

YUKON
ENERGY



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December 30, 2011

Mr. Bruce McLennan, Chair
Yukon Utilities Board
Box 31728
Whitehorse, Yukon Y1A 6L3

Dear Mr. McLennan,

RE: Consultation regarding the review and update of Yukon Utilities Board Scale of Costs and Rules of Practice

On November 8, 2011, the Yukon Utilities Board (the "Board" or the "YUB") informed interested parties that it was conducting a review of its Scale of Costs and considering changes to its Rules of Practice to bring the rules up to date. Comments were to be submitted by December 30, 2011.

The Board provided as an attachment a copy of the Board's research on cost provisions and scales of costs of other public utilities Boards or Commissions across Canada. The Board also provided for reference the current Rules of Practice (including the Scale of Costs), the Intervenor Cost Awards Policy, and Intervenor Expense Claim spreadsheet.

Yukon Energy has reviewed the November 8, 2011, letter and attachments and herein provides comments and recommendations for the Board's consideration on three matters:

- Principles underlying intervenor cost awards policy
- Principles underlying applicant hearing cost reviews
- Comments on the scale of costs

PRINCIPLES UNDERLYING INTERVENOR COST AWARDS POLICY

Intervenor cost awards are typically approved by utility regulators across Canada to encourage and facilitate effective and efficient participation by interested parties who have a substantial interest in the outcome of the regulatory process. The principle of providing for partial or full reimbursement of the costs of intervenors who aid the Board, and who cannot otherwise afford to participate without some cost-sharing assistance from the process, is well-established in Canada. Such reimbursements are

provided in order to encourage further public participation in the review process, and to recognize the value an intervenor has provided to the Board's review¹. However, such assistance is provided with clear constraints to ensure inefficient or frivolous behavior is not compensated. It is also common that such costs may not be reimbursed 100%, in part to recognize that the intervenor group is present on the basis of an interest in the outcome that justifies their participation – cost awards are intended to aid in participation, not to drive it. These costs are necessarily reviewed and awarded at the conclusion of a proceeding as they are in essence based on the performance of the intervenor and the quality of the contribution made to the process and to the Board's understanding of the issues.

The overall objective is "to ensure that the costs of hearings are reasonable relative to the matters involved", and in this regard the scale "sets general principles and amounts" to be applied in the awarding of costs. In this respect cost awards are reviewed based on criteria that include:

- The effectiveness of a Party's participation – including considerations regarding whether such participation was duplicative of others' efforts;
- The relevance of the intervention to the issues at hand;
- Whether the costs were reasonably and prudently incurred; and
- Whether the Party was diligent in the efficient presentation of its position.

Generally, the criteria noted in the Cost Award Policy continue to be reasonable criteria for testing whether an intervenor merits some or full recovery of their costs.

PRINCIPLES UNDERLYING APPLICANT HEARING COST REVIEWS

The recent practice in Yukon is to require applicant utilities to file their hearing costs as "claims" under the current Intervenor Cost Award Policy and Intervenor Expense Claim format. This approach has been recently adopted despite these cost award and expense claim processes clearly being unrelated to the applicant's costs².

In Yukon Energy's view, this amended approach misapplies the relevant Board policy (which is fundamentally about *claims for reimbursement* – i.e., a cheque from the utility to an intervenor). As reviewed further below, in Yukon Energy's view the amended approach is also inconsistent with the normal practice for regulation of utilities in Canada, and leads to a starkly different review threshold for the small component of a utilities' revenue requirement related to hearings, in contrast to the evidentiary threshold for review of all of the other components of the utilities' costs in rates.

¹Jurisdictions typically provide intervenor cost awards for bona fide third party costs related to any professional assistance (legal or consulting) retained by the intervenor in order to review the evidence and advise the Board on particular issues of concern.

² For example, the Rules of Practice specifically defines an Intervenor as "... a party other than the applicant ..."

By Reviewing "Claims" The Board Applies an Incorrect Standard of Review

At its core, it is important to recognize that, unlike intervenors, applicants have no option to participate or not participate in a hearing. During a hearing, applicants must also address all issues and questions raised by intervenors and the Board, however many or few such issues and questions ultimately arise. As such, applicants do not control nor drive the costs of a proceeding. In this regard, the costs of an applicant are akin to the costs of the Board, in that in each case the costs are integral to their respective roles and are unavoidable.

For this reason, to the utilities, the costs to prepare for and attend hearings are viewed as a necessary and integral component of their revenue requirement and expenses for rate setting purposes. The sole purpose of the entire revenue requirement setting process is to determine that the utilities' overall costs are reasonable and prudent. This is done based on a varying level of review depending on the nature of the costs and the ability of the utility to support their forecasts of costs. For the two utilities combined, this process is applied to some \$50 million in annual costs. In no case in the review of revenue requirements are utilities required to provide copies of specific receipts for amounts spent, or the specific division of labour for the services they retain between, for example, senior lawyers versus articling students, or consultants versus production staff. The entire regulatory structure is designed to ensure that the utilities have a reasonable opportunity to recover their required costs and earn a fair return.

In contrast, for proceedings since the 2005 Required Revenues and Related Matters hearing, the applicant utilities have been required to go through the normal hearing process to assess the matters at hand (including, for GRAs, the full revenue requirement) and then following this process go through a separate detailed and documentation-heavy process of filing extensive information and justification for hearing-related costs, which have made up a small fraction of the utilities' revenue requirement. Unlike intervenors, the process for utilities is not designed to provide for some form of audit of the utilities' claimed costs prior to providing them with a cheque for reimbursement. Such auditing and compliance with financial policies is already incorporated in the financial oversight functions of the utility, the processes and policies for which are open to review by the Board in the GRA.

For this reason, Yukon Energy submits that the approach that has been developed for intervenors pursuant to the Cost Award Policy is inappropriate to apply to utilities, and that the appropriate assessment of utility costs is as part of the reasonableness assessment conducted on all costs contained with the overall revenue requirement.

Yukon Approach to Reviewing "Claims" Inconsistent with Normal Regulatory Principles

The Board's present practice with respect to applicant hearing costs appears generally inconsistent with Yukon practice prior to the most recent hearings and with practice in other jurisdictions YEC has reviewed, with the exception of Alberta.

Every other jurisdiction reviewed other than Alberta includes all hearing costs incurred by the utilities as a component of testing their revenue requirement, and includes all hearing-related costs in their respective

regulated costs for the appropriate years, without any special or separate process for review of the utilities' "claims" for these costs. In particular, it is Yukon Energy's understanding that all major jurisdictions with Crown-owned utilities, regulating hydro and non-hydro electric utilities, have processes that markedly differ from the recent practice in Yukon; specifically this includes Northwest Territories, Newfoundland, Manitoba, Quebec and British Columbia.

In short, in Yukon Energy's view the appropriate process for the review and approval of applicant costs for hearings as part of overall costs to be recovered through rates for YEC, consistent with "normal principles" as outlined in OIC 1995/90 for jurisdictions with comparable Crown-owned utilities regulating hydro and non-hydro based utilities, is as set out above³ – that is, consistent with and concurrent with the revenue requirement review and not based on separate post hearing intervenor cost awards policies.

Specific Comments on Recent YUB Review of YEC Claims

In the recent experience regarding the review of applicant utilities' cost claims, the review process has failed to recognize the separate and distinct roles of applicants and intervenors in the public review process and the separate types of activities, requirements and costs that must be incurred. In this regard, the following considerations are noted:

- Applicant costs are effectively incurred as a necessary part of its business or operations as a regulated utility.
- Applicants that require an approval from the YUB must engage in the formal review process and cannot realistically limit their level of participation in the process.
- An applicant must participate actively in the process, and typically cannot reasonably coordinate with others to increase efficiency or reduce duplication.
- Applicants begin to incur costs related to their application prior to a formal process with the YUB commencing, i.e., costs to prepare and file an application.

In contrast to an intervenor, for whom the cost award policy was designed, the following key activities must be undertaken by an applicant to prepare, present and defend an application for a material regulatory approval:

- ***Production services required*** [i.e., coordinating the necessary analysis, drafting and review of materials and production of final and filed document]. A significant filing, such as a revenue requirement or rate application, is labour intensive and requires significant analysis, writing, review and production to ensure an accurate, clear and coherent document is provided. This includes the retention of services for functions that are required for any large document production – document management, editing, layout, formatting, proofing, copying, assembly,

³ Section 3 of OIC 1995/90 provides with regard to 'normal principles' as follows: "Except to the extent otherwise stated by this Directive or the Act, the Board must review and approve rates in accordance with principles established in Canada for utilities, including those principles established by regulatory authorities of the Government of Canada or of a province regulating hydro and non-hydro electric utilities."

etc. As the Board requires the applicant to make multiple copies available for public review in all communities, documents are required to be print ready and multiple copies are required to be printed. These services are separate and apart from the work of utility analysts, accountants, managers and consultants working on preparation of the utility's core business plan and regulatory proposals.

Once an Application is filed, document production services continue and are fundamental to the efficient and effective conduct of the hearing process, i.e., in the 2008/2009 General Rate Applications the applicants each received between 700 (YECL) and 850 (YEC) IRs. Each question must be entered into templates by production staff and each response must be tracked, compiled (particularly subparts), formatted, pdf'd, consolidated into one document, produced in the appropriate formats and distributed. Further, in these recent proceedings intervenors and the Board have requested that where other IRs are referenced, links be included in the consolidated pdf which is an extra task for these service providers. This requires production staff to review each response and insert links where appropriate. There is no option but to engage some form of production services for a GRA at a specific and identifiable cost. YEC further notes that applications and other filed documents that are well laid out and organized aid the hearing process.

- ***Multiple parties required, including more junior supporting analysts*** [includes all aspects of coordination, drafting and finalization of responses and production activities] - Applicants are subject to more rigorous testing of evidence including materially more intensive interrogatory requirements than intervenors (see for example the magnitude of interrogatories noted above for the 2008/2009 GRAs). Generally, aside from the effort required to research or accumulate data for each individual interrogatory response, as well as draft and review responses, a great deal of effort is required to coordinate the process and ensure accuracy and consistency of information provided. Multiple parties are required from the various utility departments, differing professional backgrounds, and consulting support to complete the assignment, along with support and production services (as noted above). Often, both the utility and consultants will utilize a mix of more senior and junior staff and analysts to more efficiently and expeditiously handle the massive volume of material that must be prepared, and to cost effectively engage support resources that are lower cost than having senior people (staff or consultants) address every detail.
- ***Witness panel preparation*** – Applicants are necessarily subject to a great deal of scrutiny as part of the public review process and especially during the oral hearing where the applicant witness panel will be subject to cross examination by the Board and intervenors. It is a very difficult and infrequent experience for most witnesses to appear on a panel, even for those who have appeared on panels a number of times during their career. More importantly, there is limited time at a hearing and to best help the Board, it is critical that each panel fully engage in preparation as a critical means of ensuring that the witnesses can work together on the specific material to be covered, and can efficiently provide testimony in a clear and coherent fashion that facilitates an understanding of the issues and helps ensure the review process unfolds in an

efficient and effective manner. Dedicated witness preparation time is an essential component of this process, and a reasonable and necessary expenditure of time and money for the utility as part of its revenue requirement.

- ***Disbursements*** – Applicants incur certain costs prior to the Application being filed, including disbursements related to required travel for in person meetings. Where feasible issues are addressed via email or conference call; however, prior to a filing and during the hearing process (e.g., meetings for the witness panel to prepare their testimony) some travel for in person meetings is inevitably required for Yukon utility applications. Such disbursements that occur outside the oral hearing dates are a necessary part of the application process and must be recognized.

Hearing activities require significant effort on the part of an applicant – in this respect YEC and YECL (both small, northern utilities with relatively infrequent regulatory proceedings), do not have and cannot justify hiring dedicated internal staff resources for GRA processes. As a result, both utilize regulatory support from outside sources. This is also consistent with each of the other electrical utilities in NWT and Nunavut. Consequently, applicant costs to retain and utilize required outside resources and expertise are reasonable and prudently incurred, and are a necessary part of the operations of a regulated utility to be recovered in rates.

COMMENTS ON THE SCALE OF COSTS

In order to facilitate the administration of claims for costs, the Scale of Costs (Schedule 1 of the Rules of Practice) sets out maximum hourly fees and disbursement rates for intervenor costs. The Scale of Costs should be aligned with the objective of encouraging and supporting efficient interventions by allowing intervenors to be partly or fully supported financially in presenting their case where they can establish that their participation in the public review process has helped the Board deal with the matters before it.⁴ The Scale of Costs has also been applied in recent hearings (as noted above) to applicant hearing costs (maximum hourly fees for lawyers and professional consultants, and disbursements rates).

Yukon Energy has reviewed the Board's attached review of the scale of costs from other Canadian jurisdictions. This review confirms that the current Scale of Costs in Yukon is no longer aligned with that of many other jurisdictions. In order to ensure that interventions are not discouraged and the hearing process continues to benefit from informed interventions the scale of costs should be updated. Yukon Energy has only completed a cursory review of the information, but is aware that the NWT has in effect determined that the Alberta Utilities Commission cost scale was reflective of current market conditions, and applied them in the case of hearings on YECL's sister company, Northland Utilities (NWT) Limited. Beyond recommending that the Scale of Costs be updated to reflect current market rates and certain other matters noted below, Yukon Energy has no specific recommendation regarding the Scale of Costs maximum hourly rates to be adopted at this time.

⁴ The current scale of costs notes, it should represent "a fair and reasonable contribution by consumers to provide interested parties with adequate, competent and professional assistance in making an effective submission to the Board."

The current YUB scale of costs notes for professional fees that "the fee will be deemed to include and cover all overhead charges implicit in the normal operation of professional office including meals" (with some exceptions). For example, it has been YEC's experience that consultants and other professionals do not include meals as part of the overhead expenses included in fees.

Aside from concerns about treatment of specific disbursements, Yukon Energy notes that this provision is appropriate when it applies to typical overheads such as costs for office space or stationery, but is inappropriate when extended to cover professional staff engaged in document management, research, production, editing etc. where the fees for document production professionals are individually billed and not included as part of the senior lawyers' or consultants' normal fees. Some lawyers and consultants do not include overhead costs related to support staff in normal professional fees charged and therefore normally bill these separately. This is of particular concern in circumstances where a standard developed based on principles related to intervenor costs awards is sought to be applied to applicant costs where there are materially different requirements and levels of activity (see comments above re: Specific Comments on Recent YUB Review of YEC Claims).

The Scale of Costs was last reviewed and updated in 1995. It is recommended that the maximum fees and disbursements be reviewed on a more regular basis to ensure they remain aligned with market rates.

If you have any questions regarding the above please contact the undersigned at 867.393.5338 or ed.mollard@yec.yk.ca.

Yours truly,

YUKON ENERGY CORPORATION

A handwritten signature in black ink, appearing to read 'Ed Mollard', written over a horizontal line.

Ed Mollard
Chief Financial Officer