

IN THE MATTER OF the *Public Utilities Act*, RSY 2002, c 186

And

Review and Variance of Board Order 2020-01

BEFORE: B. King, Vice-Chair) October 7, 2020
 A. Fortin)
 A. Middler)
 M. Johnson)
 H. Campbell)

BOARD ORDER 2020-03

Background

1. On August 17, 2020, the Utilities Consumers' Group (UCG) filed an Application for Review and Variance (Review Application) of Board Order 2020-01 which was issued February 14, 2020.
2. Board Order 2020-01 addressed the cost claim applications related to the second compliance filing for Yukon Energy Corporation's (YEC) General Rate Application (GRA) for approval of revenue requirements for 2017 and 2018.¹ That order also approved certain costs for the applicant and intervener participation in the first compliance filing for YEC's GRA.²
3. In its application for costs in the proceeding leading to Board Order 2020-01, UCG claimed costs for its consultant, Patrick McMahon of PaTina Energy Consultants, and the costs of Roger Rondeau, President of UCG. As part of Board Order 2020-01, the Board approved Mr. McMahon's costs as filed and made the following findings regarding Mr. Rondeau's costs:

With respect to UCG's claim for Mr. Rondeau, a rate of \$60.00 per hour was applied to his activities. No statement of account was provided for the 17.50 hours for preparation, 6.00 hours for attendance at the technical meeting and 8.00 hours for the development of argument.

¹ The costs relate to the proceeding resulting in Board Order 2019-08: Yukon Energy Corporation (YEC) GRA second compliance filing decision, An Application by YEC for Approval of Revenue Requirements for 2017 and 2018, November 24, 2019.

² Board Order 2019-04: YEC GRA compliance filing, General Rate Application by YEC for Approval of Revenue Requirements for 2017 and 2018, September 12, 2019.

A statement of account is required by the Board's Scale of Costs. In addition, sections 4.3 and 4.4 of the Scale of Costs state:

4.3 Fees and Honorarium of Unrepresented Intervener An intervener who has not hired legal counsel or a consultant may claim for the number of hours spent in preparing its evidence and submissions in a proceeding. The hourly rate of an intervener shall not exceed \$100 per hour and will be determined by the Board when assessing the costs claim.

4.4 Attendance Honorarium An unrepresented intervener may claim an honorarium of \$50 for each day of attendance at an oral hearing.

The Board is of the view that Mr. Rondeau is acting as the unrepresented intervener, and a consultant was also hired to represent UCG. Since UCG was represented by a consultant, the Board finds that Mr. Rondeau is only reasonably eligible for an attendance honorarium for the six hours to attend the technical meeting.

4. In the Review Application, UCG requested that the Board review and vary Board Order 2020-01 on the basis of a factual error of the Board in that UCG filed a statement of account with its costs application. UCG stated that costs awarded in Board Order 2020-01 did not include the amount listed in the account found at page 7 of its costs claim — i.e. Invoice 2019-01 of December 1, 2019, which clearly outlines the work and hours rendered for the first and second compliance filings. Therefore, the proper forms were filed with the Board and the Board made a factual error in its determinations in Board Order 2020-01. Accordingly, UCG requested relief in that its award for costs should have been a total of \$12,894.38, which is an increase of \$840.00 from the amount awarded to UCG.

Board review process

5. The Board's authority to review its own decisions is found in section 62 of the *Public Utilities Act*. Section 31 of the Board's *Rules of Practice* states that the Board will use a two-phase system for applications for review. The first phase is the initial screening phase where the applicant must establish a *prima facie* case sufficient to warrant full consideration by the Board. In the case of an alleged error, in order to advance to the second phase of the process, the applicant for review must show that the claim of error is substantiated on a *prima facie* basis and that the error has significant material implications.

6. Given the nature of the review and variance application, the Board does not consider that comments are required on the application as specified in section 31(4) of the *Rules of Practice*. The Board exercises its discretion to dispense with the requirement for comments in section 31(4) under its authority in section 2(2) of the rules. Section 2(2) states:

In any proceeding, the Board may, with or without a hearing, dispense with, vary or supplement all or any part of these rules if it is satisfied that the circumstances of any hearing or other proceeding require it.

7. The Board considers that the straightforward nature of the factual error alleged in the Review Application as to whether an invoice was filed with Board renders it unnecessary for registered parties who are not the applicant to comment on the error. Accordingly, the Board will address the merits of the application in its findings.

Board findings

8. Section 31(5) sets out the criteria in the first phase of the review process, as follows:

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.

9. As part of the first phase of the review process, the Board accepts that there was a statement of account filed for Mr. Rondeau in the proceeding leading to Board Order 2020-01, which is Invoice 2019-01. The Board finds that UCG has shown on a *prima facie* basis that there is an error of fact in the award of Board costs in Board Order 2020-01. However, the Board finds that the error of fact does not have significant material implications that would likely warrant a change in the costs awarded to Mr. Rondeau. This is because, consistent with the Board's finding in the order, Mr. Rondeau's costs remain reasonably approved at \$360.00 for his participation in the proceeding — i.e. attendance at a technical meeting. Further, this approach to approving Mr. Rondeau's costs is consistent with honorarium costs awarded for Mr. Rondeau related to his participation in the original proceeding for YEC's GRA, as approved in Board Order 2019-03,³ and with Board Order 2017-07⁴ where an honorarium was similarly awarded for Mr. Rondeau for his participation in a Yukon Electrical Company Limited rates proceeding.

³ Board Order 2019-03: YEC GRA cost awards, General Rate Application by YEC for Approval of Revenue Requirements for 2017 and 2018, May 23, 2019, page 6 of 16.

⁴ Board Order 2017-07: Yukon Electrical Company Ltd., An Application by Yukon Electrical Company Limited for Approval of Revenue Requirements for 2016 and 2017, August 24, 2017, page 5 of 13.

10. Section 4.1 of the Scale of Costs allows for costs of professional fees for lawyers and consultants in the following two categories: (a) legal fees; and (b) fees of consultants, analysts, and experts and support staff.
11. Pursuant to section 4.3, the Scale of Costs allows for costs of an intervener who has not hired legal counsel or a consultant, to recover the costs of preparing evidence and submissions to a maximum hourly rate that shall not exceed \$100.00 per hour. In section 4.4, an “unrepresented intervener” may claim an honorarium of \$50.00 for each half day of attendance at a hearing.
12. In Board Orders 2020-01, 2019-03, and 2017-07, the Board has allowed Mr. Rondeau’s costs for his participation as an “unrepresented intervener”, by awarding an honorarium pursuant to section 4.4 of the Scale of Costs, in proceedings where UCG has other representation from a consultant. In Board Order 2020-01, the Board exercised its discretion and awarded Mr. Rondeau an honorarium of \$360.00 for the technical meeting related to the second compliance filing that was in excess of the \$50.00 per half day honorarium specified in section 4.4.
13. As demonstrated by the Board Orders referenced in the previous paragraph, the Board has generally awarded an honorarium for Mr. Rondeau’s participation in proceedings by categorizing him as an “unrepresented intervener” to ensure that his participation on behalf of UCG in Board proceedings and technical meetings receives an award of costs. The Board appreciates that this categorization of Mr. Rondeau’s participation as an unrepresented intervener may cause confusion because UCG is represented at times by consultants such as Mr. McMahon. Although no process for revisions to the *Rules of Practice* is currently underway, the Board will invite comments from external parties on the intervener costs provisions of the *Scale of Costs* in its next consultation process regarding revisions to the *Rules of Practice*.
14. The Board notes that the word “half” was inadvertently omitted from Board Order 2021, when it quoted Section 4.4 of the *Scale of Costs*. The quote should read, “An unrepresented intervener may claim an honorarium of \$50 for each half day of attendance at an oral hearing.”
15. For the reasons set out in paragraphs 9, 12, 13 and 14, the Board denies UCG’s application for a revised Board Order 2020-01 to increase the costs awarded by \$840.00. However, as a result of UCG’s application demonstrating a factual error, the Board amends its findings in section 2 of Board Order 2020-01 as follows:

With respect to UCG’s claim for Mr. Rondeau, a rate of \$60.00 per hour was applied to his activities. A statement of account was provided for the

17.50 hours for preparation, 6.00 hours for attendance at the technical meeting and 8.00 hours for the development of argument.

Sections 4.3 and 4.4 of the Scale of Costs state:

4.3 Fees and Honorarium of Unrepresented Intervener An intervener who has not hired legal counsel or a consultant may claim for the number of hours spent in preparing its evidence and submissions in a proceeding. The hourly rate of an intervener shall not exceed \$100 per hour and will be determined by the Board when assessing the costs claim.

4.4 Attendance Honorarium An unrepresented intervener may claim an honorarium of \$50 for each half day of attendance at an oral hearing.

The Board is of the view that Mr. Rondeau is acting as the unrepresented intervener, and a consultant was also hired to represent UCG. Since UCG was represented by a consultant, the Board finds that Mr. Rondeau is only reasonably eligible for an attendance honorarium for the six hours to attend the technical meeting.

NOW THEREFORE, the Board orders as follows:

1. The Utilities Consumers' Group's request for a review and variance for additional costs of \$840.00 is denied.
2. Board Order 2020-01 is corrected in section 2 of the order to account for the amendments made by the Board in this review and variance decision.

DATED at the City of Whitehorse, Yukon, the 7th day of October 2020.

BY ORDER



Bonnie King
Vice-Chair