

**IN THE MATTER OF
the *Public Utilities Act*
Revised Statutes of Yukon, 2002, c. 186, as amended**

**Review of Yukon Utilities Board Order 2009-02 and
Appendix A- Reasons for Decision**

BEFORE: **W. Shanks, Chair**) **September 8, 2009**
 R. Hancock)
 J. Woodland)
 K. Avery)

BOARD ORDER 2009-09

WHEREAS:

- A. On June 19, 2009 the Yukon Utilities Board (Board) received an application for review and variance of Board Order 2009-06 (Decision) from Yukon Electrical Company Limited (YECL). The Decision issued on May 25, 2009 contains the Board's cost awards to the applicant and interveners for the YECL's 2008-09 General Rate Application.
- B. In its review and variance application, YECL requests a review and variance of the Board's cost award to YECL regarding the costs of Foster and Associates, ATCO Electric, and Bennett Jones LLP on the basis that the Board committed errors of law or fact.
- C. The Board may review, change or cancel any of its decisions or orders, under section 62 of the *Public Utilities Act*.
- D. The Board adopted section 62 Review Guidelines which set out that the Board uses a two-phase system for applications for review and variance. 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 a second phase on the merits. In the case of an alleged error, the application must show that the error is substantial on a *prima facie* basis and has significant material implications.
- E. On July 3, 2009, the Board sought comments from the parties who participated in the YECL 2008-2009 General Rate Application on whether the review and variance application met the initial screening phase. YECL was provided with an opportunity to reply to the other parties' comments.
- F. The Board received comments on the review and variance application from Yukon Energy Corporation (YEC), as well as, a reply from YECL.

- G. The Board has considered the YECL review and variance application and the submissions of the parties in light of the Board's section 62 Review Guidelines.
- H. The Board has decided that YECL has not shown on a *prima facie* basis that the Board committed substantial errors of law or fact in its costs award to YECL. Therefore, YECL has not established a *prima facie* case sufficient to warrant full consideration by the Board in a second phase on the merits.

NOW THEREFORE, for the reasons set out in the attached Appendix A, the Board denies the YECL review and variance application dated June 19, 2009.

DATED at the City of Whitehorse, in the Yukon Territory, the 8th day of September, 2009.

BY ORDER



Wendy Shanks
Chair

Appendix A

Yukon Utilities Board

Reasons for Decision

Board Order 2009-0X

A. BACKGROUND

On May 25, 2009, the Board issued Board Order 2009-06 (Decision) awarding costs to the applicant and interveners for the YECL's 2008-09 General Rate Application. In this Decision, the Board reduced certain costs claimed by YECL and disallowed others for the reasons set out in the Decision.

B. YECL Review and Variance Application and submissions of parties

YECL filed a review and variance application of the costs awarded to YECL respecting the costs claimed for Foster and Associates, ATCO Electric, and Bennett Jones LLP on the basis that the Board committed errors of law or fact in the Decision.

YECL alleged that the Board committed the following errors:

- by addressing the issue of costs in its Rules of Practice it constrained its discretion under section 56 of the *Public Utilities Act* (PUA),
- its Decision was made without any factual basis or contrary to the only facts before it,
- an applicant is entitled to notice regarding a decision that may negatively impact it and an opportunity to make representations,
- YECL was deprived of the opportunity to recover reasonably and prudently incurred costs.

More specifically, in relation to the reduction in costs of Foster and Associates, YECL argued that had it been provided notice and an opportunity to comment, it would have provided evidence that the hours spent were reasonable and were less than the time spent on several other recent proceedings. YECL refers to the hours spent by Foster and Associates in utility proceedings in other jurisdictions.

With regard to the disallowance of the costs claimed for ATCO Electric, YECL submitted that as part of the record of the proceeding it provided Schedule A to the Master Services Contract between YECL and ATCO Electric for various services including the regulatory support reflected in its cost claim. YECL argued that this constitutes the retainer agreement and that the cost claimed are not otherwise included in its revenue requirement. It added that details of the costs were provided in a debit memo. YECL

submitted that it did not possess the resources internally to conduct regulatory proceedings and is being deprived of its prudent and reasonable costs.

Respecting the disallowance of student hours from the costs claimed for Bennett Jones LLP, YECL argues that the Board, by relying on its Scale of Costs, has constrained its discretion to award costs and that the use of a student-at-law for research was more cost effective.

YEC addressed only the affiliate cost issue and submitted that the Board should proceed to review this issue on its merits because the affiliate costs issue was not appropriately raised in the original proceeding which resulted from the Board's Order. It submitted that utilities should be entitled to recover costs required to be incurred, to adequately prepare and present a general rate application filing.

In its reply, YECL noted the reply from YEC and that no other submissions were received. It submitted that it had met the requirements associated with step 1 of the review process.

C. Discussion

In determining phase 1 of this review and variance application, the Board carefully considered the matters raised by YECL which are addressed below.

Has the Board constrained its discretion under section 56 of the *Public Utilities Act* (PUA) by enacting Schedule 1 to the Yukon Utilities Board Intervener Costs Award Policy (Scale of Costs) made pursuant to section 33 of its Rules of Practice?

The Board is of the view that it has not constrained its discretion to award costs based on the following introductory statements in its Scale of Costs:

To facilitate the administration of claims for costs, the Board had prescribed this scale of costs under which costs of and incidental to any proceeding before the Board may be taxed or assessed.

...

This scale sets general principles and amounts which apply to the awarding of costs. Costs are in the discretion of the Board and claims will be assessed particularly on the usefulness of the party's participation in testing the utility's case and thereby helping the Board discharge its basic mandate to fix just and reasonable rates for all customers.

Also, the Scale of Costs provides that the Board may adjust the Scale of Costs to meet unique circumstances where a party can advance a persuasive argument that the Scale is inadequate given the complexity of the case.

Furthermore, the Board notes that in its Decision it stated that the decision was made pursuant to section 56 of the PUA and that the Board may "order to whom or by whom any costs incidental to any proceeding before the Board are to be paid and may fix the

costs to be paid.” Also, the Board stated that it reviewed all applications for costs in light of the criteria set out in its Schedule 1 to the Yukon Utilities Board Intervener Costs Award Policy (Scale of Costs) made pursuant to section 33 of its Rules of Practice and the principles set out in previous costs awards contained in Appendix A to Board Order 2006-7, Board Order 2007-7, 2007-8, 2007-9, 2005-17 and 2005-16.

Therefore, the Board is not satisfied by the submissions of YECL on a *prima facie* basis that it erred in the exercise of its discretion when it disallowed the student hours claimed by Bennett Jones LLP because student hours could not be claimed as professional hours or the ATCO Electric costs were considered inter-affiliate costs.

Was the Decision made without any factual basis or contrary to the only facts before it?

The Board notes that this allegation was made in particular with regards to the costs claimed by Foster and Associates. The Board notes the following from the Decision

Regarding the hours claimed by Foster and associates, the Board finds that 393 hours were excessive, considering the focused nature of the issue Foster was hired to comment on, and the degree of Foster’s expertise on the said issue. Accordingly, the Board has chosen to exercise its discretion under the Scale of costs and reduce the hours claimed by Foster by 50%.

The Board based its Decision on the hours submitted and the reasonableness of the hours in light of the Board’s assessment of the evidence and testimony provided by Foster and Associates. The Board explained its reasons for the reduction in these costs. Therefore, the Board finds that the review and variance application has not made a *prima facie* case that the Board erred in relation to the reduction of costs regarding the costs claimed by Foster and Associates.

Did the Board fail to give notice regarding a decision that may negatively impact it and an opportunity to make representations?

The Board notes that it notified parties to the proceeding of its hearing cost process which sets out its requirements for cost applications. Also, in the Scale of Costs the Board sets out the criteria for costs awards is set out. The Board highlights the following from the Scale of Costs:

The Board will consider such questions as the effectiveness of the party’s participation, its relevancy to the issues and whether the costs were reasonably and prudently incurred, and whether the party has been diligent in the efficient presentation of its position.

The Board may also review whether or not an expenditure by a party to the proceeding is prudent and reasonable and if it is found that it is not prudent or

reasonable, the Board may disallow or reduce disbursements, consultant fees and solicitor's fees.

The Board notes that YECL was aware of the Board's hearing cost process and submitted its cost claim. The parties had an opportunity to comment on the cost claims submitted. The Board then exercised its discretion to award costs and gave reasons for its reductions and disallowances. Therefore, the Board did not deprive YECL of notice or the opportunity to make representations on costs. The Board finds that YECL has not made a *prima facie* case that the Board erred with respect to this issue.

Did YECL have an opportunity to recover reasonably and prudently incurred costs?

As noted above, the Scale of Costs provides for the recovery of prudent and reasonable costs. The Board considered YECL cost claim in light of whether the costs claimed were prudent and reasonable.

The Board notes the following from the Decision with respect to ATCO Electric costs claimed:

ATCO Electric costs relate to evidence on load forecast and revenue forecast for YECL and were provided by ATCO Electric's pricing group. As noted in Appendix A to Board Order 2009-2, YECL is a wholly owned subsidiary of ATCO Electric Ltd., a private, investor-owned utility which is a member of the ATCO group of companies. Participation in the proceeding by ATCO Electric was on an inter-affiliate basis, and as such, the hours claimed for services provided by ATCO do not fall under the scope of the Scale of Costs.

As stated in this excerpt, the Board was well aware of the role of ATCO Electric in this proceeding and of the existence of Schedule A to the Master Services Contract between YECL and ATCO Electric, as it was an exhibit in the proceeding, and the Board exercised its discretion accordingly. The Board is not satisfied that YECL has made a *prima facie* case that it erred in its findings in disallowing the ATCO electric costs.

D. Conclusion

Based on the above, the Board finds that YECL has not shown on a *prima facie* basis that the Board committed substantial errors of law or fact in its costs award to YECL. Therefore, YECL has not established a *prima facie* case sufficient to warrant full consideration by the Board in a second phase on the merits.