2000-1

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

and

A Yukon Energy Corporation Application to Finalize Rates

BEFORE:

B. Morris, Chair	)	
G. Leslie, Member	)	
C. Metz Murray	)	
D. Schmekel, Member	)	
W. Shanks, Member	)	February 15, 2000

ORDER 2000-1

WHEREAS:

A. By letters dated December 3, 1999 and December 10, 1999, the Utilities Consumers' Group ("UCG") made two applications to the Board. The first was an application for a review and variance of Board Order 1999-3 and the second was an application for a review and variance of Board Order 1999-5, both pursuant to s. 62 of the *Public Utilities Act* R.S.Y., c143, as amended ("Act"). Both applications relate to the Yukon Energy Corporation ("YEC") and the Yukon Electrical Company Limited ("YECL") (collectively referred to as the "Utilities," the "Companies").

B. On December 23, 1999 the Board requested written comments from the participants in the proceedings leading to the issuance of the above Orders. The only comments on the UCG Applications came from the Companies.

C. The Board considered the applications for a review and variance, and reviewed the materials cited in the applications, and the responses to the Board's request for comments, and the UCG January 31, 2000 rebuttal arguments.

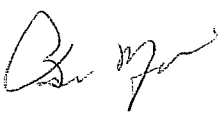
NOW THEREFORE the Board orders as follows:

1. The applications for a review and variance of Board Orders 1999-3 and 1999-5 are dismissed.

2. The Board reasons for this Order are cited in Appendix A attached hereto.

Dated at the City of Whitehorse, in the Yukon Territory, this 18 day of February, 2000.

BY ORDER



Brian Morris
Chair

REASONS FOR DECISION

UTILITIES CONSUMERS' GROUP APPLICATION TO REVIEW AND VARY BOARD ORDERS 1999-3 AND 1999-5

I GUIDELINES

Section 62 of the Act states: "The board may reveiw, change or cancel any decision or order made by it, and may re-hear any application or complaint before deciding it." While the Act provides the Board with discretion to determine whether it will grant a review, it does not provide any guidance as to the grounds for review or the content of the application for review. Accordingly, in 1996 the Board issued guidelines as follows.

A. GROUNDS FOR REVIEW

The Board will consider the following circumstances as grounds for review under Section 62 of 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 circumstance or facts since the decision or order;
(iv) a basic principle has not been raised in the original proceedings;
(v) a new principle has arisen as a result of the decision or order;
(vi) such other grounds as the Board determines require review.

B. CONTENT OF THE APPLICATION FOR REVIEW

The Application for review should at a minimum set forth the following:

(a) the grounds on which the application is based;
(b) a brief statement of facts supporting the alleged ground(s) for review;
(c) if new evidence is sought to be filed, a statement of the nature and purpose of the evidence;
(d) any further matter that the applicant believes will assist the Board in reaching a decision to grant a review.

C. PROCEDURE

The Board uses a two phase system for applications for review. Such a process is attractive as it enables certain applications to be dealt with expeditiously and economically. An application for review is subject to an initial screening phase where the applicant must establish a prima facie case sufficient to warrant full consideration by the Utilities Board. In the first phase, the

Board assesses an application having regard to some or all of the following questions:

- Should there be a review by the Board?
- If there is to be a review, should the Board hear new evidence and should the parties be given the opportunity to present evidence?
- If there is a review, should it focus on the items from the application for review, a subset of those items or additional items?

Upon receipt of an application for review, the Board issues an order inviting registered Intervenors and interested parties to comment on the application for review by addressing those questions set out in the order and further specifying a process to be followed which is either by written submissions with reply by the applicant or by written submissions and oral argument. In the case of an alleged error, in order to advance to the second phase of the process, the application must show that:

1. The claim of error is substantiated on a prima facie basis; and
2. The error has significant material implications.

If there is a second phase, then the Board will hear full arguments on the merits of the application.

II THE DECEMBER 3, 1999 APPLICATION TO VARY ORDER 1999-3

A. ERRORS IN JURISDICTION

The December 3, 1999 Utilities Consumers' Group ("UCG") application alleges, with regard to Board Order 1999-3, that (item 38) the Board "has made an error in jurisdiction by not acting in the public interest by not holding a full public review and debate on the Diesel Contingency Fund."

1. Background

Board Order 1996-6 approved a negotiated Settlement Agreement which included provisions for the creation of a Diesel Contingency Fund ("DCF") with the following terms:

> "This fund is to replace the proposed rate stabilization fund. The fund will operate to smooth customer rate changes and offset forecast diesel costs. Rates and the fund will be determined using the long-term average water expected to be available for generation (105 + 246 GW.h). The initial funding will be determined based upon the funds available as at December 31, 1995. If additional funding becomes available due to other determinations with respect to diesel costs or other utility costs in 1995, the fund will be adjusted. The fund is only to be used for the purposes of stabilizing customer rates and offsetting diesel generation cost estimates and the fund is not to be accessed for other reasons, including government subsidy of rates.

The cap on the fund is set at the initial contribution level. If the fund accumulates revenues in excess of the cap, the surplus balance at the end of the year is to be refunded by way of a rate-rider to customers over the following two years. If the fund falls below the equivalent negative cap level, a rate-rider increasing customer bills will occur to maintain the fund within the positive and negative cap levels. The fund is to attract interest based upon the short/intermediate term bond rates in which the Companies may invest the fund and any negative balances would only attract interest at the lowest short-term borrowing rate available to the Companies through a line of credit.

The fund is to operate outside of rate base but an annual report detailing additions and deletions to the fund is to be filed with the Board so that the Board may oversee the fund activities. The Board will direct the Companies on the additions and deletions to the fund. The annual report to the Board will also include a forecast of available water for the following year.

2. Review Procedures

On June 6, 1999 Yukon Energy Corporation ("YEC") filed a report, detailing the changes to the Diesel Contingency Fund in 1998, together with revised reports for 1996 and 1997. The filing also included, for convenience, copies of relevant DCF tables for the Yukon Electrical Company Limited ("YECL"). The Board found that approval of the report was in the public interest, and issued Board Order 1999-3 approving the additions and deletions to the Diesel Contingency Fund for 1996 to 1998 as filed.

The UCG application does not define "full public review and debate". There is no requirement under the Act for the Board to hold oral public hearings on every issue it deals with. As noted in the Department of Justice June 1995 Results of Public Review of Utility Regulation Process, "full public hearings are expensive, encourage litigative tactics by lawyers and attract sparse public participation." However, the Board went to great lengths to obtain written submissions from interested parties before making its decision in this matter.

After receiving the DCF report filed by YEC, the Board distributed copies of the report to interested parties for comment. On July 4, 1999 the Utilities Consumers' Group responded with some preliminary concerns and requested a full review of this report with a similar process to rate hearings; interrogatories and responses to/from the Companies to the various intervenor concerns. No other comments were received. The Board forwarded the UCG concerns to the Companies but noted that the Board had the ultimate jurisdiction over the DCF. On October 7, 1999 Yukon Energy Corporation provided comments on the submission from the Utilities Consumers' Group and additional information to assist the Board in its review. On October 10, 1999 UCG again argued for a "public review", in part because the "1996/97 Settlement Agreement was very general in terms of reference for the operation." The Board considered that it had provided for a sufficient public review and Order 1999-3 was signed on November 3, 1999 after its review of all the material received.

B. ERROR IN FACT OR LAW

As part of its justification for a "full public review" of the DCF, UCG stated that it had argued many times that the "the terms of reference and operation parameters of the Fund were too vague." This portion of the application (item 37) alleges the opposite; that the Board "made an error in fact or law by not upholding the terms of the Settlement Agreement and the terms of the Diesel Contingency Fund".

1. Diesel Contingency Fund

Board Order 1999-3 simply approved the additions and deletions to the Diesel Contingency Fund for 1996 to 1998 as filed. The UCG application does not specifically state which part of the fund additions and deletions it takes issue with, but the remedy requested in items 40 and 41 of the application is that:

> "Only those additions and deletions to the Diesel Contingency Fund arriving out of offsetting costs when the Utilities had to rely on diesel be approved. The money arising from other deletions be returned to the Diesel Contingency Fund with interest from the time it was deleted."

The report prepared by the Yukon Energy Corporation was filed in accordance with the Board's directions under Board Orders 1996-6, 1997-7 and 1998-5. UCG appears to be taking issue with the provisions of the latter two orders, to the extent they amend the operation of the DCF. As well, the UCG January 31, 2000 Rebuttal points to Board Orders 1996-11 and 1997-4 as supporting its position.

a) Order 1996-11

Pursuant to direction of the Court of Appeal on April 9, 1996, the Board concluded that the Utilities were entitled to recover an additional $1,952,912 in revenue from the test years 1993 and 1994 previously disallowed by the Board. 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 options outlined, one of which was to collect the revenue from the DCF, 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. After consideration of all of the submissions the Board issued Order 1996-11 approving an increase in rates charges to all customers of all classes, sufficient for the Utilities to recover the Appeal Revenue in approximately one year.

The UCG Rebuttal states: "The Board established the guiding principle of the DCF, "that it be used as a reserve only to be activated when diesel was/is on the margin and the fund is not to be accessed for other reasons, including subsidy of rates."

To clear the record, this is not an accurate quote. Order 1996-11 actually quoted the Settlement Agreement which included the comment that the fund could be used for the purposes of stabilizing rates and that it was not to be assessed for other reasons, including government [emphasis added] subsidy of rates. Board Order 1996-11 did not preclude the use of the DCF for

stabilizing rates at another time.

b) Order 1997-4

On December 30, 1996, Anvil Range Mining Corporation ("Anvil") requested that the Board review and vary Order 1996-11. With the exception of UCG, all submissions with respect to the variance (including the City of Whitehorse, and the Association of Yukon Communities) 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. After reviewing the written submissions, Board Order 1997-4 denied the appeal by Anvil.

The UCG Rebuttal (item 7) refers to Order 1997-4 as having committed the Board as a matter of fact that the utilization of the DCF was only to offset diesel costs when the Utilities had to rely on diesel generation.

However, the Appeal dealt mainly with whether the Board had the legal right or authority to make an order requiring current customers to pay in their rates to recover costs incurred in the rate years 1993 and 1994, particularly if the customer (Anvil) did not exist when the costs were incurred.

Board Order 1997-4 did not state that the DCF was only to offset diesel costs. As quoted in the Background above, the Settlement noted that the DCF "will operate to smooth customer rate changes and offset forecast diesel costs". At that time the Faro mine was in operation and there was an expectation that the funds would be needed to offset the higher cost of diesel.

In its Reasons for Decision, the Board stated:

> "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.
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> 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.
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> 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."

In deciding that the DCF should not be used to recover the Appeal revenue, it did not preclude its later use to smooth rate changes.

c) Order 1997-7

On April 1, 1997, the Faro mine did shut down and ceased to be a customer of YEC. In response to an application by the Companies to increase rates due to the shutdown, Board Order 1997-6 approved an interim refundable rider surcharge of 20%, to be reviewed at a later hearing. However, the Commissioner in Executive Council, pursuant to Section 17(1) of the *Public Utilities Act*, then issued a direction to the Board, as follows:

> "The Commissioner in Executive Council directs the Yukon Utilities Board to determine and order by July 1, 1997 a method for providing rate stabilization from the Diesel Contingency Fund established by the Board in Decision 1996-7 in the form of a minimum 25 per cent reduction for all customers in the general rider surcharge approved by the Board in Decision 1997-6. The method determined by the Board shall provide that the rate stabilization be effective on June 1, 1997 and shall continue until such time as the surcharge is removed."

The Board complied with the Order-in-Council and Board Order 1997-7 amended the operation of the Diesel Contingency Fund to allow the recovery of the above credit from the amounts in the fund. No request for variance of this order was received.

d) Order 1998-5

On April 22, 1998 YEC filed an application to finalize its 1997 rates. After the July 1998 hearing, Board Order 1998-5 helped to stabilize rates by disallowing recovery by YEC of $3,177,200 Anvil bad debt, and directing that the balance in the Diesel Contingency Fund be used to make contributions to all eligible customers to offset the rate increases. YEC appealed the former direction and UCG is apparently now appealing the latter.

However, in its deliberations over the application by YEC to change the operation of the DCF, the Board has requested submissions on its jurisdiction. On June 17, 1998 UCG stated:

> "These prior applications and Orders in Council provided ample reason for the Board to open all areas of the 1996 negotiated settlement process and GRA, including the Diesel Contingency Fund (DCF) and Rate of Return (ROE)."

> "Although UCG wish to protect the status of the DCF, prior Order in Council has directed the Settlement on this Fund irrelevant. It is on the table for further negotiation."

Although UCG preferred to see the DCF issue left to the next General Rate Application, it was part of the YEC limited scope application and Board Order 1998-4 directed that the use of the DCF as proposed by YEC would be an issue for review in the July 8, 1998 hearing.

YECL's submission (Exhibit 57) stated:

> "It is generally recognized that this type of account is validly established by regulatory tribunals within the exercise of their general rate making authority. Likewise, there are no specific constraints on the manner in which the Board can dispose of any balance in such a fund. This provides the Board with considerable latitude in establishing the course of conduct it wishes to pursue."

The evidence during the July 1998 hearing was that the DCF requirements to stabilize hydro-related cost impacts were significantly curtailed when the Faro mine closed, since diesel generation typically is no longer on the margin.

YEC stated (Exhibit 58):

> "In Board Order 1997-4 the Board reviewed in some detail the discussions during the settlement process which led to a consensus amongst the parties on this issue. It found that the fund was established to stabilize rates to offset "diesel generation cost estimates" and that the fund would only be active when diesel was on the margin. It is important to note, however, that the Fund was established within the context of the Faro mine operating during the two test periods at issue in the negotiations. The issue of the closure of the Faro mine, and what if any effect this would have on the Fund, was not specifically addressed by the parties in the settlement proposal presented to the Board. However, during the hearing the issue of what would happen to the fund if Anvil closed was raised by Mr. Duncan. Mr. Kerslake's response was:
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> "If there is no diesel on the margin, then the fund would lie dormant and either you would have then a decision to make whether to go and get rid of the fund or you leave the fund sitting there waiting for the next time we go back into when diesel is on the margin."

The purpose of the July 1998 hearing was to see what could be done to deal with the fact that the Faro mine had shut down and was not expected to return in the foreseeable future. The hearing established that there was nothing in the Act or Orders-in-Council that limited or restricted the jurisdiction of the Board to utilize the DCF to help stabilize rates and mitigate the impact of what would have been a rate increase of almost 30%.

The Board is of the view that it has not "made an error in fact or law by not upholding the terms of the Diesel Contingency Fund."

2. Negotiated Settlement Terms

UCG clarified its position regarding its request for variance of Order 1999-3 in its January 31, 2000 rebuttal, stating that, while UCG does not dispute Board jurisdiction to direct the Companies on additions and deletions to the fund for offsetting diesel generation, it (item 4):

> "does dispute the YUB's jurisdiction to change the parameters of the DCF without quashing the Negotiated Settlement Agreement. This package was agreed upon, in whole, by the parties and later by the Board. Acceptance of each article of this agreement in the negotiated process was contingent on acceptance of all other articles. Changing one part of this agreement must open the whole package for renegotiation, especially in light of the fact that the Companies did not file a GRA for 1998, 1999 nor 2000 and the components of the curent [sic] Revenue Requirement have not been tested."

In fact, the package was not agreed upon, in whole, by all the parties. As noted in its March 12, 1996 submission UCG was unable to agree to all of the terms of the Settlement.

Negotiated Settlements can also be an important addition to the regulatory process. However, they are not a replacement for hearings; rather they are an addition to the pre-hearing process. Such settlements are generally an agreement between an applicant and intervenors on one or more issues relevant to an application before the regulator. Bargaining positions presented during the settlement discussions are without prejudice and confidential, and the right to dissent is explicitly recognized by the regulator. The regulator may approve agreements as "packages" rather than line-by-line, but will not accept individual terms that, in its judgment, contravene its obligations under its legislation. Ultimately, any Negotiated Settlement is simply another, albeit weighty, pieces of evidence to be considered by the regulator.

However, after an oral hearing in which the Board heard evidence and argument from UCG and other parties, the Negotiated Settlement was approved by Board Order 1996-6.

But, as noted above, the Settlement stated the DCF could be used for the purposes of stabilizing rates. As well, the issue of the closure of the Faro mine was not specifically addressed by the parties in the settlement proposal. Again, the Order which results from any proceeding (including one which incorporates a Negotiated Settlement) can have force only until another proceeding is instituted by the regulator. Without this, rates could be neither increased nor decreased once an order is made. If, in the judgment of the regulator, a change in operating or economic conditions necessitate a change in the Order, then the change must be made. The change which resulted in Board Order 1998-5 and the resulting approvals in Board Order 1999-3 was the shutdown of the Faro mine and the evidence received in the July 1998 hearing.

The prime purpose of the DCF as approved by the Negotiated Settlement was to stabilize rates. The prime de-stabilizer of rates in the Yukon is the on-again off-again operation of the Faro mine. When the mine is in operation and diesel is on the margin, the funds can be used to offset diesel costs. When the mine shuts down and diesel is no longer on the margin, the funds can be used to offset the resulting rate increase. Board Order 1999-3 approved both uses.

The Board is of the view that it has not "made an error in fact or law by not upholding the terms of the Negotiated Settlement."

III THE DECEMBER 10, 1999 APPLICATION TO VARY ORDER 1999-5

A. ERROR IN FACT OR LAW

The December 10, 1999 UCG application alleges (item 66) that the Board has made an error in fact or law "by not ordering a full review after allowing only a limited scope process in their Interim Refundable Rate Hearing."

Although UCG does not explain what constitutes a "full public review", item 69 notes that UCG could agree to a paper hearing.

1. Regulatory Review Process

Rates are set using test years in order to allow the utility to cover operating costs and provide a reasonable opportunity to earn a fair return. Theoretically, the purpose is to determine an annual level of revenue and costs that is representative of the level a utility can be expected to experience on an ongoing basis. In a General Rate Application ("GRA"), future test periods act as a proxy for the results of the unforeseeable future course of events and can be compared against actual operating experience and economic conditions. Significant changes in operating conditions may require changes in the rates but do not necessarily require a complete re-review of the evidence provided in a General Rate Application. Indeed, the lack of a full review, including the concept of "regulatory lag" (the time delay between rate cases) can provide an incentive for utility management to operate more efficiently.

The flexibility and cost-effectiveness of a limited review of changes in operating or other conditions is well-known to regulators although both intervenors and utilities have, at various times, objected to the selective updating adjustments to the test year cost of service. Examples are cost increases beyond the effective control of the utility (such as increases in income tax rates) and automatic adjustment mechanisms, where a change in a preselected cost item or economic indicator will automatically permit a change in the rate to customers, without the delay and expense of a formal regulatory hearing.

2. 1996/97 GRA Review

The last General Rate Application by the Companies was heard by the Yukon Utilities Board at a public hearing on March 18 and 19, 1996 utilizing forecasts of forward test years 1996 and 1997. The issues on which most parties could agree were enclosed in a Negotiated Settlement Package, reviewed at the hearing and approved by Board Order 1996-6. The rates for both YEC and YECL resulting from that hearing were confirmed as final by Board Order 1996-7.

However, the forecasts used in the 1996/97 GRA assumed that the Anvil Range Mining Corporation would continue to be a Rate Schedule 39 customer of YEC providing annual revenues of almost $15 million to cover its share of the cost of utility service.

3. Anvil Mine Shutdown Reviews

Anvil subsequently shut down and ceased to be a customer of YEC as of April 1, 1997, resulting in an application by the Companies that the rates be made interim, with an interim refundable rate surcharge of 20%, effective for billings issued on or after May 1, 1997. These rates were to continue thereafter until such time as the Faro mine resumed as a Rate Schedule 39 customer of YEC, or until the Board determined final rates for 1997 and a 1998/99 GRA, whichever occurred earlier.

Following an exchange of Information Requests and Responses, a public hearing was held on May 12 and 13, 1997 and projected impacts were reviewed for the balance of 1997 and all of 1998. The Board found that, without special relief, the losses caused by the ongoing Faro mine closure were projected to eliminate all of YEC's $5.1 million projected 1997 earnings. Board Order 1997-6 therefore approved the application and ordered "that an application to finalize 1997 rates be made at the earlier of October 1, 1997, or when the Mine re-opens and the uncertainties are removed."

Although Anvil temporarily returned as a customer, it again shut down its mining and milling operations at the Faro mine on January 31, 1998, leaving behind a 1997 cost of service shortfall of $1.6 million, bad debts of $3.2 million, and a 1998 shortfall in excess of $3 million. Recognizing that a new GRA was not required, on April 22, 1998, YEC filed a Revised Application, based on the revenues and costs for the Companies that were adopted in the Settlement Package approved by the intervenors and examined by the Board, adjusted only to recognize the huge losses to YEC associated with the closure of the Faro mine.

Board Order 1998-3 agreed that this approach was reasonable and approved a limited scope review to consider the impact of the Faro mine shutdown. The Board concluded that YECL's rates as originally approved by Board Order 1996-8 were fair, just and reasonable and, as a result, YECL was excused as an Applicant to the July 8, 1998 hearing.

A public hearing was held on July 8, 1998. There were extensive information requests, and full provision for cross-examination and argument on the issues. Exhibit 83, Schedule 6D, updated the Revised Application and detailed how the schedules approved in the 1996/97 GRA should be adjusted to recover the revenue shortfalls caused by the Faro mine shutdowns in 1997 and again in 1998. The YEC application included measures suggested by YEC to lower or mitigate the immediate rate impact, including fuel cost savings, reduced equity returns and amortization costs. Although the columns in Schedule D were headed 1997, 1998 and 1999 impacts, it is important to note that the amounts on the schedule did not, and were not supposed to, represent actual operations in those years.

Board Order 1998-5 approved the recovery of the revenue shortfalls as detailed in Exhibit 83, Schedule 6D, except for recovery of the $3,177,200 Anvil bad debt. To enable recovery of the shortfalls, the Board approved interim refundable riders, subject to further adjustment as directed by the Board in future proceedings.

4. "Future Proceedings"

There were concerns expressed during the hearing that, with the rate increase, the Companies might over-earn their approved return on equity. At the time of the hearing, YEC had planned to file a new GRA prior to the end of 1998 to increase rates in 1999 and 2000. The Board recognized that, in this case, it would be more cost-effective to deal with the finalization of 1998 rates in the same proceeding. However, the Board also recognized that GRA's incur substantial costs of their own and that YEC might be able to order a GRA and, if the savings attributed to YECL did not arise, Board Order 1998-5 allowed YEC to apply to recover the greater shortfall in an application for final 1998 rates.

The Board's April 21, 1999 letter to YEC (copied to hearing participants) provided further guidance, stating:

> "Board Order 1998-5 approved interim refundable riders for Yukon Energy Corporation, to be subject to further adjustment as directed by the Board in future proceedings. The Board accepted that Yukon Electrical Company Limited's approved return on equity should not be changed by an application made by YEC but agreed that it could monitor YECL's forecasts and operations to satisfy itself as to whether there are cost savings not offset by other costs. As YEC's request was for interim refundable rates, the Board directed that YEC's 1998 cost of service is to include the alleged savings attributed to YECL on Schedule 6D of Exhibit 83 in its calculations. If the savings do not arise, the Board stated that YEC can make application to recover the greater shortfall in its application for final 1998 rates expected later this year.
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> In response to UCG Information Request in the July 1998 hearing, YEC stated:
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> "Interim 1998 rates are requested in light of the limited scope review as set out in the Revised Application, the need to facilitate an early public hearing date, and the overall requirement to secure the necessary 1998 rate increases as soon as possible to deal with revenue losses associated with the ongoing closure of the Faro mine. The Revised Application proposes that the 1998 rates be made final at the time when the next GRA is heard by the Board and rates are approved for 1999 and 2000."
>
> In order to aid YEC and expedite the process, at the outset of the July 1998 hearing, the Board noted that the hearing did not constitute a general review and examination of YEC's actual operations for 1997 or its forecasts for 1998 and that questions for 1998 should recognize that the YEC application is proposing only interim rates.
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> Subsequent letters to the Board indicate that YEC no longer wishes to make a General Rate Application for 1999 but will finalize its 1998 rates at this time. As noted in the Board's January 7, 1999 letter, only a General Rate Application with full budgets and forecasts for 1999 and beyond would be accepted if the Yukon Energy Corporation is seeking a greater increase than the interim refundable rates already in place. One exception to this, of course,

would be any resulting revenue shortfall if the alleged YECL savings do not materialize.

The Board has reviewed YECL's forecasts and operations and finds that any alleged cost savings are likely to be offset by other costs. The Board accepts that YECL's approved revenue requirement should not be changed by an application made by YEC. Therefore, the Board will accept an Application from YEC to recover the $1.6 million shortfall by way of a 3.46% increase in Rider J, as outlined by YEC in Schedule A (section c) of its August 31, 1998 letter to the Board.

In support of this Application, and to ensure that YEC's actual return does not exceed approved levels, YEC should include its 1998 Annual Report to the Board together with a forecast for 1999 similar to YECL's November 19, 1998 information provided to the Board and forwarded to YEC for comment. The Board also wishes to know when YEC expects to file a General Rate Application."

YEC filed a "Final Rates Application" together with supporting information on August 27, 1999, with copies to all intervenors. On September 30, 1999 the Utility confirmed that, subject to finalization of YEC's rates at the level applied for, YEC did not intend to file a general rate application for 2000. Intervenors were given an opportunity to comment on the Application material and responses were received from YECL, the Association of Yukon Communities and the Utilities Consumers' Group. UCG stated that it remained committed to a public review process.

YEC responded to the questions raised by the intervenors, and in its November 5, 1999 Final Reply stated:

> "Subject to the adjustments made to reflect the Faro mine closure and other items noted in Order 1998-5, the rates applied for today are based on costs forecast in 1995 for 1996 and 1997. A GRA for further increases in rates, which had been previously anticipated to be required, is no longer intended for 1999 or 2000. This result has been achieved, in part, through aggressive cost control implemented by Yukon Energy. It yields a significant benefit to all ratepayers. This is a marked improvement over Yukon Energy requiring, as previously anticipated, higher rates to cover ongoing cost increases plus the significant added cost associated with any general rate application process."

5. Board Order 1999-5

After review of the written submissions, Board Order 1999-5 confirmed YEC's rates as final by way of a 3.46% increase in the 15.28% rider approved by Order 1998-5, subject to YEC not filing for a further rate increase for the year ending December 31, 2000. The Appendix to Board Order 1999-5 explained the Board's rationale.

6. "Full Public Review"

During the public hearing on YEC's rates, UCG filed Exhibit 53, noting that:

> "The Board has the authority to determine final rates without a hearing, a paper hearing nor any input from intervenors, as was done in 1996."

Even UCG's Application for review and variance of Board Order 1999-5 (item 69) states that "UCG could agree to a paper hearing."

In its application, UCG provided a chronology of events leading up to the Order. As shown by the UCG chronology, both YECL and YEC rates were confirmed as final only after the Board received evidence from both an oral and written public hearing process. The oral hearing scope was limited to recognize that rates were being set at 1997 levels, using evidence previously received in a full GRA, adjusted for the impact of the shutdown of a major customer. The subsequent written hearing process was initiated to address intervenor concerns and to help the Board determine that the Companies did not somehow receive excessive profits in later years. The Board considered that it had sufficient evidence to finalize YEC's rates.

The Board is of the view that it did not make an error in fact or law as alleged by UCG.

B. ERROR IN JURISDICTION

The December 10, 1999 UCG application also alleges (item 65) that the Board has exceeded its jurisdiction by "deciding arbitrarily and unilaterally on the potential savings to YECL."

1. Background

The initial application for rate increases made necessary by the shutdown of the Faro mine was jointly made by both YEC and YECL. However, based on a motion by UCG to save hearing costs, YECL's rates were finalized at 1997 levels and YECL was excused from the hearing. The limited scope hearing was then undertaken to determine the impact on YEC's cost of service due to the loss of revenue from its major customer.

However, as noted above, YEC attributed certain cost savings to YECL as a result of the shutdown. Although it was no longer an applicant, YECL provided complete regulatory schedules for YECL for the years 1996 through 1999, plus additional information to assist the Board in its review of the YEC allegations. YEC provided comments on the filings. The Board reviewed the material and found that any alleged cost savings were likely to be offset by other costs.

Item 56 of the UCG application states that "This term "were likely" sends a message to UCG that the Board is unsure of this decision and any reasonable doubt substantiates this decision must be reviewed." However, this was not an arbitrary or unilateral decision but simply an examination of an additional piece of evidence to be used to set YEC's rates. The Board used the term "likely" in reference to the fact that it was dealing with forecasts of future events, as would be the case with the material in an actual rate application.

UCG believes (item 61) that: "It is a regulators responsibility to order the applicants provide sufficient evidence, beyond a reasonable doubt, of their revenue requirements." As noted in YEC's January 13, 2000 submission on the UCG application, there is no such burden of proof in utility regulation. In any case, YECL was not an applicant to this proceeding.

UCG continues on in item 61 to state:

> "But if they wish the desired effect of a more efficient operation of the utility system, then the regulator must order the applicants to save "x" number of dollars from this requirement. If the applicants do not find these savings, then their rate of return will be impacted. By continuously allowing the applicants their full requested revenue requirements without setting parameters, the regulator is not acting in the best interest of the public."

Regulators must base their decisions on the evidence placed before them, as was done in this application. To determine the appropriate revenue requirements of a utility and then order it to save "x" dollars from this requirement, would be acting in an arbitrary and unilateral manner and would be outside the Board's jurisdiction. In any case, YEC did not receive its "full requested revenue requirements" in its rate application, since the Board disallowed recovery of the Anvil bad debt of $3.2 million.

The Board is of the view that it has not made an error in jurisdiction as alleged by UCG.

YUKON UTILITIES BOARD
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Our file no.: 2210/3011
Your file no.:

February 21, 2000

R. Rondeau
Utilities Consumer's Group
P.O. Box 6086
Whitehorse, Yukon
Y1A 5L7

Dear Sir:

Re: UCG's Applications to Review and Vary Board Orders 1999-3 and 1999-5

I enclose Board Order 2000-1 containing the Board decision, with reasons, on the above captioned matters.

Yours truly,

Jim Slater

Enclosure

cc	R. McWilliam	Yukon Energy Corporation
	P. Goguen	Yukon Electrical Co. Ltd.
	L. Bagnell	Association of Yukon Communities
	J. McLaughlin	Association of Yukon Communities
	B. Newell	City of Whitehorse
	R. Clarkson	New Era Engineering
	P. McMahon	YTG, Dept. of Ec. Dev.
	P. Percival	