

**IN THE MATTER OF YUKON  
ENERGY CORPORATION 2021  
GENERAL RATE APPLICATION  
TO THE YUKON UTILITIES  
BOARD**

**APPLICATION BY YUKON ENERGY CORPORATION  
FOR REVIEW AND VARIANCE OF BOARD ORDER 2022-03**

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**I. INTRODUCTION**

In Appendix A to Order 2022-03 (Appendix A) regarding Yukon Energy Corporation's ("Yukon Energy" or "YEC") 2021 General Rate Application, the Yukon Utilities Board ("Board" or "YUB") made the following directions (collectively, the "2021 GRA Rulings"):

1. That "a reduction of 50 basis points is warranted in YEC's risk premium", and that "YEC shall reflect the Board-approved ROE of 8.20 percent for 2021" in the compliance filing to Order 2022-03;
2. That the compliance filing reflect a disallowance of costs for the Whitehorse Hydro Unit #2 Uprate Project (WH2 Uprate Project) of \$6.531 million;
3. That the compliance filing reflect a disallowance of costs for the Whitehorse Unit #4 Servomotor Replacement Project (WH4 Project) of \$0.983 million.

Yukon Energy submits that the Board committed errors in fact or law or in jurisdiction in making these rulings, and that the process followed by the Board in making these rulings was unfair to YEC.

Accordingly, pursuant to section 62 of the *Public Utilities Act*, RSY 2002, c. 186 ("Act" or "PUA") Yukon Energy is applying to review and vary the above noted 2021 GRA Rulings.

**II. THE REVIEW AND VARIANCE PROCESS**

Section 62 of the Act gives the Board the unfettered discretion to review, change or cancel any decision or order made by it.

Without limiting the Board's discretion under section 62 of the Act, the Board's *Rules of Practice* provide further that the Board may consider reviewing and varying a Board Order on grounds of an error in fact or law or in jurisdiction, or "such other grounds as the Board may determine require a review".<sup>1</sup> The review and variance procedure thus gives the Board the ability to correct any errors or oversights in its Orders, including factual, legal and jurisdictional errors. It also gives the

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<sup>1</sup> *Yukon Utilities Board Rules of Practice*, s. 31(1)(a), (b) and (f) [*Board Rules*].

Board the ability to receive and consider additional evidence or submissions to remedy any unfairness in its initial hearing process.

The Board uses a “two-phase system” for review and variance applications.<sup>2</sup> The first phase is an “initial screening phase” where the application must establish a *prima facie* case sufficient to warrant full consideration by the Board. The Board will assess an application having regard to some or all of the following:<sup>3</sup>

1. Should there be a review by the Board?
2. If there is to be a review, should the Board hear new evidence and should the parties be given the opportunity to present evidence?
3. 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?

In the case of an alleged error, in order to advance to the second phase of the process, the applicant must show that the claim of error is substantiated on a *prima facie* basis, and that the error has significant material implications.<sup>4</sup> If there is a second phase, then the Board will hear full arguments on the merits of the application.<sup>5</sup>

Yukon Energy submits that there is a *prima facie* case for the 2021 GRA Rulings to be reviewed by the Board based on errors in fact, law, or jurisdiction, and on the basis of procedural unfairness, and that these errors have significant material implications.

### **III. GROUNDS FOR REVIEW AND VARIANCE APPLICATION**

#### **1. Board Ruling Regarding Return on Equity**

##### ***Summary Grounds for Review and Variance***

A review of the Board ruling regarding return on equity (ROE) is warranted on the following grounds:

1. Error in law and in jurisdiction – The ruling does not comply with the direction in section 3 of OIC 1995/90 (the Board “must review and approve rates in accordance with

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<sup>2</sup> *Board Rules*, s. 31(3).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Board Rules*, s. 31(5).

<sup>5</sup> *Board Rules*, s. 31(6).

principles established in Canada for utilities”) or with section 2(2) of OIC 1995/90 (the Board must include in the rates of YEC “provision to recover a fair return on the Corporation’s equity, less one-half of one percent (.5%)”) and is contrary to prior decisions of the Board in Orders 2014-06, 2017-01 and 2018-10.

2. Error in fact – The ruling assumes, contrary to the evidence, that YEC’s risk premium to provide a fair return on equity prior to this decision included provision for risks that have now been reduced.
3. Materiality – The ruling materially reduces Yukon Energy’s return on equity and 2021 revenue requirement, by over \$600,000.

### ***Board Ruling***

The Board in Order 2022-03 (para 233) states:

“The Board can only determine if the risks to YEC warrant the requested risk premium or whether an adjustment must be made to the risk premium adder to recognize the shifting of risk of incremental load from YEC to customers through the OIC [OIC 2021/16] and the further addition of the pension deferral account.... The OIC reduces YEC’s risks in providing utility service and the Board determines that a reduction of 50 basis points is warranted in YEC’s risk premium. Therefore, in the compliance filing to this Board, YEC shall reflect the Board-approved ROE of 8.20 percent for 2021.”

In summary, this ruling determined that the previously approved risk premium of 45 basis points should be reduced by 50 basis points to address determinations by the Board in Order 2022-03 that YEC now had lower risk due to (1) the approval of the defined benefits pension deferral account; and (2) the impact of OIC 2021/16 which the Board asserts reduces YEC load related risk.

### ***Grounds for Review***

The Board’s ruling reduces YEC’s risk premium by 50 basis points. This apparently assumes that the referenced risk premium absent OIC 2021/16 and the defined benefits pension deferral account includes 50 basis points to cover risks reduced by OIC 2021/16 and the defined benefits pension deferral account. That assumption is erroneous:

- With regard to OIC 2021/16 impacts on YEC risks, the assumption that YEC's fair return on equity as previously approved by the Board made any provision for risks reduced by OIC 2021/16 is contrary to the evidence in the proceeding and contrary to the prior Board decisions in Order 2018-10 and 2019-08. This point is elaborated on further below.
- With regard to the defined benefits pension deferral account introduced in YEC's 2021 GRA, Board Order 2014-06 noted that approval of a similar deferral account for ATCO Electric Yukon (AEY, then referred to as YECL) does not affect the utility's ROE risk premium because it meets the criterion that "costs are not under the control of the company and are not reasonably foreseeable."<sup>6</sup> In short, the Board has previously determined that introduction of a defined benefits pension deferral account does not affect the utility ROE risk premium required for a fair return on the utility's equity used to finance rate base as required by section 2(1) and (2) of OIC 1995/90.

The Board's ruling in Order 2022-03 confirms that absent the above determinations YEC's approved ROE would be 8.70 percent, the same as applied for by YEC in its 2021 GRA and the same as approved by the Board in Order 2018-10.<sup>7</sup> The following details are noted regarding relevant evidence based on referenced BCUC decisions and practices (see Tab 8 of GRA filing, and para 224 of Order 2022-03) to confirm that YEC's fair return on equity of 8.70 percent as previously approved by the Board made no provision for risks reduced by OIC 2021/16:

- BCUC benchmark ROE of 8.75% for FortisBC Energy Inc. (natural gas utility).
- Approved risk premium of 45 basis points for YEC over the BCUC benchmark to account for: (1) YEC's smaller size; and (2) YEC risk related to generation, isolated grid, and customer diversity.<sup>8</sup>

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<sup>6</sup> See YEC's Final Argument in 2021 GRA proceeding, page 32 for quote from Order 2014-06 where the Board agreed with YEC that approval of this deferral account reduces YECL's risk but disagreed with YEC "that this is detrimental to ratepayers." The Board noted that defined benefit funding requirements will be inherently volatile and by requesting the defined benefit pension requirement deferral account "YECL has signaled that it does not want to speculate on the financial markets. In the Board's view, neither does the ratepayer." The amount of the defined benefits for YEC is lower compared to the amount for YECL/AEY (the amount for AEY for the 2013 test year noted in the YUB Order 2014-06 was \$1.041 million; the forecast cost for YEC for 2021 GRA is \$0.720 million). YUB-YEC-1-35(d) confirms that the swing in the actual amount related to this defined benefit account could be in both directions as highlighted in Board Order 2014-06.

<sup>7</sup> Footnote 130 of Board Order 2022-03 confirms that the 8.70 percent equals the BCUC benchmark of 8.75 percent plus premium adder of 0.45 percent [45 basis points] less OIC 1995/90 provision of 0.5 percent [50 basis points].

<sup>8</sup> Board Order 2018-10, para 283.

- The Board in making these prior determinations noted that appropriate comparator utilities for YEC for the purpose of determining this risk premium were FortisBC (Electric) and AEY:
  - The Board noted YEC has more risk than FortisBC (Electric), which has a 40 basis point risk premium over the BCUC benchmark utility. There is no evidence on the record of the current proceeding to support a change in this determination.
  - The Board noted YEC has more risk than AEY (which based on the same BCUC evidence the Board determined in Order 2017-01 has a 25 basis point risk premium over the BCUC benchmark). The Board has consistently found that YEC has more risk than AEY in all prior decisions where this matter has been specifically addressed. There is no evidence on the record of the current proceeding to support a change in this determination.
- The Board confirmed in Order 2022-03 (para 278) that: "In Order 2018-10, the Board did not make adjustments to YEC's risk premium due to the existence of rate stabilization measures, including the LWRF".
  - In referencing the LWRF, the Board in Order 2019-08 relating to the same 2017-18 GRA confirmed that it had modified the LWRF to require YEC to bear, for load above the approved GRA forecast, the risk of thermal generation fuel costs due to water condition below the long-term average used to set rates. This modification had no impact on YEC's approved ROE, i.e., no addition was made by the Board to the risk premium to reflect this added risk.
  - Undertaking 11 in the current proceeding revealed that this direction in Board Order 2019-08 would result (absent OIC 2021/16) in YEC incurring an added \$0.738 million of thermal generation fuel costs for 2019 due to water conditions below long-term average and load above the last approved GRA forecast (see Order 2022-03, para 226, bullet 5).
  - As referenced in Board Order 2022-03 (para 226, last bullet), YEC states that evidence in the 2017-18 proceeding confirmed that no such water-related risk applied to FortisBC (Electric), as a comparator to YEC with its 40 basis point risk

premium<sup>9</sup>, and therefore based on BCUC evidence and practices any such added risk being applied to YEC would require adding to the ROE risk premium for YEC. No such adding was done to the referenced 45 basis point risk premium for YEC, and no evidence has been referenced on the record of any proceeding to indicate any basis for asserting the FortisBC (Electric) bears any similar risk, i.e., an added risk premium would in fact be required above YEC's approved 45 basis points to cover this risk that was added to YEC for the first time in Order 2019-08.<sup>10</sup>

In summary, the assumption that YEC's fair return on equity as previously approved by the Board made any provision for risks reduced by OIC 2021/16 is contrary to the evidence in the proceeding as reviewed above and contrary to the prior Board decisions in Order 2018-10 and 2019-08. Accordingly, the ruling to reduce the 45 basis point risk premium due to OIC 2021/16 in effect reduces YEC's ROE below the level required by section 2(2) of OIC 1995/90, and is as a result an error in law and in jurisdiction of the Board.

The effect of the Board ruling is to determine that YEC has a risk premium of 8.70 percent prior to the 50 basis point reduction required by section 2(2) of OIC 1995/90. This would indicate, based on the evidence in this proceeding, a determination by the Board that YEC has less risk than the BCUC benchmark utility with its 8.75% allowed ROE; less risk than AEY with its 25% risk premium and an allowed ROE of 9.00%; and less risk than FortisBC (Electric) with its 40% risk premium and an allowed ROE of 9.15%. This is patently incorrect, and constitutes a clear error in principle in the Board's reasoning. Based on the available evidence, and the established facts and prior determinations of the Board that have not been changed by any evidence in the current proceeding, it is incontrovertible that YEC has more risk than the BCUC benchmark utility, more risk than AEY, and more risk than FortisBC(Electric). A ruling to reduce YEC's risk premium below that of FortisBC(Electric), i.e., below 40 basis points over the BCUC benchmark, therefore results

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<sup>9</sup> The response to UCG-YEC-1-32 Revised provides additional details regarding FortisBC (Electric) ("FBC") power supply context and contract with BC Hydro and information showing that the context for FBC is very different and less risky than YEC. It has been well documented in YEC proceedings that FBC is not on an isolated grid, and is not expected to be exposed to the same thermal cost risks as YEC given that FBC has access to renewable generation resource options available on BC's integrated grid system. The power supply context for FBC was also reviewed in the 2017-18 GRA Undertaking #38 and Undertaking #39 as well as the following follow-up questions on YEC Undertakings: YUB-YEC-3-3, YUB-YEC-3-4, and YUB-YEC-3-6.

<sup>10</sup> Responses to Undertakings #8 and #20 in the current proceeding provide documentation regarding past Board decisions related to the LWRF or DCF to confirm that there is no evidence that these earlier rate stabilization measures were applied (as directed in Order 2019-08) only to forecast rather than actual YEC load. ROE decisions by the Board for YEC prior to Order 2019-08 therefore assumed that water based risks were beyond YEC's control and not reasonably foreseeable for all load supplied by YEC – the same risk profile as once again applies to YEC under OIC 2021/16.

in an unfair return on equity for YEC, which fails to comply with section 2(2) of OIC 1995/90, and is accordingly an error in law and in jurisdiction.

## 2. Board Ruling on Whitehorse Unit #2 Uprate Costs

### ***Summary Grounds for Review and Variance***

A review of the Board ruling regarding Whitehorse Unit #2 (WH2) Uprate Costs is warranted on the following grounds:

1. Error in law and in jurisdiction – The ruling does not comply with the direction in section 3 of OIC 1995/90 (the Board “must review and approve rates in accordance with principles established in Canada for utilities”), which requires approval of capital costs incurred absent clear evidence that the assets are not used and useful or that the costs were unreasonable or imprudently incurred. Nor does the ruling comply with the combined effect of section 11 of OIC 1995/090<sup>11</sup> (the Board must include provision in the rates for retail and major industrial customers to recover costs that YEC “reasonably incurs to plan or develop renewable generation projects”) and section 7 of OIC 1995/90 (the Board must fix wholesale rates that “must be sufficient to enable Yukon Energy Corporation to recover its costs that are not recovered from its other customers”), since the ruling will result in a determination of rates that will be insufficient for YEC to recover its actual reasonably incurred costs.<sup>12</sup>
2. Error in fact – The ruling does not take into account all of the available evidence and erroneously assumes that specific Hatch study costs provide a reasonable basis for determining final actual costs incurred.
3. Procedural unfairness – The ruling was made without sufficiently putting YEC on notice that the Board would require more detailed evidence or submissions to support the inclusion of the WH2 Uprate Costs in its rate base, in circumstances where YEC presented a reasonably adequate business case to provide *prima facie* support for this

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<sup>11</sup> As amended by OIC 2021/16.

<sup>12</sup> In particular, the Court of Appeal has interpreted section 7 of OIC 1995/090 as imposing a “mandatory and unambiguous” statutory direction upon the Board to set wholesale rates that enable YEC “to recover its otherwise unmet reasonable costs of generating the electricity”: *Yukon Energy Corporation v. Yukon (Utilities Board)*, 2017 YKCA 15 [*YEC v. YUB* (2017)], at paras 56-57. When costs are incurred for the purpose of planning or developing renewable generation projects, the Board’s obligation to set rates that are sufficient to enable YEC to recover its reasonably incurred costs is reinforced by the further statutory direction that has been added in section 11 of OIC 1995/090, specifically requiring the Board to include provision for those costs in the rates for retail and major industrial customers.



project, and where the reasonableness or prudence of YEC's actual expenditures was not materially questioned by the Board, Board staff, or intervenors in the two rounds of IRs or in the oral hearing. This breached the Board's duty of procedural fairness to YEC.

4. Materiality – The ruling materially reduces Yukon Energy's ability to recover through rates its actual costs incurred, by disallowing over \$6.5 million of costs incurred (over 50% of the final costs incurred).

### ***Board Ruling***

The Board in Order 2022-03 (para 278) states:

“Given the business case, the Board finds YEC's business plan for this project did not adequately justify the costs and benefits of this project, nor did it adequately explain the reasons the project was the preferred alternative. Given the Board's concerns with the reasonableness of the costs, the recommendations in the Hatch report and the deficiencies in the business case, the Board finds it appropriate to approve costs of \$4.78 million, which was the Hatch cost estimate for uprating a unit with increased turbine flow, plus 20 percent for cost overruns.”

The Board also notes (para 277) the following:

“YEC's costs for this project were \$12.267 million even though Hatch's cost estimates for uprating the WH1 unit, which would be similar to the cost estimates for uprating the WH2 unit, were approximately \$1.99 million with the same original turbine flow and \$4.78 million with an increase in turbine flow. However, YEC never discussed the reasons for these cost differences in its business case or why the WH2 Uprate Project exceeded the Hatch estimates. Additionally, Hatch presented an alternative in its report that also allowed for efficiency gains of two percent and an offset in thermal generation half of that achieved with the WH2 Uprate Project. YEC did not discuss this alternative, any costs associated with this alternative, and the reasons for dismissing this alternative over the proposed project in the business case.”

Notwithstanding Board comments about YEC not discussing its selection of alternatives, this ruling in summary accepted as reasonable the WH2 uprate project option with increased turbine

flow and then approved costs of \$5.736 million for the project based on the Hatch cost estimate plus 20% for cost overruns – thereby disallowing over \$6.5 million of YEC's \$12.267 million actual costs for the project.

### ***Grounds for Review***

The Board's ruling on the WH2 uprate costs states that YEC never discussed the reasons for the cost differences between the Hatch study estimates and YEC's actual costs – and based on the absence of this discussion, the Board approved costs in effect based on only the Hatch study estimate. Review of two rounds of IRs plus the oral hearing record, however, indicates that YEC was never asked to discuss or explain these costs differences. YEC's final argument noted that no material issues were raised in IRs or at the oral hearing regarding this project.<sup>13</sup>

In summary, evidence provided during the proceeding on the Hatch study costs and final YEC actual costs indicates the following:

- **Hatch report cost estimate:** Because the WH1 and WH2 units were identical Pelton units, Hatch stated in its report that the issues, costs and benefits relating to the WH1 unit also applied to the WH2 unit – Hatch accordingly only referenced the WH1 unit in its study investigations.
  - Hatch indicated that the principal benefit of uprating the turbines was the ability for YEC to offset more costly thermal generation and that replacing the existing turbine runners with a new runner of modern design would increase generating unit efficiency and power output. Hatch concluded that uprating WH1 (or WH2) unit resulted in a positive economic benefit, and estimated the cost as noted in the Board ruling.<sup>14</sup>
  - Hatch indicated further that its cost estimate of \$4.78 million was limited to the uprate project, and that it excluded additional turbine and rehabilitation work that would also be required, in any event, regardless of YEC's uprating plans. In particular, when dealing with the unit outage time estimated in the preliminary

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<sup>13</sup> YEC's final argument noted that the basis for proceeding with the project is reviewed in detail in the Application at section 5.2.1.9. Further detail regarding the project is provided in the following information requests: YUB-YEC-1-57; YUB-YEC-2-22; UCG-YEC-1-52; UCG-YE-1-53; UCG-YEC-2-15; CW-YEC-1-32 and CW-YEC-1-33.

<sup>14</sup> Board Order 2022-03 (paras 272 and 273) reviews this evidence from YUB-YEC-1-57(d) [the Hatch report] at pages 5, 8, 23 and 66.

schedule, Hatch noted: “This allows some time for turbine and generator rehabilitation work that would typically be done when the equipment is dismantled. The rehabilitation work is not attributed to the uprate; therefore it is not included in the capital cost discussed above.”<sup>15</sup>

- Hatch cost estimates as provided in Table 3-2 (page 23) of its report are in 2017\$ and do not include YEC costs (owner’s engineer, AFUDC, internal cost and project management) beyond provision of 10% for “engineering and administration”.
- **YEC actual costs:** YEC’s actual costs as updated for the WH2 uprate project of \$12.267 million include costs incurred in 2019 to 2021 (i.e., include escalations after 2017 cost estimates) with \$8.766 million for turbine and generator and \$3.501 million for owner’s engineer, internal costs and project management, balance of plant, contingency and AFUDC.<sup>16</sup>
  - YEC decided to uprate the WH2 unit over the WH1 unit since the WH2 unit produced more energy and the WH2 governor was having issues with power control that could be resolved with the uprate project (GRA Application, page 5-18; also YUB-YEC-1-57(e)). No evidence has been provided to challenge the prudence of this decision.
  - As specifically contemplated in the Hatch report, YEC’s WH2 uprate project was defined from the outset to include rehabilitation work that would reasonably be required in any event, which was outside the scope of Hatch’s cost estimate for the uprate work.
  - Once the WH2 unit was disassembled (i.e., after business case assessments and when actual implementation underway), assessments of both the embedded components as well as the removable components were also undertaken (this assessment can only be undertaken upon completion of disassembly). These assessments revealed in many cases that the condition of the components was worse than originally expected, and these components had to be refurbished as part of the project to ensure proper operation and acceptable service life of the unit. In addition, during the inspection and assessment process certain

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<sup>15</sup> YUB-YEC-1-57(d), pages 22 and 23. These clear statements are not reviewed in Board Order 2022-03.

<sup>16</sup> YUB-YEC-2-17, Table 4.

components of the WH2 unit were found to be misaligned – this discovery resulted in the need for additional machinery of several components to bring the items back into proper alignment.<sup>17</sup>

- In the end, the scope of work for the WH2 uprate project included unit rehabilitation, runner replacement, generator stator and rotor rewinding, governor replacement, exciter replacement, upgrading the control and condition monitoring systems, and rehabilitation of the tailrace crane superstructure and concrete piers, i.e., the project scope went well beyond the scope for the Hatch cost estimates (GRA Application, page 5-17).
- There is no evidence that similar issues would not have affected WH1 uprate costs if it had been selected, that selecting unit 2 vs unit 1 was imprudent, or that planning and implementation for the WH 2 uprate project to address these issues was imprudent.

Based on the evidence as reviewed above, there is no basis for the Board to use (as was done in the ruling) Hatch's estimated WH1 uprate costs as a proxy for reasonable actual WH2 Uprate Project costs, when it is apparent that the actual project costs materially exceeded Hatch's original estimate (aside from escalations due to timing differences) because of additional necessary work that was outside the scope of the original estimate.

To elaborate, WH2 had been in service for approximately 60 years prior to the uprate project; however, most of the components were original. When developing the specifications for the project, YEC identified a number of systems associated with WH2 that were at end of life including the governor, excitation system, oil head, turbine shaft seal, greased bushing system, HPU and unit controls. YEC followed recommendations from engineering and operations that it was essential to replace these aged assets, to ensure their continued reliability and to extend the life of the unit.

It was obviously most expeditious to undertake these required system replacements during the uprate project, even though they were not included in Hatch's initial cost estimate. In fact, as noted above, the Hatch report specifically acknowledged the prudence of such an approach,

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<sup>17</sup> YUB-YEC-2-17, pages 11 and 12.

indicating that their schedule for the uprate work “allows some time for turbine and generator rehabilitation work that would typically be done when the equipment is dismantled.”<sup>18</sup>

Additionally, many unanticipated issues with the turbine and generator were discovered during site work once the unit was disassembled, which needed to be corrected to achieve the target life extension.

There is no question that the WH2 uprated asset is used and useful. The completed project also provides for better use of the Whitehorse Hydro Generating Facility, ensuring added renewable generation is added to the Yukon Integrated System. This aligns with the direction provided in section 11 of OIC 1995/090 (as amended by OIC 2021/16), which requires the Board to include provision in rates to enable YEC to recover costs it reasonably incurs to plan or develop renewable generation projects.<sup>19</sup>

Based on the evidence, and on normal principles applicable for assessing such costs for rate setting purposes, it is also clear that the actual project costs incurred (as estimated in the last update provided) need to be assessed based on the final scope for this work and the actual conditions that occurred when carrying out this work. Absent clear evidence to the contrary, none of which has been referenced in the Board ruling, there is accordingly no basis for disallowance of any of the actual final project costs – and there are clear grounds for review of the ruling on WH2 Uprate project costs.<sup>20</sup>

By using the Hatch cost estimate as a proxy for YEC’s reasonable actual WH2 Uprate Project costs and disallowing \$6.531 of YEC’s actual project costs – the reasonableness of which were not materially questioned in IRs or at the hearing – the Board erred in law and jurisdiction. Section 11 of OIC 1995/090 imposes a clear obligation on the Board to include provision for recovery of such costs in rates for retail and major industrial customers; and, to the extent such costs are not recovered from retail and major industrial customers, the Court of Appeal has held that the Board “has no jurisdiction to set a wholesale rate which does not enable Yukon Energy to recover its otherwise unmet reasonable costs of generating the electricity.”<sup>21</sup> In particular, the Board has a mandatory obligation “to fix wholesale rates sufficient to enable Yukon Energy to get back

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<sup>18</sup> See footnote 15 above.

<sup>19</sup> Section 11(1) of OIC 1995/090 (as amended) requires that “[t]he Board must include in the rates of a public utility for retail customers and major industrial customers provision to recover costs the public utility reasonably incurs to plan or develop renewable generation projects.”

<sup>20</sup> While the Board provided for 20% cost overruns, that provision is clearly inadequate to account for the actual costs that YEC incurred due to the additional scope requirements noted in evidence by YEC.

<sup>21</sup> *YEC v. YUB* (2017), at para 57.

everything it reasonably paid for generating the electricity it sells to Yukon Electrical and would not otherwise recover from other customers.”<sup>22</sup> In the context of the Board’s obligations arising from OIC 1995/090, the Board’s disallowance of YEC’s actual project costs was manifestly unreasonable.

In any event, having regard to the evidence that YEC did submit to the Board in support of this project, it was also unfair for the Board to disallow the inclusion of YEC’s actual project costs in its rate base without at least putting YEC on notice that the Board would require more detailed evidence or submissions in support of those costs, in circumstances where the reasonableness or prudence of YEC’s actual expenditures was not materially questioned in IRs or in the oral hearing before the Board.

The fairness of the process must be considered in the context of the mandatory statutory directions imposed on the Board under sections 3, 7 and 11 of OIC 1995/090, as well as the extensive IR process followed in Yukon, whereby IRs are posed by the Board, its staff, and intervenors to ensure that any material issues can be addressed. It is both unfair and unreasonable for the Board to adopt an approach that effectively imposes an impracticable burden on YEC to “systematically prove that every single cost is just and reasonable”.<sup>23</sup>

In the context of the statutory scheme and IR process in Yukon, YEC has a legitimate expectation that if the Board or its staff have material concerns about the reasonableness of YEC actual costs or the sufficiency of the business case put forward to justify them, the Board or its staff will raise those concerns through IRs (or, at the very least, in questions at the hearing) so that YEC will have a fair and reasonable opportunity to address them.

A review is necessary to cure this unfairness, to give YEC an opportunity to present additional evidence that it would have adduced in IRs or at the oral hearing if the Board had put YEC on notice that the Board considered there to be a material issue regarding the prudence of YEC’s actual project costs. This will include additional evidence responding to the issues raised by the Board for the first time in its Reasons for Decision. It will also include evidence from Hatch about the reasonableness of using its preliminary cost estimate to test the costs that were actually incurred several years later, when the project was undertaken – particularly having regard to the system replacements that were identified as necessary, that were outside the scope of the original scope

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<sup>22</sup> *YEC v. YUB* (2017), at para 62.

<sup>23</sup> *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 [OPG], at para 80.

of work for the uprate project, and the further unanticipated issues that were discovered with the equipment when the unit was disassembled. It would be patently unfair not to give YEC that opportunity.

### **3. Board Ruling on Whitehorse Unit #4 Servomotor Replacement Costs**

#### ***Summary Grounds for Review and Variance***

A review of the Board ruling regarding Whitehorse Unit #4 (WH4) Servomotor Replacement Costs is warranted on the following grounds:

1. Error in law and in jurisdiction – The ruling does not comply with the direction in section 3 of OIC 1995/90 (the Board “must review and approve rates in accordance with principles established in Canada for utilities”) which requires approval of capital costs incurred absent clear evidence that the assets are not used and useful or that the costs were unreasonable or imprudently incurred. Nor does the ruling comply with the combined effect of section 11 of OIC 1995/090<sup>24</sup> (the Board must include provision in the rates for retail and major industrial customers to recover costs that YEC “reasonably incurs to plan or develop renewable generation projects”) and section 7 of OIC 1995/90 (the Board must fix wholesale rates that “must be sufficient to enable Yukon Energy Corporation to recover its costs that are not recovered from its other customers”), since the ruling will result in a determination of rates that will be insufficient for YEC to recover its actual reasonably incurred costs.<sup>25</sup>
2. Error in fact – The ruling does not take into account all of the available evidence and in error assumes that specific study costs provide a reasonable basis for determining final actual costs incurred.
3. Procedural unfairness – The ruling was made without sufficiently putting YEC on notice that the Board would require more detailed evidence or submissions to support the inclusion of the WH4 Servometer Replacement Costs in its rate base, in circumstances where YEC presented a reasonably adequate business case to provide *prima facie* support for this project, and where the reasonableness or prudence of YEC’s actual expenditures was not materially questioned by the Board, Board staff, or intervenors

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<sup>24</sup> As amended by OIC 2021/16.

<sup>25</sup> See footnote 12 above.

in the two rounds of IRs or in the oral hearing. This breached the Board's duty of procedural fairness to YEC.

4. Materiality – The ruling materially reduces Yukon Energy's ability to recover through rates its actual costs incurred, by disallowing over \$0.850 million of costs incurred (over 60% of the final costs incurred).

### ***Board Ruling***

The Board in Order 2022-03 (para 282) states:

“Accordingly, given the Board's concerns with the reasonableness of the costs and a lack of a business case for the project to support the magnitude of costs compared to the expected benefits for the project, the Board finds it appropriate to approve costs of \$457,000 based on the Hatch cost estimate, plus 20 percent for cost overruns.”

The Board also notes (para 281) the following:

“YEC did not explain why the costs for this project increased from the original Hatch cost estimate. Thus, the Board finds that YEC did not provide an adequate business case or justification that supports the significant cost increase from the original Hatch estimate. Furthermore, the Board finds that the benefits espoused by YEC do not fully justify the costs that were incurred or forecast for this project.”

Notwithstanding the Board finding that the benefits do not fully justify the costs incurred or forecast, this ruling in summary accepted as reasonable the project as developed and then approved costs of \$0.548 million for the project based on the Hatch cost estimate plus 20% for cost overruns – thereby disallowing over \$0.85 million of YEC's \$1.4 million actual costs for the project.

### ***Grounds for Review***

The Board's ruling on the WH4 servomotor replacement costs states that YEC did not explain why the costs for this project increased from the original Hatch cost estimate – and based on the absence of this explanation, the Board approved costs in effect based on only the Hatch study estimate. Review of two rounds of IRs plus the oral hearing record, however, indicates that YEC



was never asked to discuss or explain these costs differences. YEC's final argument noted that no material issues were raised in IRs or at the oral hearing regarding this project.<sup>26</sup>

In summary, evidence provided during the proceeding on the Hatch study costs and final YEC actual costs indicates the following:

- **Hatch report cost estimate:** The Hatch 2017 report provided a high level initial cost estimate that excluded upgrades required due to existing equipment condition.<sup>27</sup>
- **YEC actual costs:** The following evidence is noted regarding the actual project and its costs:
  - The project involves replacement of the servo-motors with spring assisted servo-motors that will augment the force provided by the high pressure hydraulic unit (HPU) and overcome the gate stalling issue experienced beyond 92% stroke. The governor gate position limiter will be removed and the WH4 unit will be re-commissioned with the capability to operate at 100% gate opening. The ability to operate at %100 gate opening will increase Energy and Capacity of the unit.<sup>28</sup>
  - The \$1.4 million updated actual cost includes \$0.733 million for the servomotor supplier, \$0.459 million for owner's engineer and internal costs and project management, and \$0.208 million for balance of plant that consists of a monorail lifting beam to remove/install the servomotors, the piping modifications and the new governor parts and tuning.<sup>29</sup>

Based on the evidence as reviewed above, there is no basis for the Board to use (as was done in the ruling) Hatch's 2017 high level estimates for the WH4 servomotor replacement costs as a proxy for reasonable actual WH4 servomotor replacement costs. Aside from escalations due to timing differences, the scope for the actual project work exceeded the scope for the Hatch cost estimate and also included related YEC costs not considered in the Hatch report. More detailed explanations as to specific material variance in the servomotor costs between the Hatch estimates

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<sup>26</sup> YEC's final argument noted that the basis for proceeding with the project is reviewed in detail in the Application at section 5.2.1.10. Further detail regarding the project is provided in the following information requests: YUB-YEC-1-58; YUB-YEC-2-23; UCG-YEC-1-43 revised and UCG-YEC-1-54.

<sup>27</sup> YUB-YEC-2-23(a) (Hatch report), pp19-20 and Appendix D.

<sup>28</sup> YUB-YEC-1-58(d).

<sup>29</sup> YUB-YEC-2-17 (Table 6) for updated costs, and UCG-YEC-1-43 Revised for details on balance of plant costs.

and YEC's actual procurement costs were not requested during the proceeding and are not on the evidence record.

The WH4 servomotor project assets are used and useful. The completed project also provides for better use of the Whitehorse Hydro Generating Facility, ensuring added renewable generation is added to the Yukon Integrated System. This aligns with the direction provided in section 11 of OIC 1995/090 (as amended by OIC 2021/16), which requires the Board to include provision in rates to enable YEC to recover costs it reasonably incurs to plan or develop renewable generation projects.<sup>30</sup>

Based on the evidence, and on normal principles applicable for assessing such costs for rate setting purposes, the actual project costs incurred (as estimated in the last update provided) need to be assessed based on the final scope for this work and the actual conditions and contract costs that occurred when carrying out this work. Absent clear evidence to the contrary, none of which has been referenced in the Board ruling, there is accordingly no basis for disallowance of any of the actual final project costs – and there are clear grounds for review of the ruling on WH4 servomotor replacement project costs.

By disallowing \$0.983 million of YEC's actual project costs – the reasonableness of which were not materially questioned in IRs or at the hearing – the Board erred in law and jurisdiction. Section 11 of OIC 1995/090 imposes a clear obligation on the Board to include provision for recovery of such costs in rates for retail and major industrial customers; and, to the extent such costs are not recovered from retail and major industrial customers, the Court of Appeal has held that the Board “has no jurisdiction to set a wholesale rate which does not enable Yukon Energy to recover its otherwise unmet reasonable costs of generating the electricity.”<sup>31</sup> In particular, the Board has a mandatory obligation “to fix wholesale rates sufficient to enable Yukon Energy to get back everything it reasonably paid for generating the electricity it sells to Yukon Electrical and would not otherwise recover from other customers.”<sup>32</sup> In the context of the Board's obligations arising from OIC 1995/090, the Board's disallowance of YEC's actual project costs was manifestly unreasonable.

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<sup>30</sup> Section 11(1) of OIC 1995/090 (as amended) requires that “[t]he Board must include in the rates of a public utility for retail customers and major industrial customers provision to recover costs the public utility reasonably incurs to plan or develop renewable generation projects.”

<sup>31</sup> *YEC v. YUB* (2017), at para 57.

<sup>32</sup> *YEC v. YUB* (2017), at para 62.

In any event, having regard to the evidence that YEC did submit to the Board in support of this project, it was also unfair for the Board to disallow the inclusion of YEC's actual project costs in its rate base without at least putting YEC on notice that the Board would require more detailed evidence or submissions in support of those costs, in circumstances where the reasonableness or prudence of YEC's actual expenditures was not materially questioned in IRs or in the oral hearing before the Board.

The fairness of the process must be considered in the context of the mandatory statutory directions imposed on the Board under sections 3, 7 and 11 of OIC 1995/090, as well as the extensive IR process followed in Yukon, whereby IRs are posed by the Board, its staff, and intervenors to ensure that any material issues can be addressed. It is both unfair and unreasonable for the Board to adopt an approach that effectively imposes an impracticable burden on YEC to "systematically prove that every single cost is just and reasonable".<sup>33</sup>

In the context of the statutory scheme and IR process in Yukon, YEC has a legitimate expectation that if the Board or its staff have material concerns about the reasonableness of YEC actual costs or the sufficiency of the business case put forward to justify them, the Board or its staff will raise those concerns through IRs (or, at the very least, in questions at the hearing) so that YEC will have a fair and reasonable opportunity to address them.

Accordingly, as in the case of the WH2 uprate determination, a review is necessary to cure this unfairness, to give YEC an opportunity to present additional evidence that it would have adduced in IRs or at the oral hearing if the Board had put YEC on notice that the Board considered there to be a material issue regarding the prudence of YEC's actual project costs. This will include additional evidence responding to the issues raised by the Board for the first time in its Reasons for Decision. It would be patently unfair not to give YEC that opportunity.

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<sup>33</sup> OPG, at para 80.

#### IV. RELIEF REQUESTED

For the foregoing reasons, Yukon Energy respectfully requests that the Board issue an order or directions pursuant to section 62 of the PUA and rule 31 of the Board Rules:

- a) convening a phase II review on the merits of the 2021 GRA Rulings; and
- b) providing an opportunity for YEC and other registered parties to present additional evidence relevant to the 2021 GRA Rulings, pursuant to rule 31(3)(b), in addition to arguments presented by YEC and other registered parties under rule 31(6).

ALL OF WHICH is respectfully submitted this 14th day of April, 2022.

Yukon Energy Corporation

Per:



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P. John Landry, Q.C.  
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