

Appendix A to Board Order 2019-05 Reasons for Decision

1. Review Application

1. On December 27, 2018, the Yukon Utilities Board (Board) issued its decision, Board Order 2018-10, in relation to Yukon Energy Corporation's¹ (YEC) 2017-18 General Rate Application (GRA). In Board Order 2018-10, the Board denied inclusion of certain YEC demand-side management (DSM) costs in 2017-18 rates.

2. On March 15, 2019, YEC filed an Application for Review and Variance of Board Order 2018-10 (Review Application) pursuant to section 62 of the *Public Utilities Act*² (*Act*) and section 31 of the Board's Rules of Practice.³ In its Review Application, YEC is requesting that the Board convene a Phase II review on the merits of its Review Application or proceed directly to approve \$3.319 million in DSM costs.⁴ YEC alleged that the Board erred in law with regard to DSM findings in Board Order 2018-10 by:
 1. failing to determine YEC's rate base in accordance with the requirements of Section 32 of the *Act*
 2. taking into account irrelevant considerations in concluding that the DSM costs were imprudently incurred; and
 3. failing to consider YEC's evidence in relation to YEC's DSM costs.

3. In its Review Application, YEC submitted that the DSM rulings in paragraphs 477-479 of Appendix A of Board Order 2018-10 are based on errors in law. In reaching its findings, the Board failed to undertake a proper prudence analysis because it failed to consider and review YEC's evidence with respect to DSM costs. YEC stated that:

The Board must determine the issue of prudence for all costs under review in a rate approval exercise such as a General Rate Application. This includes costs being reviewed in the context of section 32 of the *PUA*.

Further, under section 32 of the *PUA* in determining a rate base for Yukon Energy it must give due consideration to Yukon Energy's capital project costs, including Yukon Energy's DSM Costs. The Board has no discretion to refuse the DSM Costs without considering these costs under a proper prudence analysis

¹ Yukon Energy Corporation is a wholly owned subsidiary of the Yukon Development Corporation, a Crown corporation. Yukon Energy Corporation is a publicly owned company.

² *Public Utilities Act*, R.S.Y. 2002, c. 186, section 62.

³ Yukon Utilities Board Rules of Practice, approved by Board Order 2012-09, October 17, 2012, section 31.

⁴ Yukon Energy Corporation Application for Review and Variance of Board Order 2018-10, March 15, 2019, paragraph 28.

which must include a review of the evidence led by Yukon Energy to justify the expenditures.⁵

4. YEC argued that the previous Board order, Board Order 2014-06,⁶ outlined specific guidelines for determining whether DSM costs being considered in that proceeding were considered cost effective and prudently incurred. These four cost-effectiveness standards⁷ used for the inCharge Program were the total resource cost test (TRC), the program administration cost test (PAC), the rate-impact measure test (RIM), and the participant cost test (PCT). Other considerations of the Board in that decision related to the utilities' delivery of electricity and cost savings and that program elements must at least be rate-neutral for all ratepayers.⁸
5. YEC submitted that it presented evidence in the form of supporting documents in the application⁹ and in responses to Board and intervener information requests.¹⁰ In YEC's view, the evidence it provided indicated that DSM remained a cost-effective and competitive resource option and, further, that the DSM programs were not duplicative of other programs adopted by the Yukon government.¹¹ YEC added that if the evidence was properly reviewed and considered as part of a prudency analysis, the disallowed DSM costs would have been found to be prudently incurred. YEC acknowledged in its review and variance application that some of the DSM programs included supply-side options or projects.¹²
6. With respect to the second ground, that the Board took into account irrelevant considerations, YEC stated that the only basis provided by the Board for denying the DSM costs was: (i) that YEC did not seek prior approval of these costs before proceeding; (ii) that the Yukon government has DSM incentive programs in place; and (iii) "...that it is better to leave DSM projects to government, rather than having ratepayers fund these projects."¹³
7. YEC asserted that the Board is mandated to consider the DSM costs and their prudency in light of the evidence on the record of the proceeding and that this

⁵ Yukon Energy Corporation Review and Variance of Board Order 2018-10, March 15, 2019, paragraphs 10-11

⁶ Yukon Utilities Board Order 2014-06, April 23, 2014.

⁷ The four cost-effectiveness measures are industry measures that were included in a report by ICF Marbek, dated January 9, 2012, in the proceeding leading to Yukon Utilities Board Order 2014-06.

⁸ Yukon Energy Corporation Review and Variance of Board Order 2018-10, March 15, 2019, paragraph 13, referring to Yukon Utilities Board Order 2014-06, Appendix A, April 23, 2014, page 100.

⁹ Yukon Energy Corporation 2017-18 GRA Supporting Documents, Tab 5 — Capital Projects, June 2017, section 5.3.1.5.

¹⁰ Responses to YUB-YEC-1-80, YCS-YEC-1-14, UCG-YEC-1-10, UCG-YEC-140, and JM-YEC-1-3.

¹¹ Yukon Energy Corporation Review and Variance of Board Order 2018-10, March 15, 2019, paragraph 44

¹² *Ibid.*, paragraphs 39-40 regarding the New Program Development.

¹³ *Ibid.*, paragraph 18, referring to Yukon Utilities Board Order 2018-10: Appendix A, paragraph 482, page 91.

requirement forms part of the Board's obligation to review and approve rates in accordance with Canadian rate-setting principles given section 3 of the Rate Policy Directive 1995.¹⁴ In YEC's view, the Board failed to review YEC's evidence altogether, even though it was clearly relevant and necessary to the assessment of whether the DSM costs were prudently incurred.¹⁵ The Board's failure to consider YEC's evidence is an error in law.¹⁶

2. Comments and reply comments

8. The Board issued a process letter on March 26, 2019, affording interveners an opportunity to submit comments on the Review Application by April 17, 2019, and affording YEC an opportunity to submit reply comments by May 8, 2019.¹⁷ The Utilities Consumers' Group (UCG), the Yukon Conservation Society (YCS) and John Maissan submitted comments on the Review Application on April 17, 2019. YEC responded to these comments on May 8, 2019.¹⁸
9. In its submissions, UCG argued that YEC had provided limited information related to the various costs it incurred since 2013. UCG contended that the onus was on YEC, the utility, to provide clear evidence that all expenditures are relevant and prudent, including DSM costs. The UCG submitted that "By requiring the utility to absorb costs of imprudent decisions, management has an economic incentive to manage the system prudently."¹⁹ Ratepayers must not be required to absorb costs attributable to unreasonably commenced managerial decisions or in the absence of regulatory approval. In UCG's view, the Board made it clear in Board Order 2014-06 that it was not approving the DSM program for the five-year term and that YEC was to make a formal application to the Board before expanding the DSM program elements beyond 2015. YEC missed the opportunity to reduce or eliminate their regulatory risk concerning DSM and chose to ignore directions from the Board. Accordingly, UCG recommended that the Board deny the Review Application.
10. YCS supported YEC's request for a review and variance of Board Order 2018-10. Citing the arguments already advanced by YEC, YCS provided the following reasons supporting a review: DSM is used worldwide as a viable energy resource for electrical utilities; British Columbia relies on DSM to meet at least 66 percent of new energy demand growth and has relatively low electricity rates; and YEC's 2016

¹⁴ Rate Policy Directive, 1995, YOIC 1995/090, May 29, 1995, section 3.

¹⁵ Yukon Energy Corporation Review and Variance Application of Board Order 2018-10, March 15, 2019, paragraph 21.

¹⁶ *Ibid.*, paragraphs 23 and 24 citing *Wal-Mart Canada Corp. v Calgary (City)*, 2013 ABQB 21, paragraph 27 and *Boyd v JBS Foods Canada Inc.*, 2015 ABCA 380, paragraph 38.

¹⁷ Yukon Utilities Board letter to Yukon Energy Corporation and parties re: R&V, March 26, 2019.

¹⁸ Yukon Energy Corporation letter to Yukon Utilities Board re: R&V of Board Order 2018-10, May 8, 2019.

¹⁹ UCG comments on Yukon Energy Corporation Review and Variance of Board Order 2018-10, April 17, 2019, page 2.

Resource Plan both identified DSM as a viable resource option and identified DSM as being preferable to new electrical generation infrastructure from a socio-environmental perspective.

11. John Maissan supported YEC's position regarding the Review Application. Per Mr. Maissan's submission, it is in the ratepayers' and public interest for YEC to be involved in electricity-focused DSM programs and YEC has shown that its DSM programming benefits all stakeholders. He added that the Board's role is to ensure that all electricity DSM programming that the utilities carry out is cost effective for all ratepayers and that it is not in the ratepayers' or public interest for the Board to discourage utilities from carrying out cost-effective electricity DSM programming.
12. In its reply comments, YEC stated that the UCG's comments fail to address any of the specific points of law or fact raised in the Review Application and therefore are of no assistance to the Board. YEC disagreed with the UCG's characterization of its evidence and stated that there was evidence that the DSM costs were prudently incurred. With respect to UCG's statements on regulatory risk, YEC argued that the degree to which a regulatory risk exists may affect a utility's return on equity. A regulator may only disallow costs to the extent that they were imprudently incurred or where capital expenditures are not used and useful. In YEC's view, regulatory risk cannot be used to justify disallowance of expenditures that otherwise provide benefits to ratepayers, are cost effective and are prudently incurred. In addition, YEC submitted that no Board "regulatory approval" is required by YEC under the *Act* prior to YEC undertaking any expenditures. In YEC's view, while only costs that are approved by the Board can go into rates, where costs are prudently incurred or expenditures are used and useful, there is no basis for the Board to disallow such costs from going into rates.

3. Test for review and variance

13. YEC's Review Application was made pursuant to section 62 of the *Act* and section 31 of the Board's Rules of Practice.
14. Section 62 of the *Act* states:

The board may review, change, or cancel any decision or order made by it, and may re-hear any application or complaint before deciding it.
15. The Board has enacted Rules of Practice under section 10 of the *Act*, which include the following provisions regarding applications for review:

31. (1) Pursuant to section 62 of the *Act*, the Board will consider the following as grounds for review:

- a) the Board has made an error in jurisdiction;
- b) the Board has made an error in fact or law;
- c) there has been a fundamental change in circumstances or facts since the decision or order;
- d) a basic principle has not been raised in the original proceedings;
- e) a new principle has arisen as a result of the decision or order;
- f) such other grounds that may require a review as determined by the Board.

(2) The application for review should, as a minimum, set forth the following:

- a) the ground(s) upon 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.

(3) The Board will use a two-phase system for applications for review. Such a process enables certain applications to be dealt with expeditiously and economically. An application for review will be subject to an initial screening phase wherein the applicant must establish a prima facie case sufficient to warrant full consideration by the Board. In the first phase, the Board will assess an application having regard to some or all of the following questions:

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

(4) Upon receipt of an application for review, the Board will invite registered parties to comment on the application for review regarding the questions set out in subsection (3) for the first phase of the review and the applicant for review may respond to the comments received.

(5) In the case of an alleged error, in order to advance to the second phase of the process, the application must show that:

- a) the claim of error is substantiated on a prima facie basis; and
- b) the error has significant material implications.

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

4. Public Utilities Act

16. Part 2 of the *Act* addresses the regulation of public utilities. Sections 27 to 29 set out the Board's authority to set rates and the requirements of the public utility when it proposes a new rate. Section 27(a) allows the Board to make orders setting the rates of a public utility. Section 27(b) allows the Board to make orders prohibiting or

limiting any proposed rate change. Section 28(2) specifies that no public utility shall begin to charge a new rate except on receipt from the Board of an order authorizing it to do so.

17. Section 29 of the *Act* sets out factors affecting rates. It states, in part:

In setting rates that a public utility is permitted to charge,

(a) the board may consider the revenues and costs of the public utility in the financial year in which the proceedings for setting the rates and charges began or in any period immediately following, without considering the allocation of those revenues and costs to any part of that period;

(b) the board may give effect to that part of any excess of revenue received or deficiency incurred that is in the opinion of the board applicable to the whole of the financial year of the public utility in which the proceeding was initiated as the board considers just and reasonable;

18. Under subsection 32(1), the Board must determine a rate base for the capital requirements of a public utility as follows:

The board, by order, shall determine a rate base for the property of a public utility used or required to be used to provide service to the public, and may include a rate base for property under construction, or constructed or acquired, and intended to be used in the future to provide service to the public.

19. Section 32(3) states the following:

In determining a rate base the Board shall give due consideration to the cost of the property when first devoted to public utility use, to prudent acquisition cost less depreciation, amortization, or depletion, and to necessary working capital.

5. Board Orders

20. Previous DSM requests for approval that are relevant to the Review Application are summarized below.²⁰ Yukon Electrical Company Limited's (YECL) application for its 2008-09 revenue requirement, which resulted in Board Order 2009-02²¹, and later, in Board Order 2009-08 regarding YEC's 2008-09 GRA, the Board directed YEC, in conjunction with YECL, to consult with stakeholders and develop a policy paper with respect to DSM initiatives. The Board directed YEC and YECL to lead this process jointly and submit the policy paper as part of both YEC's and YECL's next GRA.²² In that decision, the Board found DSM to be a critical issue for all electric rate payers in the Yukon.
21. YEC applied for DSM costs in its 2012-13 GRA. In Board Order 2013-01, the Board found that it was premature to approve or disallow DSM expenses until YEC and YECL had jointly filed a DSM plan as directed in Board Order 2009-08.²³ The Board further directed YEC to create a deferral account for its DSM operating and maintenance-related costs and hold its DSM-related capital costs in work-in-progress.²⁴
22. On May 27, 2013, YECL filed its 2013-2015 GRA. In that application, YEC and YECL filed a joint five-year DSM plan. The joint DSM plan was developed in consultation with stakeholders and with additional representation from the Government of Yukon.²⁵ A joint YEC and YECL panel was convened at the oral

²⁰ Earlier Yukon Utilities Board Orders dealing with Yukon Energy Corporation's DSM programs in terms of: the reasonableness of Yukon Energy Corporation's DSM programs and forecast costs for the 1991-92 revenue requirement found in Decision 1992-1 re: Yukon Energy Corporation, January 17, 1992, at pages 45-47 and the approval of DSM costs and the formation of a working group for DSM found in Board Order 1996-7, A Joint Application by Yukon Energy Corporation and The Yukon Electrical Company Limited, June 11, 1996, (see attachment to the Board Order re: Proposed Settlement of Issues Concerning the Revenue Requirement and Rate Design Application of Yukon Energy Corporation and Yukon Electrical Company Limited, March 11, 1996, letter of W.J. Grant, section 4). In *Yukon Energy Corporation and The Yukon Electrical Company Limited v Yukon Utilities Board*, 74 BCAC 58; 1996 CanLII 2558 (YKCA), the Court of Appeal for Yukon Territory also issued its decision on the Board's findings on the amortization of DSM costs based on the interpretation of section 5 of Order-in-Council 1991/62 (which has since been repealed). The Board decision on amortization of DSM costs that was overturned and the denial of forecast 1993-94 DSM costs in revenue requirement that was upheld by the Court related to the Board's decision in Decision 1993-8, A Joint Application by Yukon Energy Corporation and The Yukon Electrical Company Limited, November 23, 1993.

²¹ Yukon Utilities Board Order 2009-2, Appendix A, Reasons for Decision, February 12, 2009, PDF page 46.

²² Yukon Utilities Board Order 2009-8, Appendix A, Reasons for Decision, September 8, 2009, paragraph 40, PDF page 17.

²³ Yukon Electrical Company Limited was directed to file a joint plan with the Board as set out in Yukon Utilities Board Order 2009-02, Appendix A: Reasons for Decision, page 44. The Board direction in paragraph 40 of Board Order 2009-08 for YEC contains similar language to Board Order 2009-02.

²⁴ Yukon Utilities Board Order 2013-01, Appendix A: Reasons for Decision, March 25, 2013, paragraph 367, PDF page 76.

²⁵ Yukon Utilities Board Order 2014-06, Appendix A: Reasons for Decision, April 23, 2014, page 87.

hearing to the proceeding to test the inCharge Program as part of the overall DSM program.

23. In Appendix A to Board Order 2014-06, the Board approved the following DSM programs for YEC and YECL, as part of its inCharge Program, until the end of 2015:
- a) LED Lighting
 - b) Automotive Heater Timer Rebates
 - c) Low-cost Energy Efficient Products program²⁶

24. The Board's findings on DSM programs included the following analysis and reasons:

The Board is of the view that many DSM-related expenditures already incurred by the Utilities [YECL and YEC] test the limits of what would be expected of a policy paper. The Board further considers that the Utilities must have been aware that to proceed with any DSM activities beyond the Board's direction could result in the incurred costs being disallowed if the DSM plan was rejected by the Board.

The Board recognizes that, with the exception of UCG, interveners generally are supportive of a DSM program in Yukon; however, when deciding whether to approve any program expenditures, the Board must carefully weigh the benefits arising from the program with the costs of implementing the program, and if, in the Board's view, the project is not in the best interest of ratepayers, the Board cannot approve the project even if it was supported by interveners.

In this situation, the Utilities have estimated the avoided costs of new generation resulting from the DSM plan at \$1.95 million by the end of the fifth year of the DSM plan and the total costs of implementing the DSM plan as proposed at approximately \$6.9 million. The Board notes, however, that if the lifetime electricity savings are taken into consideration, the avoided costs of new generation, based on \$0.21 per kWh, would be approximately \$20.8 million. Although the estimates demonstrate that there is a substantial opportunity for cost savings over the lifetime of the DSM program, the Board has a number of reservations with respect to the DSM program and therefore, cannot approve the program in its entirety.

The Board is concerned that not all of the program elements pass the Rate Impact Measure (RIM). Although the Board recognizes and accepts that DSM programming will not benefit all ratepayers equally, the Board finds it undesirable that some program elements benefit some ratepayers — i.e. the participants and Utilities — at the expense of others — i.e. non-participants. The Board agrees with UCG's argument that low-income customers are more likely to be excluded from participating in the DSM program due to barriers and, as a result, harmed by DSM program elements that fail the RIM test. In the Board's view, all program elements must at least be rate-neutral for all ratepayers.

²⁶ Yukon Utilities Board Order 2014-06, Appendix A: Reasons for Decision, April 23, 2014, pages 100-101, PDF pages 105-106.

The Board does not agree that DSM programming should be extended to government buildings or the commercial sector at this time. The Board recognizes that DSM programming is in its infancy in Yukon and believes that the Utilities should focus their efforts on supporting the non-government residential DSM initiatives first. Further, the Board disagrees with interveners who have suggested that the DSM plan is not aggressive enough and that the Board should order the Utilities to introduce more program elements in the future. Before the Utilities consider other additional initiatives, the Board wants to see that the Utilities can deliver on the promised electricity and cost savings of the proposed program elements first.

Based on the overall positive potential of the DSM programming presented in this proceeding, the Board approves program elements of the residential non-government DSM portfolio that pass all of the four cost-effectiveness measures for 2014 and 2015. More specifically, this includes the LED Lighting and Automotive Heater Timer Rebates and the Low-cost Energy Efficient Products program elements...²⁷ (Footnotes removed.)

25. In the same order, the Board also established a deferral account and directed YEC to make a formal application before expanding the DSM program beyond 2015:

As argued by CW and UCG, the Board recognizes that the forecast risks with respect to the DSM program are one-sided. If participation rates are lower than expected, the Utilities benefit, but if participation rates are higher than expected, the Utilities have the ability to enforce the budget. Therefore, in the Board's view, a deferral account would not only protect ratepayers but it would also normalize the incentive for the Utilities to maximize participation in the DSM program. Accordingly, the Board orders YECL to track all DSM programming costs occurring in 2014 and 2015 in a deferral account and to apply for recovery of those costs in its next GRA.

Further, the Board affirms it does not approve the program for the five-year term requested and that the Utilities are to make a formal application to the Board before expanding the DSM program elements beyond that approved above or beyond 2015. The Board directs YECL, within its compliance filing, to quantitatively provide the load reduction in GW.h related to DSM for each of the years 2014 and 2015, by rate class that has been incorporated in YECL's load forecast and to explain and quantify the changes to the load forecast based on the determinations of the Board regarding DSM.²⁸

26. YEC did not file a GRA for 2016 rates.

²⁷ Yukon Utilities Board Order 2014-06, Appendix A: Reasons for Decision, April 23, 2014, pages 99-101, PDF pages 104-106.

²⁸ Ibid., pages 101, PDF pages 106.

27. In its 2017-18 GRA (which is the subject of the Review Application), YEC applied for DSM programs as part of its capital costs. The DSM programs can be categorized as follows:
- 1) the inCharge Program, which includes the three programs identified previously; and
 - 2) six newly proposed programs, which are the New Program Development, Industrial DSM, Pilot DSM, LED Streetlight Retrofits, Internal Energy Conservation, and Administration (collectively referred to as the six programs).
28. In YEC's 2017-18 GRA, YEC informed the Board it planned to continue delivery of the inCharge Program for 2017 and 2018 without joint partnership of the program delivery with YECL. The inCharge Program has been in operation since 2014 and is delivered jointly to both YEC's and YECL's residential customers.
29. YEC DSM programs were described in the application and a summary of this information is helpful in assessing the Review Application.
30. The New Program Development was referenced in YEC's 2016 Resource Plan as a way to meet energy and capacity demands and was expected to be included in future energy supply projects for residential and commercial customers. YEC stated that "these additional DSM programs must be designed prior to submission to the YUB for approval."²⁹ The proposed \$190,000 in costs associated with the New Development Program in 2018 were to update YEC's Conservation Potential Review model and to perform a Capacity DSM Feasibility Study.³⁰
31. YEC's Industrial DSM project was undertaken by YEC in 2016 with a net cost of \$82,000. YEC stated that it "partnered with each of its industrial customers, Alexco and Capstone, to complete energy audits of their mining operations."³¹
32. The Pilot DSM projects were described by YEC as pilot projects focused on building the culture of energy conservation. YEC described other benefits of the program including learning how the Yukon market reacted to electricity conservation programs and how certain electricity technologies performed in Yukon's harsh climate. Certain pilot projects were conducted in past years by YEC with a net cost in 2016 of \$51,000. In addition, YEC planned to contribute \$20,000 to the Yukon Government's commercial lighting program in 2018.³²

²⁹ Yukon Energy Corporation 2017-18 General Rate Application, June 2017, page 5-40, PDF page 211.

³⁰ Ibid., page 5-41, PDF page 212.

³¹ Ibid., page 5-41, PDF page 212.

³² Ibid., pages 5-41 and 5-42, PDF pages 212-213.

33. For LED Streetlight Retrofits, YEC began a pilot project in 2011 to retrofit its existing high-pressure sodium streetlights. In 2016, YEC commenced retrofitting streetlights with LEDs in Dawson and Mayo at a net cost of \$142,000. YEC projected to retrofit streetlights in Faro, Mendenhall and Champagne in 2018 with a forecast cost of \$80,000.³³
34. YEC applied for an Internal Energy Conservation program for its own existing buildings and facilities. A third party performed an energy audit of 25 Yukon Energy buildings. Six buildings had detailed energy audits and energy upgrades to lighting. YEC spent \$353,000 in 2016, and it forecast to spend \$25,000 in 2018.
35. With respect to Administration, YEC explained that it dedicated two full-time employees to the management of research, pilot programs and the development of DSM planning in 2011. YEC stated, "With the YUB's [Board] 2014 decision to approve only three of the residential programs, the decision was made to close the Energy Conservation office and merge the roles of the two employees dedicated to DSM into one position."³⁴ The cost of DSM administration was \$397,000 at the end of 2016, and YEC forecast costs of \$20,000 in each of 2017 and 2018.
36. In addition, YEC stated with respect to implementation that "All new DSM programs will be filed with the YUB in advance of delivery."³⁵
37. With respect to the DSM programs proposed in the YEC's 2017-18 GRA, the Board made the following findings in paragraphs 477-482 of Appendix A of Board Order 2018-10:

In Board Order 2013-01, Appendix A: Reasons for Decision, the Board found that it was premature to approve or disallow DSM expenses until YEC and YECL jointly filed a DSM plan. Until that time, the Board directed YEC to hold all DSM-related costs in WIP. YEC and YECL later submitted a five-year DSM plan, which the Board addressed in Order 2014-06. In that Order, the Board approved three DSM projects proposed by YEC and YECL: LED lighting, automotive heater timing rebates and low-cost energy efficient products. The Board also stated that it was not approving the DSM program for the five-year term and that YEC was to make a formal application to the Board before expanding the DSM program elements beyond that approved or beyond 2015.

Despite the Board determination that DSM projects were only approved up to 2015, YEC has continued with program expenditures beyond that point and has forecast continued DSM expenses during the test period. YEC did not make an

³³ Yukon Energy Corporation 2017-18 General Rate Application, June 2017, page 5-42, PDF page 213.

³⁴ Ibid., page 5-43, PDF page 214.

³⁵ Ibid., page 5-43, PDF page 214.

application to the Board before expanding DSM programs beyond 2015. Accordingly, the Board finds that any DSM program expenditures that occurred after 2015 were not prudently incurred and are disallowed for inclusion in YEC's rate base.

YEC also incurred expenses on DSM projects that do not fall within the three projects approved by the Board in Order 2014-06, despite the Board's explicit statement that YEC must apply to the Board before expanding its DSM program beyond the elements approved in that order. Accordingly, the Board finds that YEC's DSM expenditures on programs not approved in Order 2014-06 (LED lighting, automotive heater timing rebates and low-cost energy efficient products) were not prudently incurred and are disallowed for inclusion in YEC's rate base.

Specific to LED streetlight retrofits, in Board Order 2017-01 the Board stated the following:

293. With respect to LED streetlight installations that are not end-of-life conversions, the Board directs AEY to treat the costs related to new installations or requested conversions as capital costs that attract a full customer contribution in aid of construction.

Although the Board made the above-noted finding in relation to AEY, YEC should have taken note of this finding, because such a finding equally applies to YEC. As a result, the Board considers that retrofitting streetlights at end of life with LED lights were prudent expenditures. Any LED installations that are not end-of-life conversions must not be included in YEC's rate base.

The Board is not persuaded that YEC should continue to operate DSM projects. YEC has indicated the benefits of expanding the program and submitted that its programs have met or exceeded key performance indicators. However, the Board notes that the Yukon government has DSM incentive programs in place, and the Board is of the view that it is better to leave DSM projects to government, rather than having ratepayers fund these projects. For these reasons, the Board is of the view that continuation of DSM programs by YEC is not necessary. Accordingly, the Board denies YEC's requests to continue with any DSM programs other than end-of-life streetlight conversions as discussed above. (Footnotes removed.)

6. Views of the Board

38. In these views, the members of the Board panel who authored the decision will be referred to as the "hearing panel" and the members of the Board panel considering the review application will be referred to as the "review panel".
39. The review panel has considered the Review Application and has addressed the three grounds in the following two sections.

Whether there was an error in considering YEC’s rate base pursuant to section 32 of the *Public Utilities Act* and whether the hearing panel took into account irrelevant considerations in concluding that the DSM costs were imprudently incurred.

40. YEC is relying on Section 32(1) of the *Public Utilities Act* in support of its review application that the hearing panel committed an error in law in denying YEC’s inCharge Program and the six programs.
41. Section 32 of the *Public Utilities Act* sets out the provisions of setting a rate base for public utilities.
42. Section 32(1) requires the Board to determine a rate base for the property of a public utility used or required to be used to provide service to the public. The review panel notes that the Board must set a rate base for a public utility based on the property of the public utility used or required to be used to provide service. However, there are no restrictions on the Board determining a rate base other than those provisions regarding setting a fair return on rate base, as outlined in the *Act* in sections 32(2), 32(4) and 32(5), and in section 32(3) which requires the Board to “give due consideration to the cost of the property when first devoted to public utility use, to prudent acquisition cost less depreciation, amortization, or depletion, and to necessary working capital.”
43. There are other rate-setting considerations that the Board must follow in the *Act* – for example, the factors setting rates in Section 29.
44. In view of the above, and in assessing YEC’s arguments concerning section 32, the review panel finds that YEC is incorrect in its submission that the hearing panel, in not undertaking a specific prudence analysis, made an error in law. Thus YEC has failed to establish a prima facie case sufficient to warrant further consideration of this issue by the Board. Section 32 of the *Public Utilities Act* requires the Board to set a rate base for the property of a public utility and establishes that how the Board determines the rate base is in its discretion. The Board must assess the ultimate DSM costs to be recovered through rates, and Section 32 does not establish a particular methodology for the Board to determine rate base for a public utility.
45. In the context of determining rate base for property for a utility’s assets that were no longer used or useful in providing service, the Court of Appeal of Alberta’s decision of *FortisAlberta Inc v Alberta (Utilities Commission)*³⁶ is instructive. In that decision, the Court of Appeal dismissed the utility’s argument that a provision in Alberta’s

³⁶ *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295, September 18, 2015.

*Electric Utilities Act*³⁷ provides that, when considering a tariff, the Alberta Utilities Commission must have regard to the principle that the tariff must provide the utility with a reasonable opportunity to recover the costs and expenses associated with capital related to the owner's investment in the electric utility. The Court found:

In my view, taking into account the legislative history and context alone, and disregarding the Alberta jurisprudence beginning with *Stores Block*, the guaranteed prudent cost recovery model would be a permissible interpretation of the current *EUA*. But that, of course, is not the question. For the appeal to succeed, it must be the only permissible interpretation. I cannot say this is so for several reasons.

First, whether the regime is one of prudent investment cost recovery or "used or required to be used", the allowance of cost recovery falls squarely within the regulator's purview. I do not read the legislation as removing the discretion of the Commission to disallow cost recovery (even if originally prudently incurred) if to do so is in keeping with the legislative mandate. Assurance of opportunity is not a guarantee, and I find no such guarantee in the language of the legislation.³⁸

...

The entitlement to an opportunity to recover prudently incurred costs under this regime is not a guarantee. A policy that excludes stranded assets from rate base is not a derogation from the Commission's statutory powers if that policy is necessary to further the ultimate objective of the legislation - to achieve just and reasonable rates.³⁹

46. The review panel will now consider whether there was an error in law in the hearing panel's determination that DSM costs applied for in the 2017-18 GRA were imprudently incurred. Whether a utility regulatory framework prescribes a certain methodology in assessing whether costs are prudent, i.e. reasonable, was addressed by the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*⁴⁰ in considering provisions of Alberta's *Electric Utilities Act* (EUA) and *Gas Utilities Act* (GUA). Justice Rothstein, writing for the Court, found that the burden of establishing that the proposed tariffs are just and reasonable is on the utility.⁴¹ The Court determined at paragraphs 47, 61 and 64:

It is thus apparent that the relevant statutes may reasonably be interpreted not to impose the ATCO Utilities' asserted prudence methodology on the Commission. The existence of a reasonable interpretation that supports the Commission's

³⁷ *Electric Utilities Act*, SA 2003, chapter E-5.1, section 122(1)

³⁸ *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295, September 18, 2015 paragraphs 157-158.

³⁹ *Ibid.*, paragraph 169.

⁴⁰ *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 SCR 219.

⁴¹ *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 SCR 219, page 2.

implied understanding of its discretion is enough for the Commission's decision to pass muster under reasonableness review: *McLean*, at paras. 40-41. Thus, the Commission is free to apply its expertise to determine whether costs are prudent (in the ordinary sense of whether they are reasonable), and it has the discretion to consider a variety of analytical tools and evidence in making that determination so long as the ultimate rates that it sets are just and reasonable to both consumers and the utility.

...

As discussed above, a key principle in Canadian regulatory law is that a regulated utility must have the opportunity to recover its operating and capital costs through rates: OEB, at para. 16. This requirement is reflected in the EUA and GUA, as these statutes refer to a reasonable opportunity to recover costs and expenses so long as they are prudent. A regulator must determine whether a utility's costs warrant recovery on the basis of their reasonableness — or, under the EUA and GUA, their "prudence". Where costs are determined to be prudent, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting a utility's recovery to what it reasonably or prudently costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary: OEB, at para. 20.

...

The Commission was not statutorily bound to apply a particular methodology to the costs at issue in this case. (Footnotes removed.)

47. As part of its Review Application, YEC has argued that the Board must give due consideration to YEC's capital costs and that the Board is required to follow Canadian rate-setting principles under section 3 of the Rate Policy Directive, 1995.
48. In *Yukon Energy Corporation v Yukon (Utilities Board)*, the Court of Appeal of Yukon described Canadian rate-setting principles as follows:

Canadian rate-setting principles generally require that rates, and thus approved costs upon which they are based, be just and reasonable to both the utility and consumers: *Ontario (Energy Board)* at paras. 7, 14-20. Subject to its overarching duty to ensure that its orders are just and reasonable, nothing in the OIC or the *Act* constrains the Board's discretion to determine the methodology it uses to assess Yukon Energy's costs in its rate-setting decisions.⁴²

⁴² *Yukon Energy Corporation v Yukon (Utilities Board)*, 2017 YKCA 15, September 12, 2017, paragraph 18; see also *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28, January 20, 2014, paragraph 31.

49. Given the context of the *Act* and the case law, the review panel will evaluate the Review Application with respect to the specific DSM programs. With respect to the six programs (excluding the inCharge Program), the four cost-effectiveness measures were not available because the majority of these programs⁴³ were new programs or studies proposed in the 2017-18 GRA. Consequently, no details or data regarding cost-effectiveness measures were available. YEC did not provide any supporting analysis based on the four cost-effectiveness measures for these six programs that could be used for a prudency review. As YEC noted in paragraphs 36-37 of the Review Application, specific prudency measures were not relevant to the assessment of the costs for implementation of these DSM programs. YEC stated:

In contrast with the Approved inCharge Programs, the Other DSM Programs as defined (which exclude LED Streetlight Retrofits) do not involve implementation of specific DSM programs for customers of YEC or ATCO Electric-Yukon. Prudency measures related specifically to actual DSM program implementation with residential or other customer classes, such as the Rate Impact Measure test to confirm rate impact neutrality, are therefore not relevant in the assessment of prudency for these costs. In these instances, prudency is demonstrated by the reasonableness of costs incurred for DSM planning and development, internal YEC energy conservation measures, and YEC's overall DSM administration.

50. Accordingly, based on the information on the record, the review panel finds that it would not have been possible for the hearing panel to examine the prudency of costs for the six programs based on the four cost-effectiveness measures.
51. For the inCharge Program, in Board Order 2014-06, the Board approved DSM costs to be allocated to work-in-progress for capital projects and found that it would consider the inclusion of these costs in rate base until the end of 2015. In that decision, no inCharge Program costs were approved beyond 2015. After that decision was issued, the review panel found that YEC exercised management discretion in incurring DSM costs of the inCharge Program beyond 2015. In doing so, YEC assumed costs for such work at management's risk, and it did not apply for any of the inCharge Program costs in 2016.
52. At paragraph 478 of Board Order 2018-10, the hearing panel found with respect to inCharge Program:

Despite the Board determination that DSM projects were only approved up to 2015, YEC has continued with program expenditures beyond that point and has forecast continued DSM expenses during the test period. YEC did not make an

⁴³ It could be viewed that Administration was not a new program because administrative costs were not new costs for administering DSM.

application to the Board before expanding DSM programs beyond 2015. Accordingly, the Board finds that any DSM program expenditures that occurred after 2015 were not prudently incurred and are disallowed for inclusion in YEC's rate base.⁴⁴

53. Further, the hearing panel was not required to approve 2017-18 forecasts costs if the programs or costs were not found to be reasonable. For the specific DSM costs included in the 2017-18 GRA, the hearing panel was not persuaded by YEC's submissions regarding why the DSM projects should be accepted as reasonable. The panel's findings are at paragraph 482:

The Board is not persuaded that YEC should continue to operate DSM projects. YEC has indicated **the benefits of expanding the program and submitted that its programs have met or exceeded key performance indicators.** However, the Board notes that the Yukon government has DSM incentive programs in place, and the Board is of the view that it is better to leave DSM projects to government, rather than having ratepayers fund these projects. **For these reasons, the Board is of the view that continuation of DSM programs by YEC is not necessary.** Accordingly, the Board denies YEC's requests to continue with any DSM programs other than end-of-life streetlight conversions as discussed above.⁴⁵ (Emphasis added.)

54. The review panel does not agree that it is an irrelevant consideration that the hearing panel found that YEC did not make an application to the Board before expanding its DSM projects beyond 2015. It was within the hearing panel's discretion to consider compliance with the Board's previous direction in Appendix A of Board Order 2014-06 in assessing YEC's DSM programs. YEC incurred capital expenditures before filing its 2017-18 GRA, and it was not incumbent on the hearing panel to include DSM costs in rate base without a pre-approval of these programs by the Board, nor was it required in 2017-18 if the continuation of the programs were not reasonably supported.
55. With respect to YEC's second argument on irrelevant considerations regarding government involvement and DSM programs, the review panel is not persuaded by YEC's submissions in the Review Application. The question of scope of YEC's DSM programs and the Yukon government's incentive were examined through IRs and at the oral hearing. YEC witnesses were questioned on its DSM programs and government involvement.⁴⁶ YEC noted that its programs were economically based

⁴⁴ Yukon Utilities Board Order 2018-10, Appendix A: Reasons for Decision, December 27, 2018, page 91, PDF page 95.

⁴⁵ Ibid., pages 91-92, PDF pages 95-96.

⁴⁶ Yukon Energy Corporation 2017-18 GRA hearing transcript, Volume 1, July 26, 2018, pages 161-162; Volume 2, July 27, 2018, pages 244-246, 309-310, 386-392; and Volume 3, July 28, 2018, pages 461-467, 508-509 and 530-536.

and that the Yukon government has different considerations than the utility.⁴⁷ However, the following exchange about government involvement and the benefits expected by YEC for its own DSM studies and programs shows the intersection of the benefits of DSM programs, government considerations, economic considerations and funding of DSM programs by ratepayers:

Q: And just to follow up on that, I'm trying to understand what the need is if there's already government programs addressing DSM for the -- for YEC to even undertake a study and spend money on that, rather than working with government and having government-funded programs simply.

A. MR. HALL: Mr. Chair, I think the example of capacity DSM is a -- is a very relevant example. So Mr. Sreckovic outlined that one of the areas that we'd like to focus on in a prospective DSM program would be programs that bring down peak, peak demand. Because what we're saying is growth in those peaks over time. Now, there's -- you know, big picture, there's two ways you meet that growth. You either build a new asset -- typically a thermal plant to meet that peak load -- or are you bring that peak down. So you remove the problem to begin with. And bringing that peak down is all about -- can be addressed through an appropriately designed DSM program. Now, what we're finding is that the Yukon government programs aren't necessarily targeted at that kind of benefit, and so, you know, we feel that we need to investigate our own programs that specifically go after that objective.

Q. Following up on that, if the -- given that there's a limited opportunity for YEC to sell its surplus power and that peak demand is the deciding factor in how much capacity YEC installs, is it prudent to continue to promote DSM in that, when you're looking at it, if you're reducing the peak demand, how will that -- you said that that's what you would be looking at. How would that affect the sales -- or if there's less -- less peak load, what would be the impact on YEC?

A. MR. HALL: Mr. Chair, I don't think there's really a relationship between the issue of surplus energy over a year and the instantaneous peak demand that we may face on a cold winter morning, for example. They're a fairly discrete phenomenon in some respects.

A. MR. MOLLARD: And just with respect to the DSM energy programs, we did touch on this a little bit when we were originally doing the approvals. DSM in their nature are particular, the programs that we're running are behavioural programs, and it's difficult to turn them off and start them up again. So even though today you may be in a period where you're not necessarily looking for additional energy, it's fairly low cost to keep the program going. If you shut it down to get the benefit back when you do have that energy shortfall, you have a big ramp-up period. So our understanding from discussions with experts in the industry is that you want to

⁴⁷ Ibid., page 465, lines 5-18.

keep a stable presence in that -- in that -- that space so that it's always there for you.⁴⁸

56. The above testimony shows that YEC felt it was prudent to investigate whether DSM programs had benefits regarding the potential for bringing down peak demand and in running behavioral programs. The Board was tasked with determining the reasonability of DSM programs and costs. In Appendix A to Board Order 2018-10, YEC's position on the benefits of the program were noted in the reasons given in paragraph 482. In weighing the suggested benefits, the hearing panel determined that DSM programs were better left to the government rather than having ratepayers fund these projects, and it considered the overall benefits to ratepayers. Further, the record supports, for example, the Pilot DSM program, including a proposal to contribute \$20,000 to the Yukon Government's commercial lighting program, and for these proposed costs to be included in rates. This Pilot DSM program, at the very least, had a reasonable nexus with a government program and supports that this was not an irrelevant consideration of the hearing panel. For these reasons and upon review of the decision and the record, the review panel is not convinced that the hearing panel's finding that it is better to leave DSM projects to the government was an irrelevant consideration.
57. As such, the review panel finds that a reviewable error on a prima facie basis has not been substantiated. The hearing panel provided its reasons as to why the actual and forecast DSM costs were not considered prudent, including a finding that DSM should be addressed through the government. For the reasons above, the review panel is not convinced that the hearing panel took into account irrelevant considerations in its denial of DSM programs.

Whether the hearing panel failed to consider YEC's evidence in relation to YEC's DSM costs

58. As outlined in the previous section, the review panel has found that the hearing panel examined evidence on YEC's DSM programs. However, the review panel will provide further comment on this issue.
59. In paragraph 20 of Appendix A to Board Order 2018-10, the hearing panel noted that it had considered all relevant materials on the record of the 2017-18 GRA but that it had exercised discretion in choosing what parts of the record to include in the decision:

In reaching the determinations contained within this decision, the Board has considered all relevant materials comprising the record of this proceeding,

⁴⁸ Yukon Energy Corporation 2017-18 GRA hearing transcript, Volume 3, June 28, 2018, page 465, line 19 to page 467, line 21.

including the evidence and argument provided by each party. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Board's reasoning related to a particular matter and should not be taken as an indication that the Board did not consider all relevant portions of the record with respect to that matter.

60. In addition, the review panel notes that the hearing panel referenced YEC's submissions regarding DSM several times in Appendix A to the order. For example, in paragraph 482 of Appendix A to the order, the hearing panel acknowledged YEC's submissions on the benefits of expanding the program and that its programs have met or exceeded key performance indicators. The hearing panel also acknowledged the contents of the application, a response to a Board information request and YEC's argument on DSM programs in paragraphs 472-474 of Appendix A to the order.
61. In the review panel's view, there is insufficient support in the Review Application to make a finding that the hearing panel failed to consider the relevant information and evidence regarding YEC's DSM programs and associated costs. Rather, the review panel concludes that, in substance, YEC's arguments amount to a complaint that the hearing panel failed to give the weight desired by YEC to its submissions and evidence. However, as stated by Justice Fruman in *Epcor v Alberta (Energy and Utilities Board)*⁴⁹ at paragraph 23:

The Board is free to accept or reject evidence presented by the parties and, as an expert tribunal, it is entitled to use its expertise to arrive at different conclusions than the parties.

62. Therefore, based on its review of the Board Order 2018-10 and the record of the proceeding, the review panel finds that YEC has not substantiated that the hearing panel ignored evidence in its determinations on YEC's DSM programs.

7. Conclusion

63. The Board has decided that YEC has not shown on a prima facie basis that the Board committed an error of law in Board Order 2018-10 in denying YEC's DSM programs and associated costs. Therefore, YEC's application for review is dismissed.

⁴⁹ *Epcor v Alberta (Energy and Utilities Board)*, 2003 ABCA 374, December 22, 2003.