

Appendix A

Yukon Utilities Board

Reasons for Decision — Board Order 2011-13

A. Background

On June 28, 2011, the Yukon Utilities Board (Board) issued Board Order 2011-08 (Decision) awarding costs to the applicants and intervenors for the Yukon Energy Corporation (YEC) and Yukon Electrical Company Ltd. (YECL) 2009 Joint Phase II Rate Application. In the Decision, the Board reduced and in certain instances, disallowed costs claimed by parties in the proceeding including the City of Whitehorse (City). The reasons for the reduction or disallowance of costs are set out in the Decision.

B. The City of Whitehorse Review and Variance Application

On July 11, 2011, the City filed a review and variance application (Application) of the Board's cost award to the City regarding the solicitor costs of Kristjana Kellgren. The City submitted that the Board erred in holding that the appropriate hourly rate for Ms. Kellgren as legal counsel was \$130 per hour. The City further submitted that this finding resulted in an error of fact, law or jurisdiction. The City stated that the Board arbitrarily assigned an hourly rate to the City's legal counsel that is not representative of what the City paid nor is it reflective of market rates. The Board's decision is unnecessarily punitive and unreasonable, particularly in light of the fact that the Board made other substantial reductions to the City's cost claim.

The City stated that they had not included costs related to City consultation processes and the City had not claimed costs beyond the maximum amounts allowed in the Scale of Costs. Without the ability to recover reasonably incurred costs, its intervention in proceedings is cost prohibitive. It was noted that the City is the only Intervenor that represents a large, defined group of ratepayers whose experienced consultants and counsel provide interventions that assist the Board. The City has repeatedly requested the Board to revisit its Scale of Costs and the Board maximum for legal fees of \$225 per hour, which has been in effect since September 1, 1995.

In relation to the City's solicitor costs, Ms. Kellgren had been retained as more junior legal counsel. Her requested rate of \$175 per hour is \$65 per hour less than she charges in Alberta utility proceedings. Further Board reductions in hours claimed by legal counsel and consultants, and disbursements are paid by the City, and ultimately taxpayers.

C. Submissions of Other Parties

The Utilities Consumers' Group (UCG) submitted comments on July 27, 2011 and stated there was no basis upon which to justify a review of the cost award identified for the City in the Decision. UCG stated that the City had not supplied any grounds that raise a question as to the correctness of the cost award decision. The *Public Utilities Act* and the Rules of Practice are permissive and not exhaustive, and the assessment of costs is discretionary. In reference to the Board arbitrarily assigning an hourly rate, UCG stated that any service contract between the City and its legal advisors with respect to regulatory matters should reflect that some costs may not be recoverable from ratepayers. The City should not assume that unreasonable costs should be automatically charged to taxpayers if costs are not approved by the Board. UCG submitted that the City should attempt to negotiate contracts for lower hourly rates.

In a July 22, 2011 letter, John Maissan stated that it is the Board's responsibility to ensure that costs incurred by all Parties are prudent and appropriate as ratepayers ultimately pay those costs. In the Decision, Ms. Kellgren is the only lawyer to have both her hours and hourly rate reduced and this provides sufficient grounds for the Board to review the Decision to ensure that it has treated all Parties consistently. Mr. Maissan stated that the Board should consider reviewing its Scale of Costs and Intervenor Costs Award Policy.

YECL provided comments in a July 28, 2011 letter. YECL agreed with the City that the Board erred in its decision to reduce the hourly rate for the City's legal counsel given the level of legal services provided. The City was well-prepared and well-represented by legal counsel.

YEC submitted comments on July 29, 2011. YEC noted that it is within the Board's mandate to ensure that costs to be recovered through rates are reasonably and prudently incurred but cost guidelines should be aligned with allowing Parties to be reasonably compensated for participation in the public review process before the Board.

D. Reply of City

In the August 4, 2011 reply, mainly to UCG's comments, the City reiterated its reasons from the original cost application as to why the reduction in the proceeding for Board Order 2011-08 was inappropriate and why the Board's reliance on the hourly rate of that proceeding was inappropriate. The City reiterated that it is unreasonable to limit an Intervenor's recovery of costs that are not reflective of market rates absent a compelling reason such as when a Party is not diligent in effective presentation.

E. Discussion

Section 62 of the *Public Utilities Act* addresses review and variance applications. The Board has adopted Section 62 Review Guidelines (Review Guidelines), stating the Board uses a two-phase process for applications for review.

The Board assessed all the costs claimed including those of the City in accordance with its Scale of Costs applicable to all hearings commencing on or after September 1, 1995. Therefore, the argument that the Scale of Costs is dated and not in keeping with rates currently charged by legal counsel or rates for legal counsel awarded in other jurisdictions is not indicative of an error on the part of the Board. Until the Scale of Costs is changed, the Board uses the Scale of Costs in force for purposes of awarding costs to any Party.

The Board also notes that in its Decision it stated that the decision was made pursuant to Section 56 of the *Public Utilities Act*, where 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”, and Rule 33 of the Rules of Practice. The Board is of the view that it may consider the Mayo B cost award decision, especially in light of the statement at the beginning of the decision that it considers previous cost awards.

The Decision stated in terms of Ms. Kellgren’s costs and the Board’s discretion:

Regarding the legal hourly rate in the cost claim, the Board considered that the Scale of Costs sets out a maximum fee for legal services on an hourly basis for experienced counsel. Considering that Whitehorse’s legal counsel has only a few years at the bar and that the work on the Application was being done during the same period as the Mayo B proceeding, the Board is of the view that it is not reasonable to allow an hourly fee of \$175 for this proceeding. Therefore, the Board exercises its discretion and reduces the legal fees to \$130/hour and reduces the amount claimed accordingly.

The discretion of the Board and the process for reviewing costs are supported by the following introductory statements in Schedule 1 of the Rules of Practice which contain the Scale of Costs:

The fees and disbursements in the scale of costs are not intended to prescribe the fees which any party may wish to pay when choosing to retain counsel or counsel consultants. The scales of costs represents what is, in the opinion of the Board, 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. ...

This scale sets general principles and amounts, which are to 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.

Furthermore, the following paragraphs in the Decision clearly set out that:

- O. Costs claimed by Parties are subject to stringent scrutiny by the Board, as costs are awarded against a utility and charged to the customers of the utility through the utility's rates;
- P. After careful consideration, the Board has assessed the cost applications on the principles outlined above and has made the adjustments set out below.

The Board does not accept the City's argument that the Board's adjustment to Ms. Kellgren's hourly rate was arbitrary, unreasonable or punitive. As noted above, the hourly fees awarded for Ms. Kellgren's participation in the Mayo B proceeding and this proceeding are consistent and reflect a relative measure of solicitor costs in comparison to the maximum hourly fee of \$225 per hour. A determination on the reasonableness of solicitor costs is within the purview of the Board. The City has not demonstrated that the \$130 per hour award is beyond the Board's discretion under the Act, Rules of Practice, or its Scale of Costs creating an error in fact, law, or jurisdiction.

F. Conclusion

For the above-mentioned reasons, the Board concludes that the City has not established a *prima facie* case sufficient to warrant full consideration by the Board in a second phase on the merits. Furthermore, the Board concludes that the City has not established that the Board committed substantial errors of law, fact or jurisdiction in its determinations regarding Ms. Kellgren's hourly rate on a *prima facie* basis. As a result, the Board need not decide that an error has significant material implications. The Board dismisses the City's application for the Board to review and vary Board Order 2011-08.

G. Review of Scale of Costs

Although it is a matter outside the scope of this proceeding, the Board is undertaking a consultation on its Scale of Costs and will provide further details of the consultation in the near future.