr. McMahon's submissions included the following points:

- The Report was posted on YEC's website as a publicly-accessible document shortly after its release;
- The transcripts of the Public Accounts Committee session of February 8, 2005 have been publicly-accessible on the Yukon government's website since the session was completed;
- There is no harm from adding material to the record of this proceeding that has already been placed in the public record;
- In its responses to information requests, YEC has provided information on services that it will provide to the Energy Solutions Centre ("ESC") in 2005 on a cost recovery basis;
- In its responses to information requests, YEC has identified capital costs that it has reimbursed to the ESC which now form part of YEC's rate base;
- The Report indicates new contracting policies and procedures that have been implemented by YEC, suggests that YEC will benefit from ESC programs, and also indicates a number of process and responsibility changes at YEC;
- During the testimony before the Public Accounts Committee, the Chair of YEC indicated that the ESC engaged in programs that should have been YEC programs, also indicated that YEC follows a certain procedure with respect to every one of its staff positions and likened the staff and wage guidelines used by YEC to those of the Yukon government; and
- The Report and the evidence from the Public Accounts Committee are indispensable to the consideration of issues at this proceeding, especially the costs that YEC indicate make up its 2005 revenue requirement.

By letter dated March 9, 2005, the Board directed that any responses to the March 7 and 8 Motions were to be filed by March 14, 2005, and any reply from Mr. McMahon was to be made by March 16, 2005.

By letter dated March 10, 2005, YEC responded to the March 7 and March 8 Motions and proposed an alternative process [similar to the one used in the 1996/97 General Rate Application ("GRA")] to deal with concerns raised by Mr. McMahon and any other concerns of intervenors that may arise out of YEC's information responses. The response states that in the 1996/97 GRA, the Utilities Consumers' Group ("UCG") filed a motion requesting further disclosure in relation to 21 information requests which described in more detail the information that it was requesting and why it was relevant. It further states that YEC was able to respond to 10 of the questions and the Board ruled on the remaining contested information requests. YEC proposed that a similar process be established in this case and that all motions in relation to YEC's information responses be filed by the intervenors by March 16, 2005.

By letter dated March 11, 2005, Mr. McMahon suggested that YEC's proposal for an alternative process was inconsistent with the position taken by YEC in its February 18, 2005, letter (Exhibit B1-12) regarding an application for review and variance of a procedural decision of the Board.

In the absence of a Board response to its March 10, 2005, letter, YEC filed its responses to the March 7 and 8 Motions on March 14, 2005. With regard to the March 7 Motion, YEC commented that the motion was not sufficiently specific to identify the questions to which a response is sought nor does it state the specific claims of confidentiality or privilege to which he objects. YEC stated that the Board has no jurisdiction to order YEC to disclose information that is subject to solicitor-client privilege. YEC also stated that it should not be put to defending any of its other claims of confidentiality until Mr. McMahon has established both the relevancy and necessity of the responses.

With regard to the March 8 Motion, YEC acknowledged that the Report and the transcripts of the Public Accounts Committee session of February 8, 2005, are documents that are publicly available and commented that it is open to any intervenor to attempt to file the documents as evidence in this proceeding in accordance with Rules 14 and 16 of the Board's Rules of Practice. However, YEC stated that there is no basis to compel YEC to file these documents as exhibits and it will object vigorously to its admissibility on the basis that it is not relevant to any matter in this proceeding.

On March 14, 2005, the UCG and Yukon Electric Company Limited ("YECL") filed separate comments which supported the Motions either wholly (UCG) or in part (YECL). YECL submitted that relevance was the test for disclosure with respect to March 7 Motion. It supported the production of the ESC documentation requested in the March 8 Motion.

On March 16, 2005, Mr. McMahon filed a reply to the comments received and addressed the claims of confidentiality. He referred to the case of *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.R. 522 ("*Sierra Club*"), provided additional information on the relevancy of YEC's unanswered information requests, the Report and the transcripts of the Public Accounts Committee session of February 8, 2005. Mr. McMahon also proposed that a "semblance of relevancy test" should be applied whereby "if the information is arguably relevant to the position of any parties with respect to matters in issue, it ought to be disclosed."

On March 18, 2005, YEC filed its comments on the additional information provided in Mr. McMahon's March 16, 2005, reply and responded to some of the unanswered information requests. YEC grouped its comments into four categories and identified the associated unanswered information requests which are:

**a) Questions involving customer confidentiality**

The questions are McRobb-YEC-1-9; YECL-YEC-1-3(a) and (b); YECL-YEC-1-4(a); YECL-YEC-1-6(a); YECL-YEC-1-47(d) and (e).

YEC observed that Mr. McMahon's March 16, 2005, reply did not seek to challenge the need for confidentiality on customer-specific information but asked for generic information without making reference to specific customers. YEC agreed to re-examine the specific questions and committed to provide any additional information subject to privacy laws and policies.

**b) Question involving solicitor-client privilege**

The question is McMahon-YEC-1-70(a), regarding whether YEC had received a legal opinion, and it requested a copy of any such opinion on a specific matter. YEC has replied that legal advice provided is privileged and noted that Mr. McMahon's March 16, 2005, reply is no longer seeking privileged information, is now asking for the corporate position on this contract and that part (b) of that question had already dealt with payments made under the contract. YEC stated that its internal procedures have been reviewed to ensure that signing authority rules are followed in future.

**c) Questions asking for copies of contracts or agreements**

The questions are McMahon-YEC-1-62(a), (b) and (c); McMahon-YEC-1-75(a)

YEC noted that these questions relate to specific contract or agreements with regard to the Mayo-Dawson Transmission project. YEC's view is that contracts with third parties are considered as confidential. YEC stated that the contracts related to the Mayo-Dawson Transmission project are relevant to its ongoing legal claims process and it would not be in the best interest of the company or its ratepayers to subject those contracts to public scrutiny and debate at this time. YEC is prepared to provide these contracts on a confidential basis if the Board believes they are relevant and necessary to gain an understanding of matters in this proceeding.

**d) Questions asking for copies of YEC or Yukon Development Corporation ("YDC") Board of Directors minutes or documents**

The questions are McMahon-YEC-1-19(a) and (b); McMahon-YEC-1-52(a); McMahon-YEC-1-60(a); McRobb-YEC-1-29

YEC has responded that materials provided to YEC's Board of Directors and minutes of Board meetings are confidential and that materials related to YDC are out of scope.

In its March 18, 2005, comments, YEC also addressed Mr. McMahon's new legal arguments. YEC submitted that the issue in *Sierra Club* involved the test that should be applied by the Federal Court when a party applies for an order requiring that material to be filed in the Court be kept confidential. YEC stated that to date it has not filed any documents with the Board that it is requesting be kept confidential; therefore, the issues underlying *Sierra Club* are irrelevant. YEC also noted that the "semblance of relevancy" test proposed by Mr. McMahon was not consistent with the language of Rule 12(1) of the Board's Rules. YEC stated that the proposed test did not allow for the process under Rule 13 whereby YEC is entitled to raise an objection where it is unable or unwilling to respond to an information request.

The questions listed in Mr. McMahon's March 16, 2005, reply that were not addressed in YEC's March 18, 2005, submission are McMahon-YEC-1-41; McMahon-YEC-1-42; McMahon-YEC-1-48(b); McMahon-YEC-1-55(b), (c) and (d); McMahon-YEC-1-56(a) and (b); McMahon-YEC-1-57(a) and (b); McMahon-YEC-1-60(b); McMahon-YEC-1-68(c) and (d) and McMahon-YEC-1-69(a); McMahon-YEC-1-74(b); McRobb-YEC-1-14 and McRobb-YEC-1-20 ("the Unaddressed Questions").



### **3.0 Board Conclusions**

The Board has made the following determinations on the March 7 and 8, 2005, Motions:

#### **A. March 7 Motion**

**a) Questions involving customer confidentiality**

The Board accepts Mr. McMahon's request for production limited to generic information. YEC is to provide the requested customer-specific information by a generic identification of Customer A, Customer B, etc. and the total for the group. If the information provided would result in the identity of an individual customer being determinable, then the information for that particular customer must not be provided.

**b) Question involving solicitor-client privilege**

The Board accepts YEC's claim for solicitor-client privilege. The question need not be answered.

**c) Questions asking for copies of contracts or agreements**

The Board accepts YEC's position that it would not be in the best interest of the company or its ratepayers to subject those contracts to public scrutiny and debate at this time. At present, YEC is not required to provide these contracts on a confidential basis to the Board. The Board may request YEC to file the contracts or agreements on a confidential basis at some future time. These questions need not be answered.

**d) Questions asking for copies of YEC or YDC Board of Directors minutes or documents**

The Board considers, at this time, that copies of YEC or YDC Board of Directors minutes or documents are not required by the Board in order for the Board to gain an understanding of matters in this proceeding. The Board may request YEC to file the minutes and/or documents on a confidential basis at some future time. These questions need not be answered.

The Board considers that Mr. McMahon's arguments regarding the issue of confidentiality based on the decision in *Sierra Club* and his proposed "semblance of relevancy" test are not relevant in relation to YEC's unanswered information requests.

The Board finds that, except for McRobb-YEC-1-14, the Unaddressed Questions relate to issues that are out of scope as determined by the Board in Order 2005-2. The Board considers, at this time, that any exchanges between YDC and the Minister are out of scope for this proceeding. The Board finds that McMahon-YEC-1-74(b) is beyond the time frame of this proceeding, and therefore out of scope. The Board finds that McRobb-YEC-1-14 seeks information at a level of detail that is excessive, and therefore a response is not required.

**B. March 8 Motion**

The Board denies the request that the evidence before the Public Accounts Committee on February 8, 2005, as well as the Report be filed as Board exhibits in this proceeding. If an intervenor chooses to file these documents as exhibits in this proceeding, then it may seek to file the documents at the Hearing. The Applicant and Intervenors can make oral argument on their relevance at that time.