

**APPLICATION BY YUKON ENERGY CORPORATION
FOR REVIEW AND VARIANCE OF BOARD ORDER 2018-10**

P. John Landry
DLA Piper (Canada) LLP
Suite 2800, Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

Solicitors for Yukon Energy Corporation

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I. INTRODUCTION

1. Yukon Energy Corporation's ("Yukon Energy", or "YEC") General Rate Application for Approval of Revenue Requirements for 2017 and 2018 ("**2017/18 GRA**") included \$3.319 million for the following programs in rate base related to Demand Side Management ("**DSM**") Programs (the "**DSM Costs**"):
 - (1) InCharge Program
 - (2) New Program Development
 - (3) Industrial DSM
 - (4) Pilot DSM projects
 - (5) LED Streetlight Retrofits
 - (6) Internal Energy conservation and
 - (7) Administration

2. In setting Yukon Energy's rate base, the Yukon Utilities Board (the "**Board**") directed as follows at paragraphs 478 and 479 of Appendix A to Board Order 2018-10 ("**Appendix A**") regarding the DSM Costs that were disallowed (the "**Disallowed DSM Costs**"):
 - (1) The Board approved DSM expenditures to the end of 2015 for the following programs reviewed by the Board in Order 2014-06: LED lighting, automotive heater timing rebates, and low-cost energy efficient products (the "**Approved InCharge Programs**"). Costs related to the extension of the Approved InCharge Programs beyond 2015 were disallowed, including \$443,469 to the end of 2017 and \$290,000 forecast for 2018; and
 - (2) Expenditures prior to and after 2015 for development and implementation of DSM programs other than Approved InCharge Programs and LED

Streetlight Retrofits¹ (“**Other DSM Programs**”) were disallowed, including \$1,151,924 to the end of 2017 and \$255,000 forecast for 2018.

(collectively, the “**DSM Rulings**”).

3. The Board’s reasons for making the DSM Rulings were set out in Appendix A as follows at paragraphs 477-479:

477. In Board Order 2013-01, Appendix A: Reasons for Decision, the Board found that it was premature to approve or disallow DSM expenses until YEC and YECL jointly filed a DSM plan. Until that time, the Board directed YEC to hold all DSM-related costs in WIP. YEC and YECL later submitted a five-year DSM plan, which the Board addressed in Order 2014-06. In that Order, the Board approved three DSM projects proposed by YEC and YECL: LED lighting, automotive heater timing rebates and low-cost energy efficient products. The Board also stated that it was not approving the DSM program for the five-year term and that YEC was to make a formal application to the Board before expanding the DSM program elements beyond that approved or beyond 2015.

478. Despite the Board determination that DSM projects were only approved up to 2015, YEC has continued with program expenditures beyond that point and has forecast continued DSM expenses during the test period. YEC did not make an application to the Board before expanding DSM programs beyond 2015. Accordingly, the Board finds that any DSM program expenditures that occurred after 2015 were not prudently incurred and are disallowed for inclusion in YEC’s rate base.

479. YEC also incurred expenses on DSM projects that do not fall within the three projects approved by the Board in Order 2014-06, despite the Board’s explicit statement that YEC must apply to the Board before expanding its DSM program beyond the elements approved in that order. Accordingly, the Board finds that YEC’s DSM expenditures on programs not approved in Order 2014-06 (LED lighting, automotive heater timing rebates and low-cost energy efficient products) were not prudently incurred and are disallowed for inclusion in YEC’s rate base. [Emphasis added.]

4. Yukon Energy applies under section 62 of the *Public Utilities Act*,² to review and vary the Board’s DSM Rulings.

¹ The Board, in paragraph 481 in Appendix A, considers that retrofitting streetlights at end of life with LED lights were prudent expenditures. DSM Costs for LED Streetlight Retrofits were for retrofitting streetlights at end of life with LED lights.

5. The Board's DSM Rulings in Board Order 2018-10 are based on errors of law. In reaching the DSM Rulings, the Board failed to undertake a proper prudence analysis because it failed to consider and review Yukon Energy's evidence with respect to the DSM Costs. Rather, it simply found the DSM Costs were not prudently incurred based on irrelevant considerations.

II. THE REVIEW AND VARIANCE TEST

6. The grounds for the Board to consider reviewing and varying a Board Order include errors in fact or law.³
7. The Board uses a "two-phase system" for review and variance applications.⁴ The first phase is an "initial screening phase" where the application must establish a prima facie case sufficient to warrant full consideration by the Board. The Board will assess an application having regard to some or all of the following:⁵
 - (1) Should there be a review by the Board?
 - (2) If there is to be a review, should the Board hear new evidence and should the parties be given the opportunity to present evidence?
 - (3) 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?
8. In the case of an alleged error, in order to advance to the second phase of the process, the applicant must show that the claim of error is substantiated on a prima facie basis, and that 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.⁷

² *Public Utilities Act*, R.S.Y. 2002, c. 186 [PUA].

³ *Yukon Utilities Board Rules of Practice*, s. 31(1)(b) [Board Rules].

⁴ *Board Rules*, s. 31(3).

⁵ *Ibid.*

⁶ *Board Rules*, s. 31(5).

⁷ *Board Rules*, s. 31(6).

9. Yukon Energy submits that there is a prima facie case for the DSM Rulings to be reviewed by the Board based on errors in law and that these errors have significant material implications.

III. GROUNDS FOR YUKON ENERGY'S REVIEW AND VARIANCE APPLICATION

10. The Board must determine the issue of prudence for all costs under review in a rate approval exercise such as a General Rate Application. This includes costs being reviewed in the context of section 32 of the *PUA*.
11. Further, under section 32 of the *PUA* in determining a rate base for Yukon Energy it must give due consideration to Yukon Energy's capital project costs, including Yukon Energy's DSM Costs.⁸ The Board has no discretion to refuse the DSM Costs without considering these costs under a proper prudence analysis which must include a review of the evidence led by Yukon Energy to justify the expenditures.⁹
12. Accordingly, the Board erred in law with regard to the DSM Rulings:
 1. by failing to determine Yukon Energy's rate base in accordance with the *PUA* section 32 requirements,
 2. by failing to consider Yukon Energy's evidence in relation to Yukon Energy's DSM Costs; and
 3. by taking into account irrelevant considerations in concluding that the DSM Costs were imprudently incurred.

⁸ *PUA*, s. 32(1), (3).

⁹ *PUA*, s. 32(3).

IV. ARGUMENT

Overview

13. In Order 2014-06 the Board outlined specific guidelines for determining whether DSM costs being considered in that proceeding were considered cost effective and prudently incurred,¹⁰ Order 2014-06 notes as follows:
- The Board in its assessment applied four standard cost-effectiveness measures for DSM Costs (collectively, the “**InCharge Programs Prudency Measures**”), namely the total resource cost test (TRC), the program administration cost test (PAC), the rate-impact measure test (RIM), and the participant cost test (PCT).¹¹ Program elements of the residential non-government DSM portfolio that passed all four cost-effectiveness measures for 2014 and 2015 were approved by the Board.
 - The Board noted that before the Utilities consider other additional initiatives, it wanted to see that the Utilities can deliver on the promised electricity and cost savings of the proposed residential program elements first.
 - The Board noted that all program elements must at least be rate-neutral for all ratepayers.
14. The above-noted considerations established by the Board, and especially the InCharge Programs Prudency Measures, provide a framework for determining the prudency of DSM expenditures for implementation of DSM portfolios for residential and other customer groups, including the Approved InCharge Programs. In determining the prudency of DSM expenditures for Other DSM Programs where the InCharge Programs Prudency Measures are not readily applicable such as for DSM planning and development internal YEC energy

¹⁰ See Order 2014-06, Appendix A, page 100.

¹¹ *2014-06 Reasons* at pp. 94, 100-101.

conservation measures or YEC's overall DSM administration equally principled prudence guidelines must be adopted.

15. The 2017/18 GRA DSM Costs disallowed by the DSM Rulings were not evaluated by the Board for prudence using the InCharge Programs Prudence Measures or any other principles or guidelines. No consideration was given to the performance or successful implementation of the Approved InCharge Programs, and the Board did not consider whether program elements were rate neutral.
16. Yukon Energy presented evidence during the 2017/18 GRA proceeding regarding the prudence of these DSM Costs. The 2017-18 GRA Supporting Documents, Tab 5 – Capital Projects, Section 5.3.1.5, outline in detail DSM program costs and benefits, the basis for extending the Approved InCharge Programs beyond 2015 and the basis for undertaking DSM Costs to support Other DSM Programs. This material was supplemented by responses provided to the following interrogatories from the Board and Intervenors as part of the hearing process: YUB-YEC-1-80; YCS-YEC-1-14; UCG-YEC-1-10; UCG-YEC-1-40; JM-YEC-1-3.
17. Set out in Appendix A is the detailed evidence relating to the Disallowed DSM Costs that the Board failed to properly review and consider. As described in Appendix A – if this evidence was properly reviewed and considered as part of a prudence analysis – the Disallowed DSM Costs would have been found to be prudently incurred.

Irrelevant Considerations in Denying DSM Costs

18. The only basis provided by the Board for denying the Disallowed DSM Costs was that Yukon Energy did not seek prior approval of these costs before proceeding; and the view that “Yukon government has DSM incentive programs in place” and

“it is better to leave DSM projects to government, rather than having ratepayers fund these projects”.¹²

19. The Board is mandated to consider the DSM Costs and their prudence in light of the evidence on the record of the proceeding. This requirement forms part of the Board’s obligation to review and approve rates in accordance with Canadian rate-setting principles,¹³ which requires that the rates, and the costs they are based on, be just and reasonable to the utility as well as consumers.¹⁴
20. In denying the Disallowed DSM Costs, the Board based its decision entirely on considerations not relevant to determining the prudence of the expenditures. There is no requirement or provision in the *PUA* for Yukon Energy to make an application to the Board for pre-approval of capital projects (including DSM programs) prior to incurring these costs; and no basis for finding such costs to be imprudent for this reason alone.
21. The Board needed to carefully consider the impact on Yukon Energy of disallowing any specific cost.¹⁵ But rather than “carefully consider” the evidence Yukon Energy had submitted with respect to its Disallowed DSM Costs, the Board failed to review that evidence altogether – even though it was clearly relevant and necessary to the assessment of whether the DSM Costs were prudently incurred.
22. The Board’s failure to consider any evidence with respect to Yukon Energy’s DSM Costs was an error of law.

¹² Board Order 2018-10, paragraph 482.

¹³ Order in Council 1995/90, s. 3.

¹⁴ *Yukon Energy Corporation v. Yukon (Utilities Board)*, 2017 YKCA 15 at para. 18, citing *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paras. 7, 14-20.

¹⁵ *Yukon Energy Corporation v. Yukon (Utilities Board)*, 2017 YKCA 15 at para. 18, citing *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paras. 16-17.

23. As stated by the Alberta Court of Queen's Bench in *Wal-Mart Canada Corp. v. Calgary (City)*, applying the Supreme Court of Canada's decision in *Canada (Director of Investigation and Research) v. Southam Inc.*:¹⁶

[27] [I]f a tribunal fails to consider certain evidence that the legal test requires it to consider, then the decision-maker has in effect applied the wrong law, and has thus made an error of law: *Southam* at para. 39.

24. Further, the Board's failure to consider Yukon Energy's evidence of DSM Costs is also an error of law because it makes its decision in the DSM Rulings unreasonable. This principle is articulated in *Boyd v JBS Foods Canada Inc.*, where the Alberta Court of Appeal explains:¹⁷

[38] While the reasonableness standard precludes a reviewing court from reweighing the evidence before the administrative decision-maker, it does not limit the court from interfering where the decision-maker failed to consider relevant evidence in arriving at its decision. Indeed, a decision is unreasonable and liable to be set aside by a court if the decision-maker failed to take important evidence into account: *Telus* at para 26; *Alberta (Workers' Compensation Board) v Buckley*, 2007 ABCA 7 (CanLII) at para 46, 277 DLR (4th) 1. [Emphasis added.]

25. In fact, the Board previously endorsed such principles. In Board Order 2014-06 it stated "when deciding whether to approve any program expenditures, the Board must carefully weigh the benefits arising from the program with the costs of implementing the program."¹⁸
26. More specifically, for the DSM Costs for Approved InCharge Programs to the end of 2015 approved by the Board in Order 2014-06, the Board applied four standard cost-effectiveness measures for DSM Costs (the InCharge Program Prudency Measures), namely the total resource cost test (TRC), the program

¹⁶ *Wal-Mart Canada Corp. v. Calgary (City)*, 2013 ABQB 21 at para. 27, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39.

¹⁷ *Boyd v JBS Foods Canada Inc.*, 2015 ABCA 380 at para. 38.

¹⁸ *Board Order 2014-06 Appendix A: Reasons for Decision* (April 23, 2014) at p. 100, online: Yukon Utilities Board <http://yukonutilitiesboard.yk.ca/policy/> [2014-06 Reasons].

administration cost test (PAC), the rate-impact measure test (RIM), and the participant cost test (PCT).¹⁹

27. The Board undertook no such analysis here and failed to consider Yukon Energy's evidence as applicable to these measures, or at all. More specifically, the Board in Order 2018-10 did not apply the InCharge Program Prudency Measures to assess the prudency of Approved InCharge Programs DSM Costs after 2015. Further, in Order 2018-10 the Board did not apply any prudency guidelines to assess the prudency of the Other DSM Programs DSM Costs.

V. RELIEF REQUESTED

28. For the foregoing reasons, Yukon Energy respectfully requests that the Board, pursuant to section 62 of the PUA and rule 31 of the Board Rules which establishes the two-phase system for review and variance applications, convene a phase II review on the merits of the GRA Rulings or proceed directly to vary the DSM Rulings as follows:

- (1) Allow into rate base DSM Costs as provided in the 2017/18 GRA related to the extension of the Approved InCharge Programs beyond 2015; and
- (2) Allow DSM Costs as provided in the 2017/18 GRA for Other DSM Programs, including New Program Development and its related development of Capacity DSM.

ALL OF WHICH is respectfully submitted this 15th day of March, 2019.

Yukon Energy Corporation

Per: 

P. John Landry
DLA Piper (Canada) LLP
Solicitors for Yukon Energy Corporation

¹⁹ 2014-06 Reasons at pp. 94, 100-101.

Appendix A

Evidence Regarding Approved InCharge Programs

29. The Approved InCharge Programs implement three DSM programs for non-government residential customers.
30. Evidence provided in the 2017/18 GRA indicates that the Approved InCharge Programs met InCharge Programs Prudency Measures endorsed by the Board in Order 2014-06 and were rate neutral for ratepayers. Specifically, Approved InCharge Program development and delivery was reviewed in the Application at page 5-39 and 5-40. Figure 5-1 at page 5-40 provides a summary of energy savings and costs, updated to the end of 2016 which notes that the programs achieved an overall Rate Impact Measure (RIM) ratio of 1.1 (1.0 shows the program is neutral from a utility rate impact perspective), and achieved a very high Participant Cost (PC) ratio (3.0) and high Program Administrator Cost (PAC) ratio (9.4), demonstrating that the programs are very beneficial to program participants and to utilities. Table 5-1 also shows that the program achieved a high Total Resource Cost (TRC) ratio (3.1), showing that it also compares well against other electricity resource options.
31. The evidence also shows that the Approved InCharge Programs elements were evaluated by a third party evaluation advisor in 2015 and 2016 which confirmed that the expenditures met or exceeded the above-noted InCharge Programs Prudency Measures key performance indicators. The following are specifically noted:
 - The response to UCG-YEC-1-40, provided the 2015 Interim Evaluation Report by ICF Marbek; and the 2015-16 Evaluation Report by ICF Marbek (actuals to end of July 2016).

- The evaluation reports are based on the Evaluation, Measurement and Verification Plan filed with the YUB as an attachment to YUB-YECL-26(a) during AEY's 2013-15 GRA²⁰.
- The energy savings and coincident peak demand reduction that have resulted from the Approved InCharge Program are outlined in Table 2 of both the 2015 and 2015/16 Evaluation reports.²¹
- The response to YUB-YEC-1-80 (d) and (e) notes that the cost benefit analysis provided by ICF Marbek was reviewed and approved by an independent evaluator (Econoler).

The evaluations of the Approved InCharge Programs for 2015 and 2015-16 period demonstrate the Utilities' ability to deliver on electricity and cost savings and support the reasonableness and prudence of Yukon Energy's decision to proceed with the Approved InCharge Programs beyond 2015.

32. The response to YUB-YEC-1-80(a) reviews program subsidies provided by Yukon Energy through the InCharge DSM Program and by the Yukon government through its Good Energy DSM Program. The response notes that care was taken by Yukon Energy in its DSM program design to ensure that programs being implemented complemented already existing programs, and the only area of overlap in Yukon Energy's DSM program subsidies with the Yukon government's DSM programs is the inclusion of an energy efficient light bulb in each program's free energy savings kit.
33. Yukon Energy also noted in oral testimony that Yukon Government does not target the same programs that YEC would select. Specifically, Yukon Government programs were not targeted towards addressing capacity DSM,

²⁰ UCG-YEC-1-40(a).

²¹ UCG-YEC-1-40(c).

which is a focus of concern for Yukon Energy, and Yukon Energy needed to investigate programs that meet this specific objective.²²

34. In summary, Yukon Energy provided evidence on the reasonableness and prudence of the Disallowed DSM Costs after 2015 for the Approved InCharge Programs, including the \$443,469 DSM Costs spent to the end of 2017 and \$290,000 DSM Costs forecast for 2018 for the Approved InCharge Program.²³

Evidence Regarding Other DSM Programs

35. Yukon Energy also provided evidence to support the DSM Costs incurred for Other DSM Programs (see paragraph 13 of this Review and Variance), including \$255,000 DSM Costs forecast for 2018 for Other DSM Programs.
36. In contrast with the Approved InCharge Programs, the Other DSM Programs as defined (which exclude LED Streetlight Retrofits) do not involve implementation of specific DSM programs for customers of YEC or ATCO Electric-Yukon. Prudence measures related specifically to actual DSM program implementation with residential or other customer classes, such as the Rate Impact Measure test to confirm rate impact neutrality, are therefore not relevant in the assessment of prudence for these costs. In these instances, prudence is demonstrated by the reasonableness of costs incurred for DSM planning and development, internal YEC energy conservation measures, and YEC's overall DSM administration.

²² Transcript page 465, lines 5-17 A. Hall notes "there are a few Yukon government programs in the area of energy efficiency. But they don't necessarily target the same programs that we would select. I mean, ours our very economically driven...if you looked at what the Yukon government's doing, they have different considerations. It's not -- not always about economics for these government programs." Transcript page 466, lines 1-17, A. Hall notes "one of the areas we'd like to focus on in a prospective DSM program would be programs that bring down peak", and "now, what we're finding is that the Yukon government programs aren't necessarily targeted at that kind of benefit, and so, you know, we feel that we need to investigate our own programs that specifically go after that objective".

²³ Disallowed DSM Costs reflect actual DSM Costs for 2017 as per Order 2018-10.

37. The evidence on DSM Costs of \$1,151,924 to the end of 2017 on Other DSM Programs²⁴ described prudent and reasonable spending to carry out DSM planning (including Industrial energy audits and Pilot DSM Projects) as well as Internal Energy Conservation and DSM Administration related to all DSM programs (including the Approved InCharge Programs). Most of these costs related to deferred costs for Internal Energy Conservation for YEC and DSM Administration. Over 90% of these DSM Costs were incurred prior to 2016.
38. The forecast DSM Costs of \$255,000 in 2018 on Other DSM Programs continued modest spending for Pilot DSM Projects, Internal Energy Conservation, and DSM Administration and added \$190,000 forecast DSM Costs for New Program Development.
39. The New Program Development was reviewed in the GRA Application at page 5-40 and 5-41 which noted that the 2016 Resource Plan recommended additional DSM programs as a cost effective way to meet energy and capacity demands and should be included in the proposed future portfolio of energy supply projects.²⁵ The Board had previously ordered that new DSM programs must be designed prior to review with the YUB. Yukon Energy planned to develop residential and commercial customer end use surveys (as required to gather information on how Yukon homes and businesses currently use energy), and planned to update the Conservation Potential Review model used to inform DSM program design to better match inputs needed for resource planning.

²⁴ DSM Costs to the end of 2017 for Other DSM Programs reflect actual 2017 costs, and other adjustments from the 2017/18 GRA as required to reflect costs not otherwise approved for this period by Order 2018-10.

²⁵ The Resource Plan was provided as Volume 2 of the Yukon Energy Corporation 2017/18 GRA and the Resource Plan Appendices were provided in response to YUB-YEC-2-29. The DSM Resource Option is addressed in Section 5.2.11 of the 2016 Resource Plan. Appendix 5.20 of the Resource Plan provides Updates to Yukon Electrical Conservation and Demand Management Potential Review (ICF 2016). This update considered the level of energy savings achievable through the adoption of a range of DSM programs by Yukon homes and businesses considering changes in Yukon Energy's load and population forecasts and technology, as well as learnings from initial delivery the inCharge DSM program.

40. It was also noted in the GRA Application with regard to New Program Development that work to date had focused mainly on energy DSM, and that Yukon Energy would undertake a Capacity DSM Feasibility Study to quantify potential cost and achievable uptake of capacity focused DSM programs such as demand response, behaviour change and other demand focused measures. The 2016 Resource Plan concluded that “YEC is in imminent need for new capacity to meet requirements under N-1 contingency conditions²⁶”. Capacity-focused DSM was considered one measure that could be cost-effectively implemented in the near term to reduce capacity requirements on the system; and DSM was recommended under each load scenario considered in the plan as a cost-effective supply option. The Board acknowledged these concerns in its Order at paragraph 407:

The 2016 Resource Plan identified the LNG third engine as one of the preferred options for addressing the dependable capacity gap in a cost-effective manner in the near term. Yukon Energy stated:

The 2016 Resource Plan identified a dependable capacity shortfall for the Yukon Integrated System under its single contingency (N-1) capacity reliability criterion that approximates 6 MW in 2017, increasing to 10-11 MW by 2019. Yukon Energy is required to provide sufficient dependable winter capacity to meet the single contingency capacity reliability criterion, i.e., there is no acceptable “do nothing” option given the need to maintain reliable service, and permanent solutions (rather than relying upon temporary options such as mobile diesel) are needed to address an ongoing and growing dependable capacity shortfall.”

41. In YUB-YEC-1-80 (g) and (h), Yukon Energy further noted that it had not yet completed preliminary design of new programs. Yukon Energy noted that the Conservation Potential Review would be used as the basis for identifying the potential savings and costs that can be achieved using DSM, and given the challenges with capacity growth on the system Yukon Energy will conduct necessary studies to quantify the potential cost and achievable uptake of capacity focused DSM programs. Yukon Energy noted that it needed to invest in

²⁶ 2016 Resource Plan Page 8-49.

program design in advance of review by the regulator and intended to file this with the YUB in advance of program delivery.

42. The ongoing positive performance of the Approved InCharge Program elements indicate that the decision to continue with the program elements beyond 2015 was prudent, reasonable and in the interest of ratepayers (i.e., met all economic measures endorsed by the Board).
43. Further, based on the assessments included in the Resource Plan and reviewed in the GRA, it was reasonable for Yukon Energy to pursue steps since 2011 necessary to support the development of DSM planning and general development, internal YEC energy conservation measures, overall DSM administration, and (for 2018) planning for new DSM programs, and in particular capacity focused DSM.
44. There was no evidence on the record of the proceeding to refute these conclusions. The evidence provided by Yukon Energy indicated that DSM remained a cost effective and competitive resource option and that the programs being pursued by Yukon Energy were not duplicative of other programs adopted by the Yukon government.