

Yukon Utilities Board

Board Order 2022-10
Appendix A: Reasons for Decision
August 26, 2022

Review Application

1. On March 16, 2022, the Yukon Utilities Board (Board) issued Board Order 2022-03¹ in relation to Yukon Energy Corporation's (YEC)² 2021 General Rate Application (GRA). In Appendix A to Board Order 2022-03 (Reasons for Decision), the Board made findings on the GRA, including the following ones. It determined that "a reduction of 50 basis points is warranted in YEC's risk premium" and directed YEC to "reflect the Board-approved ROE of 8.20 percent for 2021" in the compliance filing to Order 2022-03. In addition, the Board disallowed \$6.531 million of costs for the Whitehorse Hydro Unit #2 Uprate Project (WH2 Uprate Project) and \$0.983 million of costs for the Whitehorse Unit #4 Servomotor Replacement Project (WH4 Project). It directed YEC to reflect these disallowances in its compliance filing to Board Order 2022-03.
2. On April 14, 2022, Yukon Energy Corporation filed an Application for Review and Variance of Board Order 2022-03 (Review Application), pursuant to section 62 of the *Public Utilities Act*³ (Act) and section 31 of the Board's *Rules of Practice*⁴ (Rules). In its Review Application, YEC stated it disagreed with the reduction of 50 basis points to YEC's risk premium and the disallowance of costs for the WH2 Uprate Project and for the WH4 Project. YEC alleged that the Board committed errors in fact, law, or jurisdiction and that the process followed by the Board in making these findings was unfair to YEC. Its arguments in support of these assertions are summarized as follows.

- i. **Risk Premium**

The Board's determination assumed 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. YEC asserted that this assumption is erroneous, contrary to evidence, and contrary to prior Board decisions.⁵ YEC added that there is also an error of law or jurisdiction in the reduction of the 45-basis-point risk premium and due to OIC 2021/16 in effect reduces YEC's ROE below the level required by section 2(2) of OIC 1995/90.⁶

- ii. **Whitehorse Unit #2 Uprate Costs**

The Board's disallowance of costs for the WH2 Uprate Project does not comply with sections 3,7 and 11 of the OIC 1995/90 because the decision will result in a determination of rates that will be insufficient for YEC to recover its actual reasonably incurred costs. YEC argued that this results in an error of law and jurisdiction. It also submitted that there is an error in fact because the disallowance did not take into

¹ Board Order 2022-03 and Appendix A to Board Order 2022-03, Reasons for Decision, dated March 16, 2022.

² Yukon Energy Corporation is a wholly owned subsidiary of the Yukon Development Corporation, a Crown corporation. Yukon Energy Corporation is a publicly owned company.

³ *Public Utilities Act*, RSY 2002, chapter 186, section 62.

⁴ *Yukon Utilities Board Rules of Practice*, approved by Board Order 2012-09, October 17, 2012, section 31, page 11 of 12.

⁵ YEC Review Application, page 3.

⁶ YEC Review Application, page 6.

account “all of the available evidence and erroneously assumes that specific Hatch study costs provide a reasonable basis for determining final actual costs incurred.”⁷ YEC added that the disallowance 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...”⁸ As such, the proceeding was procedurally unfair to YEC. It added that this disallowance materially reduces YEC’s ability to recover through rates its actual costs incurred, in that the costs disallowed represent over 50% of the final costs incurred for this project.

iii. **Whitehorse Unit #4 Servomotor Replacement Costs**

The Board’s decision does not comply with sections 3, 7 and 11 of the OIC 1995/90 because the decision will result in a determination of rates that will be insufficient for YEC to recover its actual reasonably incurred costs. YEC argued that this results in an error of law and jurisdiction. It submitted that there is an error in fact because the disallowance of some of the costs for the WH4 Project does not take into account all of the available evidence and assumes that specific study costs provide a reasonable basis for determining final actual costs incurred.⁹ YEC added that the decision 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...”¹⁰ As such, the proceeding was procedurally unfair to YEC. It added that this disallowance materially reduces YEC’s ability to recover through rates its actual costs incurred, in that the costs disallowed represent over 60% of the final costs incurred for this project.

3. YEC requested that the Board issue an order or directions:

a) convening a phase II review on the merits of the above-noted 2021 GRA determinations and directions; and

b) providing an opportunity for YEC and other registered parties to present additional evidence relevant to the 2021 GRA findings and directions, pursuant to rule 31(3)(b), in addition to arguments presented by YEC and other registered parties under rule 31(6).

⁷ YEC Review Application, page 7, paragraph 2.

⁸ YEC Review Application, page 7, paragraph 3.

⁹ YEC Review Application, page 15.

¹⁰ YEC Review Application, page 14, paragraph 3.

Request for comments

4. The Board issued a process letter on April 19, 2022, affording interveners an opportunity to submit comments on Phase 1 of the Review Application by April 26, 2022, and YEC to submit reply comments by May 3, 2022. Intervenors did not submit any comments on the Review Application.

Test for review and variance

5. As noted above, YEC's Review Application was made pursuant to section 62 of the Act and section 31 of the Rules.

6. Section 62 of the Act states:

The board may review, change, or cancel any decision or order made by it, and may re-hear any application or complaint before deciding it.

7. The Board has enacted *Rules of Practice* under section 10 of the Act, which include the following provisions regarding applications for review:

31. (1) Pursuant to section 62 of the Act, the Board will consider the following as grounds for review:

- a) the Board has made an error in jurisdiction;
- b) the Board has made an error in fact or law;
- c) there has been a fundamental change in circumstances or facts since the decision or order;
- d) a basic principle has not been raised in the original proceedings;
- e) a new principle has arisen as a result of the decision nor (sic) order;
- f) such other grounds as the Board may determine require a review.

(2) The application for review should as a minimum set forth the following:

- a) the grounds upon which the application is based;
- b) a brief statement of facts supporting the alleged ground(s) for review;
- c) if new evidence is sought to be filed, a statement of the nature and purpose of the evidence;
- d) any further matter that the applicant believes will assist the Board in reaching a decision to grant a review.

(3) The Board will use a two-phase system for applications for review. Such a process enables certain applications to be dealt with expeditiously and economically. An application for review will be subject to an initial screening phase where the applicant must establish a prima facie case sufficient to warrant full consideration by the Board. In the first phase, the Board will assess an application having regard to some or all of the following questions:

- a) Should there be a review by the Board?

- b) If there is to be a review, should the Board hear new evidence and should the parties be given the opportunity to present evidence?
- c) 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?

(4) Upon receipt of an application for review, the Board will invite registered parties to comment on the application for review regarding the questions set out in subsection (3) for the first phase of the review and the applicant for review may respond to the comments received.

(5) In the case of an alleged error, in order to advance to the second phase of the process, the application must show that:

- a) the claim of error is substantiated on a prima facie basis; and
- b) the error has significant material implications.

(6) If there is a second phase, then the Board will hear full arguments on the merits of the application.

Public Utilities Act

8. Part 2 of the Act addresses the regulation of public utilities. Sections 27 to 29 set out the Board's authority to set rates and the requirements of the public utility when it proposes a new rate. Section 27(a) allows the Board to make orders setting the rates of a public utility. Section 27(b) allows the Board to make orders prohibiting or limiting any proposed rate change. Section 28(2) specifies that no public utility shall begin to charge a new rate except on receipt from the Board of an order authorizing it to do so.
9. Section 29 of the Act sets out factors affecting rates. It states, in part:

In setting rates that a public utility is permitted to charge,

(a) the board may consider the revenues and costs of the public utility in the financial year in which the proceedings for setting the rates and charges began or in any period immediately following, without considering the allocation of those revenues and costs to any part of that period;

(b) the board may give effect to that part of any excess of revenue received or deficiency incurred that is in the opinion of the board applicable to the whole of the financial year of the public utility in which the proceeding was initiated as the board considers just and reasonable;

10. Under subsection 32(1), the Board must determine a rate base for the capital requirements of a public utility as follows:

The board, by order, shall determine a rate base for the property of a public utility used or required to be used to provide service to the public, and may include a rate base for property under construction, or constructed or acquired, and intended to be used in the future to provide service to the public.

11. Section 32(3) states the following:

In determining a rate base the Board shall give due consideration to the cost of the property when first devoted to public utility use, to prudent acquisition cost less depreciation, amortization, or depletion, and to necessary working capital.

Views of the Board

12. The Board has considered the Review Application and addresses the three issues in the following two sections.

13. In arriving at this decision on phase 1, the Board has considered all arguments and submissions made by YEC, Board Order 2022-03, the Reasons for Decision, and the record of the proceeding. References in this decision to specific arguments and submissions of YEC, or specific parts of the Reasons for Decision, or the record of the proceeding are intended to assist the reader in understanding the Board's reasoning relating to a particular matter and should not be taken as an indication that it did not consider all relevant portions of the arguments, submissions, comments, Reasons for Decision or record with respect to any matter.

14. In considering the Review Application and whether it met Phase 1 of the review test, the Board referred the submissions of YEC, findings of the Board set out in the Reasons for Decision and the record of the proceeding in relation to the risk premium awarded to YEC and the disallowance of costs of the WH2 Uprate Project and the WH4 Project. Then the Board assessed the arguments and submissions of YEC set out in the Review Application in light of the Reasons for Decision and the record of the proceeding. The Board addresses each issue raised below in the order submitted by YEC.

i. Risk premium

15. In the Reasons for Decision, the Board stated the following on the return on equity and risk premium:

5.2.5.3 Return on equity (ROE) and risk premium

224. YEC proposed to continue with the British Columbia Utilities Commission (BCUC) benchmark utility ROE and maintain the same risk premium adder that was approved in Board Order 2018-10. YEC stated that the current BCUC

benchmark ROE is 8.75 percent. YEC advised that Board Order 2018-10 established a risk premium of 45 basis points for YEC over the BCUC benchmark ROE. YEC highlighted that the Rate Policy Directive, OIC 1995/90, section 2 requires YEC's allowed ROE to be set equal to YEC's fair return on common equity less 50 basis points. As a result, YEC is requesting an ROE of 8.70 percent.

225. Regarding the issue of whether the LWRF and the OIC afford protection to YEC against risks to the utility, YEC stated in responses to Board IRs and in the hearing that it did not believe that its risk profile had changed.

226. YEC submitted the following in argument:

- OIC 2021/16 did not change YEC's risk profile.
- The Low Water Reserve Fund (LWRF) provides rate volatility protection for customers rather than load risk protection for YEC.
- Prior to Board Order 2015-01, the Board did not address any variation in application of the LWRF or Diesel Contingency Fund (DCF) pertaining to load levels either above or below forecast, nor did any Board Orders prior to Board Order 2015-01.
- Similarly, the issue of risk responsibility for generation costs above load forecast was not addressed in Board Order 2018-10 and only came about in subsequent compliance filings to Board Order 2018-10.
- Undertaking 11 in this proceeding revealed that directions from Board Order 2019-08 resulted in YEC incurring an added \$0.738 million of thermal generation fuel costs for 2019 due to water conditions below the long-term average and load above the last approved GRA forecast.
- Requiring YEC to bear any water-related risk, including risk for load above approved load forecasts, is not consistent with prior Board Orders. Further, the evidence reviewed in the 2017-18 proceeding confirmed that no such water-related risk applied to FortisBC (electric), as a comparator to YEC, and that any such added risk being applicable to YEC would require adding to the ROE risk premium for YEC.

Board Findings

227. The setting of the ROE includes determining the risk premium of YEC that should be approved in a given test year or years.

228. The Board is not persuaded by YEC's evidence and arguments on maintaining the risk premium that was approved in past Board Orders. In Board 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. The Board recognized that YEC, by its own admission, stated that it accepted the risk of incremental loads, but YEC is not accepting the full generation costs and risks with those incremental loads.

229. However, in this proceeding, the Board finds that YEC has narrowly focused on rate stabilization measures — e.g., those that occur through the LWRF — rather than assisting the Board with determining a fair apportionment of risk between YEC and its customers for costs and risks in providing utility service. The risk premium approved should compensate YEC for risks it assumes and should exclude risks related to costs that are covered through customer rates.

230. The Board is not prepared to accept past Board Orders as determinative of the risk premium to be set for 2021, particularly with the legislature passing OIC 2021/16 that addresses cost recovery through the LWRF and provides mitigation of some of the risks related to low water conditions and the associated costs. This OIC effectively requires the Board, for applications after November 1, 2020, to:

- Include in the YEC rates a provision to recover forecast fuel costs for the amount of thermal generation needed to meet forecast customer requirements.
- Determine the forecast of the amount of renewable generation available to contribute to meeting forecast customer requirements based on long-term average annual renewable source availability.
- Review and approve the fuel costs resulting from any shortfall between actual renewable generation and actual customer requirements (and if renewable generation had been consistent with long-term annual renewable source availability).

231. OIC 2021/16 includes provisions that YEC is to credit or charge its customers for the difference in fuel costs for thermal generation when a credit or charge occurs through the LWRF. The OIC provides parameters and greater certainty for costs, accounting for actual renewable generation and actual customer requirements and the operation of the LWRF. The Board's view is that the certainty afforded by the OIC for these items provides assurance of YEC's forecast to actual cost recovery for fuel costs related to incremental loads resulting from extreme low water conditions. This in turn reduces the risks to YEC because

customers will ultimately be charged if YEC under-recovers its costs (although some forecast risk would remain until the LWRF is trued up). However, in Board Order 2018-10, the Board determined that those costs for incremental loads above forecast should not be a burden to customers.

232. YEC points out that it has been harmed by higher 2019 thermal generation fuel costs (of \$0.738 million) due to loads above forecast (due to Board Orders 2018-10 and 2019-04). However, it should be noted that YEC fails to point out the increased revenues from that incremental load which mitigate the incremental \$0.738 million in costs.

233. 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 and the further addition of the pension deferral account. Although YEC disagreed that a reduction to the risk premium is necessary to reflect the shifting of these risks, for the reasons above, the Board does not agree. 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 Order, YEC shall reflect the Board-approved ROE of 8.20 percent for 2021. (Footnotes omitted)

16. As previously stated, YEC disputed the Board's findings set out above. It argued that, in making these findings, the Board 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. It added that the assumption was erroneous because:

- 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 Order 2019-08.
- 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." 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 sections 2(1) and (2) of OIC 1995/90.¹¹

¹¹ YEC Review Application, pages 3 and 4.

17. The Board notes that section 32 of the Act directs the Board to determine a rate base for the property of a public utility used or required to be used to provide service to the public and to set a fair return on the rate base. This section further states that the Board may adopt any just and reasonable basis for determining a method of calculating a fair return on property.
18. The Board further notes section 2 of OIC1995/90, which states:
- 2.(1) Subject to subsection (2), the Board must include in the rates of Yukon Energy Corporation and the Yukon Electrical Company Limited provision to recover a fair return on their equity used to finance their rate base.
- (2) The Board must include in the rates of the Yukon Energy Corporation provision to recover a fair return on the Corporation's equity, less one-half of one per cent (.5%).
19. Pursuant to these provisions, the Board is not constrained by a specific methodology in setting a fair ROE which includes determining the risk premium that should be approved in a given test year or years for YEC. The Board may exercise its discretion in setting a fair ROE. The Board considers that, based on the evidence before it, the Board found that YEC focused on rate stabilization measures — e.g., those that occur through the LWRF — rather than assisting the Board with determining a fair apportionment of risk between YEC and its customers for costs and risks in providing utility service. The risk premium approved should compensate YEC for risks it assumes and should exclude risks related to costs that are covered through customer rates.
20. The Board notes that in the 2021 GRA proceeding, YEC proposed to continue with the British Columbia Utilities Commission (BCUC) benchmark utility ROE and maintain the same risk premium adder that was approved in Board Order 2018-10. YEC stated, in responses to Board Information Requests (IRs) and at the hearing as to whether the LWRF and the OIC afford protection to YEC against risks to the utility, that it did not believe that its risk profile had changed. In addition, when questioned by the Board during the hearing on whether the quantum of its risk profile should be adjusted to account for OIC 2021/16 and the requested pension deferral account, YEC did not address the finding in the Reasons for Decision to Board Order 2018-10 that a shift in risk from YEC to customers had occurred and that no adjustment to the risk premium was necessary.
21. In its Reasons for Decision, the Board determined that it did not accept past Board Orders as determinative of the risk premium to be set for 2021, particularly with the passing OIC 2021/16 that addresses cost recovery through the LWRF and provides mitigation of some of the risks related to low water conditions and the associated costs. This was not an assumption on the part of the Board, as argued by YEC in its Review Application, but a finding based on the evidence in the 2021 GRA proceeding and the terms of OIC 2021/16. The Board found that the risk profile of YEC had changed. Furthermore, YEC did not file evidence in the proceeding to establish its current risks relative to the current risks of any of the referenced utilities.

22. In addition, YEC takes issue with the Board including the pension deferral account as support for lower risk and a reduced risk premium. The Board notes that in its Final Argument in the 2021 GRA proceeding, YEC quoted from Board 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."¹² In that decision, the Board noted that defined benefit funding requirements will be inherently volatile and that, 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." YEC further argued that its response to 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. In the opinion of the Board, this argument was considered and the Board relied on evidence in the 2021 GRA proceeding in making its decision regarding the pension deferral account as support for lower risk and a reduced risk premium.
23. The Board is of the view that, although the Board appropriately exercised its discretion in determining the risk premium reduction, YEC has made a prima facie case sufficient to warrant the Board further considering a phase 2 review on the limited issue of determining the amount of the risk premium reduction and whether the reduction should be greater than zero but not more than 50 basis points. The Board grants a review on this limited basis, and a process letter will follow.
24. However, the Board finds that YEC has not established a prima facie case sufficient to warrant the Board's full consideration on the other allegations made in relation to the setting of the ROE, as YEC has merely reiterated its arguments made in the proceeding on the setting of the ROE. As a result, it has not established a prima facie case that the Board erred in fact, law, or jurisdiction.

ii. 5.2 Whitehorse Unit #2 Uprate Costs and Whitehorse Unit #4 Servomotor Replacement Costs

25. In the Reasons for Decision, the Board stated, in relation to the Whitehorse Unit #2 Uprate Project Costs

271. YEC stated that the purpose of the WH2 Uprate Project was to resolve existing issues around unit WH2 and to help address the existing capacity shortfall in the near term. YEC mentioned that issues had been identified with oil leaks from the runner blade to hub seals, with possible voids in the concrete behind the draft tube liner. Additionally, YEC indicated the project could help address the existing capacity shortfall by adding 6.4 GWh of generation per year. YEC stated

¹² YEC's Final Argument in 2021 GRA proceeding, page 32.

the project was expected to increase dependable capacity of the WH2 unit by 0.94 MW.

272. In 2017, YEC contracted Hatch Ltd to conduct a technical and economic study that considered uprating units WH1, WH3 and WH4 at the Whitehorse Rapids Generating Station. Because the WH1 and WH2 units were identical, Hatch stated that the issues, costs and benefits relating to the WH1 unit also applied to the WH2 unit. In the report, 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.

273. Hatch concluded that uprating the WH1 unit resulted in a positive economic benefit, with a net present value between \$0.2 million and \$2.26 million over a 30-year lifetime and a payback period of 9 to 19 years. Hatch estimated a cost of approximately \$1.99 million for uprating the WH1 unit and maintaining the same turbine flow and approximately \$4.78 million for uprating the unit and increasing the turbine flow. Uprating the WH1 unit increased efficiency by approximately four percent and allowed for a 10-percent increase in turbine flow. Another alternative proposed by Hatch was the “replacement of the cams that define the WH1 and WH2 wicket gate runner blade relationship...” This alternative presented an efficiency gain of two percent and still allowed for an offset in thermal generation, though the offset amount would be half that of the WH2 Uprate Project.

274. 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. YEC indicated that the scope of work included unit rehabilitation, runner replacement, generator station and rotor rewinding, governor replacement, exciter replacement and upgrading the control and condition monitoring systems.

275. YEC estimated a cost of \$12.038 million in its Application, which included the actual capital spending amounts for 2019 and the forecast capital spending amounts for 2020 and 2021. However, in response to the Board’s second round of , YEC updated the cost for the project to \$12.267 million to reflect the project’s actual costs for 2020 and an updated forecast capital spending amount for 2021. Respecting the variance, YEC indicated that once the WH2 unit was disassembled, it undertook assessments of embedded and removable components. YEC stated that the assessments revealed that the condition of the components was worse than expected and that these components had to be refurbished. YEC also found that certain components of the WH2 unit were misaligned and that additional machining was required to bring the components back to proper alignment.

276. YEC noted that costs for the project also included an additional \$0.259 million for the WH2 Uprate Engineering Study, for which costs were allocated in this Board Order under section 5.3.3 – Deferred Costs.

Board Findings

277. With respect to the WH2 Uprate Project, the Board finds that there is value in addressing the existing capacity shortfall and offsetting thermal generation but is not persuaded that the applied-for costs for this project are reasonable. 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 gain 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 its business case. While the metrics associated with Hatch's alternative are quantified at a lesser value compared to the WH2 Uprate Project, the Board finds that the reduction in efficiency gain and thermal generation offset is not notably significant. Finally, while Hatch concluded a positive economic benefit from the project, it indicated uncertainty in both the measured performance of the existing unit and the predicted performance of an uprated turbine. Hatch also commented that the payback period was fairly long even under higher demand assumptions.

278. 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 that 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 directs YEC to include this cost in its compliance filing. (Footnotes omitted)

26. In the Reasons for Decision, the Board stated, in relation to the Whitehorse Unit #4 Servomotor Replacement Costs (WH4 Project):

5.3.2.8 WH4 Uprate Servomotor Replacement Project

279. YEC advised that the purpose of pursuing the WH4 Uprate Servomotor Replacement Project related to its 10-year renewable electricity plan to provide incremental sources of renewable energy in the short to medium term. YEC stated that the primary benefit of this project was a 0.8 MW increase in the maximum output of WH4, resulting in an estimated energy production gain of 0.9 GWh per year, and that the secondary benefits included reduced stress levels in the servomotors, governor and wicket gates. YEC noted that the current servomotors were not meeting industry code in terms of operation and reliability and that, because of the undersized servomotors, gate opening was only 92 percent and the WH4 output was consequentially limited.

280. For this project, YEC replaced the existing servomotors with spring-assisted servomotors that would allow the WH4 unit to operate at 100-percent gate opening, which in turn would increase the energy and capacity of the unit. YEC stated that this project involved the detailed design, procurement and installation of the two new servomotors. In its Application, YEC forecast costs of \$1.531 million for this project, which included the actual capital spending amounts for 2018 and 2019 and the forecast capital spending amounts for 2020 and 2021. However, in response to the Board's second round of information requests, YEC updated the costs of the project to \$1.400 million to reflect actual costs in 2020 and an updated forecast capital spending amount for 2021.

Board Findings

281. The Board finds that there is a value for the WH4 Uprate Servomotor Replacement Project in 2021 but is not persuaded that the applied-for costs are reasonable. YEC, as part of its responses to the Board's second round of information requests, provided the Hatch report's recommendation to replace the existing servomotors. In that report, Hatch provided a cost estimate of \$457,000 for replacing the servomotors. During the proceeding, 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. The WH4 unit will have an additional maximum output of 0.8 MW once this project is completed, but the unit will not always be operating at its maximum output. Additionally, the improvement

in operating the unit with 100-percent gate opening is not significant, especially when the unit was operating with 92-percent gate opening.

282. 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, which amounts to \$548,400. The Board directs YEC to include these updated costs in its compliance filing. (Footnotes omitted)

27. Regarding YEC's submission that the Board was procedurally unfair to YEC in relation to these two projects, the Board notes section 52 of the Act which directs the Board to abide by the fundamental principles of justice. The Board interprets this provision to mean that it owes **all** parties in its proceedings a duty of procedural fairness. The concept of procedural fairness is variable and its content is decided in the context of each case. The Board's *Rules of Practice* encapsulate the procedural fairness owed by the Board to all the parties and ensure that parties to its proceedings are afforded an opportunity to put forward their views and evidence fully and have them considered by the decision-maker.
28. In the 2021 GRA proceeding, the Board provided YEC and the other parties the opportunity to file evidence in support of their case, participate in a hearing and make argument and reply argument. It does not appear that YEC is disputing that it had an opportunity to make a case in support of the applied-for costs and file any evidence to satisfy the Board that these costs were reasonable. But YEC is arguing that the decision 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..." The same argument was made in relation to the WH4 Project.
29. The Board considers that this argument does not take into account that YEC has the burden of proof as the applicant to demonstrate that the applied costs are reasonable. The Board has previously noted that the burden of proof rests on the applicant.¹³ Further, it would be contrary to procedural fairness for the Board to indicate to YEC that it required additional information because YEC had not met its burden of proof to demonstrate that the applied-for costs are reasonable. Such action would amount to the Board intervening to aid the applicant to establish its case and would compromise the Board's impartiality.
30. Further, the Board points to the fact that the Board speaks through its decisions made after weighing the evidence in a proceeding. To this point, the Board made the following preliminary remarks in the Reasons for Decision on the utility having the burden of proof and having to provide adequate business cases:

¹³ See Appendix A to Board Order 2015-02, page 7, Appendix A to Board Order 2019-05, page 14, paragraph 46.

9. In the reasons that follow, the Board makes several statements critical of YEC's consistent failure to present an adequate business case in support of the revenue requirement it is seeking in the current GRA. The Board considers that its concerns may be better understood with the help of a few preliminary remarks about its expectations concerning business case analyses as an important tool for an applicant in discharging its burden of proof. As noted below, failure to provide an adequate business case results in more information requests from the Board and from interveners, the result of which is almost invariably added expense and delay.

10. Applicants coming to the Board – whether by way of a General Rate Application, an application under Part 3 of the Act, or similar applications – are required to establish their case on the balance of probabilities, based on evidence accepted by the Board. In most cases, the Board, in deciding whether the costs of the utility can be added to its rate base or whether a proposed capital project is justified, applies the criteria of reasonableness or prudence to the subject of the Application. These criteria are relative in nature, i.e., they cannot be applied except in the context of relationships with other factors. This is a principle underlying the Board's repeatedly stated expectation that the significant projects it is called on to assess must be supported by an adequate business case.

11. In its Reasons for Decision appended to Board Order 2018-10, regarding the 2017-18 GRA, the Board stated its expectations regarding business case analyses in paragraph 470:

... YEC has not provided a business case in support of this project. YEC did not detail the costs and benefits associated with this project. The Board finds that it is not reasonable for YEC to proceed with the project without a detailed business case that considers the alternatives to the project ... The Board requires a detailed evaluation of alternatives to this project included in the business case.

12. In paragraph 471, the Board further stated:

... the Board accepts Mr. Maissan's recommendation that YEC provide a detailed comparison of alternatives for this project, including the pros, cons, capital costs, operating costs and timeline to in-service and justification for its preferred option.

13. Without a proper business case satisfying the criteria just mentioned, the Board is often left with an incomplete presentation that makes it difficult, if not impossible, to determine whether YEC, as the project proponent, has acted prudently or reasonably. This may result in the Board giving very little weight to the evidence presented. In such circumstances, YEC risks the Application being denied. Alternatively, the hearing process may be delayed or complicated due to the Board and interveners having to extract from YEC information that could and should have been included in business case analyses filed as part of the

Application at the outset. If this practice of failing to provide adequate business case information and analyses continues, YEC may find itself at risk of the project costs being denied, as well as reduction of the costs claimed in the proceeding.

31. The Board also considered, in assessing YEC's fairness argument, the decision of the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*¹⁴ in which Justice Rothstein, writing for the Court, found that the burden of establishing that the proposed tariffs are just and reasonable is on the utility.¹⁵
32. For these reasons, the Board finds that YEC has not shown that the Board acted unfairly towards it and that it did not err in fact, law or jurisdiction. As such, YEC has not made a prima facie case sufficient to warrant further consideration of the applied-for costs of these projects by the Board.
33. On YEC's submissions that the Board's decision on the WH2 Uprate Project and the WH4 Project does not comply with sections 3, 7 and 11 of the OIC 1995/90 because the decision will result in a determination of rates that will be insufficient for YEC to recover its actual reasonably incurred costs, the Board is of the view that, in accordance with the Act and OIC 1995/90, the Board sets just and reasonable rates for YEC. In doing so, the Board assesses the reasonableness of the applied-for costs. The Board considers that there is a difference between actual costs and reasonable costs, i.e., that they are not one and the same, as argued by YEC. In addition, there is no presumption in any of the governing legislation that the costs applied for by a utility are presumed reasonable, as argued by YEC, without supporting legal authority. Rather, the burden of proof rests on YEC to satisfy the Board that the costs it seeks to recover are reasonable.
34. In assessing YEC's arguments in its Review Application, the Board took note of the decision of the Court of Appeal of Alberta in *FortisAlberta Inc v Alberta (Utilities Commission)*.¹⁶ In that decision, the Court of Appeal dismissed the utility's argument that a provision in Alberta's *Electric Utilities Act*¹⁷ provides that, when considering a tariff, the Alberta Utilities Commission must have regard to the principle that the tariff must provide the utility with a reasonable opportunity to recover the costs and expenses associated with capital related to the owner's investment in the electric utility. The Court found:

In my view, taking into account the legislative history and context alone, and disregarding the Alberta jurisprudence beginning with *Stores Block*, the guaranteed prudent cost recovery model would be a permissible interpretation of the current EUA. But that, of course, is not the question. For the appeal to succeed, it must be the only permissible interpretation. I cannot say this is so for several reasons.

¹⁴ *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 SCR 219.

¹⁵ *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219, page 2.

¹⁶ *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295, September 18, 2015.

¹⁷ *Electric Utilities Act*, SA 2003, chapter E-5.1, section 122(1), page 74.

First, whether the regime is one of prudent investment cost recovery or “used or required to be used”, the allowance of cost recovery falls squarely within the regulator’s purview. I do not read the legislation as removing the discretion of the Commission to disallow cost recovery (even if originally prudently incurred) if to do so is in keeping with the legislative mandate. Assurance of opportunity is not a guarantee, and I find no such guarantee in the language of the legislation.¹⁸

...

The entitlement to an opportunity to recover prudently incurred costs under this regime is not a guarantee. A policy that excludes stranded assets from rate base is not a derogation from the Commission’s statutory powers if that policy is necessary to further the ultimate objective of the legislation - to achieve just and reasonable rates.¹⁹

35. The Board also found instructive the decision of the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*²⁰ in which the Court determined as follows at paragraphs 47, 61 and 64:

It is thus apparent that the relevant statutes may reasonably be interpreted not to impose the ATCO Utilities’ asserted prudence methodology on the Commission. The existence of a reasonable interpretation that supports the Commission’s implied understanding of its discretion is enough for the Commission’s decision to pass muster under reasonableness review: McLean, at paras. 40-41. Thus, the Commission is free to apply its expertise to determine whether costs are prudent (in the ordinary sense of whether they are reasonable), and it has the discretion to consider a variety of analytical tools and evidence in making that determination so long as the ultimate rates that it sets are just and reasonable to both consumers and the utility.

...

As discussed above, a key principle in Canadian regulatory law is that a regulated utility must have the opportunity to recover its operating and capital costs through rates: OEB, at para. 16. This requirement is reflected in the EUA and GUA, as these statutes refer to a reasonable opportunity to recover costs and expenses so long as they are prudent. A regulator must determine whether a utility’s costs warrant recovery on the basis of their reasonableness — or, under the EUA and GUA, their “prudence”. Where costs are determined to be prudent, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting

¹⁸ *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295, September 18, 2015, paragraphs 157-158.

¹⁹ *Ibid.*, paragraph 169.

²⁰ *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219.

a utility's recovery to what it reasonably or prudently costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary: OEB, at para. 20.

...

The Commission was not statutorily bound to apply a particular methodology to the costs at issue in this case. (Footnotes omitted.)

36. YEC has also argued that the Board must give due consideration to YEC's capital costs and that the Board is required to follow Canadian rate-setting principles under section 3 of OIC 1995/90. In assessing this argument, the Board took note of the decision of the Court of Appeal of Yukon in *Yukon Energy Corporation v Yukon (Utilities Board)* in which the Court described Canadian rate-setting principles as follows:

Canadian rate-setting principles generally require that rates, and thus approved costs upon which they are based, be just and reasonable to both the utility and consumers: Ontario (Energy Board) at paras. 7, 14-20. Subject to its overarching duty to ensure that its orders are just and reasonable, nothing in the OIC or the Act constrains the Board's discretion to determine the methodology it uses to assess Yukon Energy's costs in its rate-setting decisions.²¹

37. The Board is of the view that the provisions of the Act require the Board to set a rate base for the property of a public utility, but how the Board determines the rate base is in its discretion. The Board must assess the ultimate costs to be recovered through rates, and neither the Act nor OIC 1995/90 establish a particular methodology for the Board to determine rate base for a public utility. This is in keeping with the case law cited above.

38. Given the provisions of the Act and the case law, the Board considers that it determined that the applied-for costs for these projects were not reasonable for the reasons set out in Reasons for Decision and reproduced above. The Board notes IR YUB-YEC-1-57 in which the Board asked questions about the WH2 Uprate Project and in the second round of information requests and asked about the RFP process for this project. In IR YUB-YEC-1-58, the Board asked questions about the WH4 Project. The Board relied on the evidence and arguments before it in making its findings to reduce the costs. Generally, the Board found that the business cases were deficient for these projects. Also, there was a lack of information in the other evidence to justify the significant cost increases for these projects from the estimated costs and a lack of an adequate justification of costs and benefits.

39. Based on the foregoing reasons, the Board finds that YEC has not made a prima facie case sufficient to warrant the Board further considering the costs of these projects, as it has not shown that the Board made an error in fact, law or jurisdiction. Accordingly, the Board dismisses the Review Application on the costs for these projects.

²¹ *Yukon Energy Corporation v Yukon (Utilities Board)*, 2017 YKCA 15, September 12, 2017, paragraph 18; see also *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28, January 20, 2014, paragraph 31.

Conclusion

40. In conclusion, the Board is of the view that, although the Board appropriately exercised its discretion in determining the risk premium reduction, YEC has made a prima facie case sufficient to warrant the Board further considering a phase 2 review on the limited issue of determining the amount of the risk premium reduction and whether the reduction should be greater than zero but not more than 50 basis points. The Board grants a review on this limited basis.
41. However, the Board finds that YEC has not established a prima facie case sufficient to warrant the Board's full consideration on the other allegations made in relation to the setting of the ROE and on the disallowance of the costs of the WH2 Uprate Project and the WH4 Project, as it has not shown that the Board made an error in fact, law or jurisdiction. Accordingly, the Board dismisses the Review Application on the other grounds raised in relation to the ROE and the costs for these projects.
42. Therefore, the Board has determined that the Review Application will advance to the second phase of the review process only on the limited issue of determining the amount of the risk premium reduction and whether the reduction should be greater than zero but not more than 50 basis points. The Board will issue a process letter shortly.