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Our file no.: 12276-83

June 19, 2009

Yukon Public Utilities Board
Box 31728
Whitehorse, Yukon
Y1A 6L3

Att: Ms. Wendy Shanks
Board Chair

Dear Ms. Shanks:

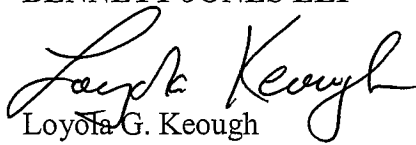
**Re: Yukon Electrical Company Limited's
Application for Review and Variance of Board Order 2009-6**

Please find attached Yukon Electrical Company Limited's Application for Review and Variance of Board Order 2009-6.

Should you have any questions regarding the above, please do not hesitate to contact the undersigned.

Yours truly,

BENNETT JONES LLP


Loyola G. Keough
Counsel for Yukon Electrical

YUKON UTILITIES BOARD

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

IN THE MATTER OF the Yukon Utilities Board Order 2009-6 dated May 25, 2009;

IN THE MATTER OF the Yukon Utilities Board Rules of Practice established pursuant to Order 1995-2.

**APPLICATION FOR REVIEW AND VARIANCE OF BOARD ORDER 2009-6
BY THE YUKON ELECTRICAL COMPANY LIMITED**

June 19, 2009

**YUKON UTILITIES BOARD
YUKON ELECTRICAL COMPANY LIMITED
BOARD ORDER 2009-6
REVIEW AND VARIANCE APPLICATION**

A. INTRODUCTION

1. By Board Order 2009-6, the Yukon Utilities Board ("YUB" or "Board") provided its decisions regarding the Applicant and Intervener costs awarded regarding the Yukon Electrical Company Limited's ("Yukon Electrical") 2008-2009 General Rate Application ("GRA") proceeding. In rendering its decision regarding the costs awarded to Yukon Electrical, as Applicant, the Board made several errors of law and/or fact. As a result, the aspects of the Board's Order discussed below must be reviewed and varied in order for Yukon Electrical's revenue requirement, and resultant rates, to be fair, proper and adequate, as required. This Review and Variance Application ("R & V Application") is brought pursuant to Section 62 of the *Public Utilities Act*, Revised Statutes of Yukon, 2002, c. 186 ("PUA") and the Board's Procedure for Applications to Review and Vary Board Orders. The applicable grounds for Review and Variance identified by the Board will be detailed below.

2. Section 56 of the PUA establishes the legislative jurisdiction of the Board to award costs incidental to any proceedings before the Board. While the Board is granted a measure of discretion regarding the award of costs, this discretion is not limitless and must be exercised in the context of the overall legislative mandate established for the Board by the PUA. Furthermore, while the Board's Rules of Practice further address the issue of costs, this inferior document cannot override the provisions of the PUA, which is a superior piece of legislation. The Rules of Practice cannot constrain the discretion expressly given by the Act itself, as the Board appears to have concluded.

3. Furthermore, the YUB like all regulatory tribunals, must render its decisions based on the evidence before it. The Board is not entitled to make decisions without any factual basis or which are contrary to the only facts before the Board. Likewise, an applicant is entitled to notice regarding the imposition of decisions that negatively

impact it and an opportunity to provide information that the Board apparently wanted, but did not seek or request.

4. A finding of a Board made without evidence, and/or made contrary to the evidence constitutes an error of fact, law and/or jurisdiction (*R. v. Yurko* [1999] A.J. No. 1359 (Q.B.), para. 17; *Foothills Provincial General Hospital v. U.N.A., Local 15* [1993] A.J. No. 434 at para. 53). Furthermore, it is an error of fact amounting to an error of jurisdiction for a tribunal to ignore relevant evidence placed before it (*Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality)* [1985] 2 S.C.R. 164 at para. 17; Jones and de Villars, *Principles of Administrative Law* (4d), at page 183).

5. A long line of administrative and judicial authority recognizes and respects the "regulatory compact" between regulated utilities and customers. The right of a utility to receive just and reasonable compensation for the provision of utility service is well established in law. As stated by Locke J. in *City of Edmonton et al v. Northwestern Utilities Ltd.* (1961), 28 D.L.R. 2(d) 125 at 132-133,

The right of the consumers to require the respondent to supply them with gas, conferred by statute, would, in my opinion, even in the absence of any statutory provision, impose upon them an obligation at common law to pay for the services on the basis of *quantum meruit*. In such circumstance, I consider that the position of the utility would be similar to that of a common carrier upon whom is imposed, as a matter of law, the duty of transporting goods tendered to him for carriage at fair and reasonable rates. (*Great Western R. Co. v. Sutton* (1869), L.R. 4 H.L. 226 at p. 237). Here the duty of determining what rates are fair and reasonable is imposed upon the Board. In the result, in the present matter the consumers paid less than fair price for a period of sometimes more than a year.

6. The recent Supreme Court of Canada decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No 4, at p. 24 states, in part, as follows:

63. ...Under the regulatory compact, regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for

investors. In return for this right of exclusivity, utilities are requested to have their rates and current operations regulated (see Black, at pp. 356-57, Milner, at p. 101; ATCO, at p. 576; *Northwestern Utilities Ltd. v City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93 (hereinafter "Northwestern 1929")).

The actions of the Board in Order 2009-6 have deprived Yukon Electrical of the opportunity to recover reasonably and prudently incurred costs. As such, the aspects of this Decision detailed below cannot stand.

7. Likewise, natural justice requires that a party before an administrative hearing must have the opportunity to know the case they have to meet. Fairness requires that a party affected by a decision having an opportunity to make representations (*Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69* (1990), 68 D.L.R. (4th) 524, at p. 566, [1990] 1 S.C.R. 282, 42 Admin. L.R. 2). "Without knowledge of the matters in issue one cannot effectively exercise one's right to be heard". (Blake, *Administrative Law in Canada*, 2d Ed (Toronto, Butterworths, 1997) at p. 30)).

8. For the first time in its Decision, the Board made findings regarding which Yukon Electrical had no notice and which could not reasonably have been expected based on the evidence on the record. As stated above, these decisions cannot stand.

9. In its Order 2009-6, the Board concluded that certain aspects of the costs claimed do not fall under the scope of the Scale of Costs. This conclusion appears to be based on the fact that Schedule 1 to the Board's Rules of Practice does not specifically enumerate the level of costs that can be recovered for certain of the items at issue. However, the overriding authority to grant costs is found in the PUA and it does not contain any constraint of the nature the Board appears to have imposed on itself. Silence regarding a particular cost item in Schedule 1 to the Rules of Practice seems to have been interpreted by the Board as overriding its general authority granted by a superior piece of legislation – the PUA. This constitutes an error of law that cannot stand.

10. Three separate aspects of Order 2009-6 must be reviewed and varied. Each of these matters will be discussed below.

B. COST CLAIM OF FOSTER AND ASSOCIATES

11. In its Order, p. 7-8, the Board arbitrarily reduced the hours claimed by Ms. McShane by 50%. In the total absence of any evidence which would justify this decision, the Board appears to have concluded without any basis, that:

...the Board finds that 393 hours is excessive, considering the focused nature of the issue Foster was hired to comment on, and the degree of Foster's expertise on said issue.

12. Yukon Electrical was before the Board in its 2008-09 GRA for the first time in twelve years. As such, the consideration of matters related to its Rate of Return, Business and Financial Risks and Capital Structure, plus debt rates, were significant matters to be considered. Yukon Electrical submits that it was reasonable and prudent for it to retain a recognized expert to assist in the presentation of its case regarding these matters.

13. Had the Board provided Yukon Electrical any notice that it took issue with the presentation by Ms. McShane, it would have provided evidence to demonstrate that the time expended by Foster and Associates was reasonable and indeed materially lower than in other comparable cases. Had Yukon Electrical been provided notice and an opportunity to comment, it would have provided evidence that the hours incurred by Ms. McShane are indeed reasonable and, in fact, less than the time spent on several other recent comparable proceedings:

<u>Proceeding</u>	<u>Hours</u>
Northland Utilities 2008/09 GRA	414
Enbridge – Line 9, 2007 (no hearing)	398
Terasen Whistler, 2009 (no hearing)	210
NTPC 2006/2008 GRA	953
Yukon Electrical 2008/09 GRA	393

14. As can be seen from the above, if the Board had any evidence before it on the matter of what is a reasonable number of hours to complete the work reflected in Ms. McShane's evidence and testimony, which it did not, the costs claimed by Yukon Electrical would have been confirmed as being very reasonable.

15. Yukon Electrical submits that this decision cannot be permitted to stand, as it was derived in the complete absence of any evidence to support such a finding, was made without notice to Yukon Electrical and deprives Yukon Electrical of any opportunity to recover its reasonably and prudently incurred costs which were required to conduct its 2008/09 GRA.

C. ATCO ELECTRIC COSTS

16. In its Order, p. 8, the Board denied the recovery of all costs incurred with respect to the use of ATCO Electric personnel to assist Yukon Electrical in the conduct of these proceedings. The totality of the reason for this disallowance appears to be that: "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. Further, the Board notes that YECL did not provide a retainer letter, or an adequate invoice to support its claim for costs respecting ATCO Electric."

17. At the outset, Yukon Electrical must correct two errors of fact in the above referenced statement by the Board. First, contrary to the position that Yukon Electrical did not provide a retainer letter, Yukon Electrical notes that as part of the record to this proceeding it provided the full Schedule "A" to the Master Service Contract between Yukon Electrical and ATCO Electric Ltd. for various services, including the regulatory support reflected in the current cost claim (see: CW-YECL-28, Attachment 3). This Attachment, p. 4/16, details the provisions of Regulatory Support by ATCO Electric and constitutes the "retainer" agreement between the parties. Yukon Electrical notes that the subject ATCO Electric costs are not otherwise included in its revenue requirement and, as such, Yukon Electrical will not receive any compensation for this significant regulatory work done on its behalf.

18. Furthermore, in support of its cost claim, Yukon Electrical provided details of the services provided and the people involved, in the form of a Debit Memo. This is the typical approach to charging for services between the companies. Yukon Electrical had no notice that the detailed information provided would be inadequate for the Board to fully understand the nature and scope of the services provided. In fact, Yukon Electrical submits that the subject Debit Memos do, in fact, provide such information.

19. The Board's Order 2009-6 deprives Yukon Electrical of any opportunity to recover these reasonable and prudently incurred costs. Yukon Electrical does not possess the resources internally to conduct regulatory proceedings such as the subject GRA. As detailed in the Organizational Chart in Section 1, Attachment 1, of the GRA, Yukon Electrical's Financial Services Department is comprised of one professional accountant, the Supervisor of Financial Services, and two clerical support staff members, the Financial Service Advisors. As such, internal Yukon Electrical resources are extremely limited. Given the infrequent nature of these proceedings, it would not be sensible, economical or logical for Yukon Electrical to retain its own employees to perform such periodic tasks. In fact, no one at Yukon Electrical possesses the knowledge and expertise of the ATCO Electric employee utilized in this GRA. Yukon Electrical notes that the Board's Order does not state that the ATCO Electric personnel did not assist in a valuable way to the presentation of Yukon Electrical's case. Yukon Electrical submits that this is indeed the case and that it would not have been able to present a complete and supported case without the assistance of ATCO Electric. The practice utilized by Yukon Electrical is consistent with past reliance on ATCO Electric for resources and expertise. Yukon Electrical is not aware of these costs being denied recovery in the past. Yukon Electrical was not provided any notice that these costs would now be considered ineligible for recovery by the Board.

20. Yukon Electrical's only other choice would have been to employ consultants with the necessary expertise. Yukon Electrical submits that this would be a far more expensive option, as the hourly rate for such consultants would be far in excess of

the subject inter-affiliate charges. As well, such consultants would not possess the knowledge of Yukon Electrical's affairs that ATCO Electric employees have. Hence, the time required to understand the issues and assist Yukon Electrical would have been greater than currently incurred.

21. Yukon Electrical also does not agree with the characterization of ATCO Electric's participation in this proceeding. It was not "on an inter-affiliate basis," as stated by the Board. Rather, ATCO Electric employees participated in order to assist Yukon Electrical in the efficient presentation of its GRA (in lieu of employees or consultants) and in order to provide expertise and assistance that Yukon Electrical simply does not possess. This is an accurate depiction of the basis and need for the involvement of ATCO Electric. The inter-affiliate nature of the relationship does not impact the need for and usefulness of the assistance provided or the reasonableness of the costs incurred.

22. Yukon Electrical is entitled to recover the reasonable and prudent costs it incurs in the orderly conduct and presentation of its GRA before the Board. Order 2009-6 deprives Yukon Electrical of any opportunity to recover such costs. There is no evidence before the Board that the costs incurred are not reasonable. In fact, they reflect the least expensive option that was available to Yukon Electrical.

23. Additionally, the Board appears to have concluded that its Scale of Costs somehow precludes Yukon Electrical from recovering the subject costs relating to ATCO Electric. There is no such constraint contained in the Board's governing legislation, being Section 56 of the PUA. Likewise, there is no such constraint contained in the Scale of Costs itself. In fact, the Scale of Costs expressly acknowledges that it "sets general principles," versus hard and fast rules, that could be interpreted as precluding the recovery of other reasonable and prudently incurred costs.

24. Yukon Electrical submits that the Board's disallowance of the subject ATCO Electric costs is entirely inconsistent with the Scale of Costs. In this regard, Yukon Electrical notes that the Scale of Costs indicates that 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's primary objective is to ensure an efficient and expeditious hearing process and to avoid duplication.

25. The use of ATCO Electric personnel by Yukon Electrical to assist it in the conduct and presentation of the subject GRA is fully consistent with the above-referenced objectives of the Scale of Costs. The fact is that Yukon Electrical could not have presented its GRA in an effective and efficient manner without the experience and expertise of the ATCO Electric personnel it utilized. There is not even a suggestion that the ATCO Electric personnel did not assist greatly in the presentation of Yukon Electrical's case and bring expertise and experience that is simply not available within Yukon Electrical itself, given the limited internal resources available to it. Contrary to the Board's finding in Order 2009-6, Yukon Electrical's use of ATCO Electric personnel is entirely consistent with the principles and policies reflected in the Scale of Costs.

26. Yukon Electrical adopted an approach which allowed it to conduct its GRA in the most cost effective and efficient manner possible. Yukon Electrical's small financial services group allows it to minimize operating costs, while being able to conduct GRAs in a cost effective and efficient manner by accessing resources from ATCO Electric's staff. This approach has positive implications for Yukon ratepayers. The only other alternatives available (internal staff and/or consultants) would have been far more expensive. The Board's Order deprives Yukon Electrical of any opportunity to recover these reasonable and prudently incurred costs.

27. Furthermore, the statements made by the Board regarding the lack of a retainer letter and supporting invoices are simply wrong on the face of the record and reflect clear errors of facts.

D. BENNETT JONES LLP COSTS

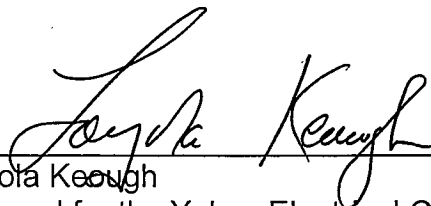
28. In its Order, p. 9, the Board disallowed 25 hours from the Bennett Jones LLP costs because they related to "student hours." The Board indicated that these costs cannot be claimed as "professional hours."

29. Yukon Electrical submits that the Board again has placed constraints on its discretion to award costs that simply do not exist. The use of a student-at-law (a recognized professional position) to conduct required research is the most cost effective resource to perform such tasks. Using a junior lawyer would have resulted in greater legal fees, as the hourly rate increases with years since being called to the bar. Yukon Electrical's efforts to minimize legal fees, by using a student-at-law, reflect a reasonable and prudent approach to obtaining the necessary legal assistance. Use of a junior lawyer would apparently have qualified for recovery, but would have resulted in higher costs. This is an illogical and unsupportable conclusion.

E. CONCLUSION

30. Yukon Electrical submits that, for the reasons detailed above, the identified aspects of Order 2009-6 must be Reviewed and Varied. The current Order contains various errors of law and/or fact and, as such, cannot be permitted to stand.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th day of June, 2009.



Loyola Keough
Counsel for the Yukon Electrical Company Limited