COURT OF APPEAL OF YUKON

Citation: *Yukon Energy Corporation v. Yukon (Utilities Board)*, 2021 YKCA 1

Date: 20210205
Docket: 19-YU853

Between:

Yukon Energy Corporation

Appellant

And

Yukon Utilities Board

Respondent

Before: The Honourable Mr. Justice Tysoe
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Lyons

On appeal from: An order of the Yukon Utilities Board, dated September 20, 2019 (Board Order 2019-05).

Counsel for the Appellant (via videoconference):	P.J.G. Landry, Q.C. E.J. Snow
Counsel for the Respondent (via videoconference):	A.A. Sabo J. Graham
Place and Date of Hearing:	Vancouver, British Columbia November 19, 2020
Place and Date of Judgment:	Vancouver, British Columbia February 5, 2021

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Lyons

Summary:

Yukon Energy Corporation appeals the decision of the Yukon Utilities Board not to approve the costs of certain demand-side management programs for inclusion in its rate base. Held: Appeal dismissed. The Board was entitled to exercise its discretion under s. 32(1) of the Public Utilities Act, R.S.Y. 2002, c. 186, not to approve costs of programs that were not required to be used to provide service to the public.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] Yukon Energy Corporation ("Yukon Energy") appeals, with leave, Board Order 2019-05 issued on September 20, 2019 (the "Review Order") of the Yukon Utilities Board (the "Board") on a question of law. Leave to appeal was granted pursuant to s. 69 of the *Public Utilities Act*, R.S.Y. 2002, c. 186 [*Act*]: 2020 YKCA 12 (Grauer J.A. in Chambers).

[2] The Review Order dismissed the application of Yukon Energy under s. 62 of the *Act* to review and vary Board Order 2018-10 issued on December 27, 2018 (the "Initial Order"). In its review application, Yukon Energy requested a panel of the Board to review the Initial Order, in which another panel of the Board refused to approve certain costs for inclusion in Yukon Energy's rate base, which is used to establish the rates charged by it to its customers. These costs are referred to as demand-side management costs.

[3] As did the panel which dealt with the review application, I will refer to the two panels as the "Hearing Panel" and the "Review Panel".

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] Yukon Energy is a government-owned public utility which generates the bulk of Yukon's electrical energy. It primarily generates hydro power, but it also relies on diesel and liquefied natural gas at times of high customer demand.

[6] Yukon Energy is regulated by the Board pursuant to the *Act*. One of the Board's functions under s. 27 of the *Act* is to set the rates of Yukon Energy and other public utilities charged to its customers. In general terms, the rates determined are intended to give the utility a fair rate of return on its assets used to generate the service provided by the utility. These assets are generally referred to as the utility's rate base, which is determined by the Board pursuant to s. 32 of the *Act*, the relevant portions of which read as follows:

> **Rate base of public utilities**
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> **32**(1) 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.
>
> (2) The board, by order, shall set a fair return on the rate base.
>
> (3) 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.

[7] As is apparent from s. 32(1), most of the rate base consists of capital assets acquired or constructed by the utility for the provision of its service. However, the rate base can include other items that would not normally be considered to be assets. One such example is "necessary working capital", which is referred to in s. 32(3).

[8] Another potential example relates to the recognition in the industry that the higher cost of more expensive sources of energy (such as diesel and liquefied natural gas) during high-demand periods can be reduced or avoided by lowering the amount of demand by the customers for electricity. Programs designed to decrease the demand are called demand-side management ("DSM") programs. The costs of DSM programs can potentially be approved by the Board for inclusion in the rate base. The Canadian utilities industry has developed four tests to measure the cost effectiveness of DSM programs. The tests involves an assessment of: total resource cost; program administration cost; rate-impact; and participant cost.

[9] Under s. 17 of the *Act*, the Commissioner in Executive Council (the "Commissioner") is empowered to issue special directions to the Board. The Commissioner enacted a rate policy directive in 1991 (O.I.C. 1991/62) (the "1991 Rate Policy Directive"), which included the following special direction with respect to DSM costs:

> **Demand-side management**
>
> **5.**(1) The Board shall encourage Yukon Energy Corporation and The Yukon Electrical Company Limited to promote economy and efficiency in the generation, transmission, and use of electricity.
>
> (2) The Board shall allow Yukon Energy Corporation and The Yukon Electrical Company Limited to recover, through rates, the expenditures reasonably incurred by them for the purposes set out in subsection (1).

[10] The Commissioner enacted a new rate policy directive in 1995 (O.I.C. 1995/090) (the "1995 Rate Policy Directive"), which replaced the 1991 Rate Policy Directive. The 1995 Rate Policy Directive, which remains in force, does not contain any special direction with respect to DSM costs. It does, however, give general directions to the Board, including the following:

> **Normal return on equity**
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> **2.**(1) … 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.
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> * * *
>
> **Normal principles to apply**
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> **3.** Except to the extent otherwise stated by this Directive or the Act, the Board must review and approve rates in accordance with principles established in Canada for utilities, including those principles established by regulatory authorities of the Government of Canada or of a province regulating hydro and non-hydro electric utilities.

[11] In October 2008, Yukon Energy filed a general rate application for the test years of 2008 and 2009. On September 8, 2009, the Board issued Board Order 2009-08 with an accompanying decision. In response to recommendations from third parties regarding DSM initiatives, the Board directed Yukon Energy, in

conjunction with the Yukon Electrical Company Limited (“Yukon Electrical”), to develop a policy paper on DSM initiatives.

[12] In April 2012, Yukon Energy filed a general rate application for the test years of 2012 and 2013, including a request for approval of approximately $3 million for DSM costs. In its decision accompanying Board Order 2013-01, issued on March 25, 2013, the Board noted the previous direction to Yukon Energy and Yukon Electrical to jointly file a policy paper and ruled that it was premature to approve or disallow DSM expenses until the policy paper was filed.

[13] In May 2013, Yukon Energy filed a general rate application for the test years of 2013, 2014 and 2015. Rather than filing the requested policy paper, Yukon Energy and Yukon Electrical filed a five-year plan to implement DSM programs in the years 2013 to 2018. In its decision accompanying Board Order 2014-06, issued on April 23, 2014, the Board noted that many of the DSM costs that had already been incurred by Yukon Energy and Yukon Electrical “test the limits of what would be expected of a policy paper” and that Yukon Energy and Yukon Electrical must have been aware that those costs could be disallowed by the Board. The Board stated that it had a number of reservations with respect to the DSM program and that it was undesirable for certain DSM program elements to benefit some ratepayers at the expense of other ratepayers.

[14] Despite its reservations, the Board approved three DSM projects proposed by Yukon Energy and Yukon Electrical (LED lighting, automotive heater timing rebates and low-cost energy efficient products), but only for the two years of 2014 and 2015. In approving these projects, the Board indicated that they passed the four cost-effectiveness tests. The Board stated that it did not approve the DSM program for the five-year term requested and that Yukon Energy and Yukon Electrical were to make “a formal application to the Board before expanding the DSM program elements beyond that approved above or beyond 2015”.

[15] Yukon Energy did not file a general rate application in 2016. In June 2017, it filed a general rate application for the test years of 2017 and 2018. In the years following the issuance of Board Order 2014-06, Yukon Energy had expended funds on the three DSM projects approved by the Board in 2014, and it also developed six new DSM initiatives (new program development, industrial DSM, pilot DSM projects, LED streetlight retrofits, internal energy conservation and administration). In the application, it requested that the amount of $3.319 million, including approximately $2.5 million that had already been spent, be included in its rate base on account of the DSM projects.

[16] Yukon Energy's request was denied by the Hearing Panel with one exception. In its decision accompanying the Initial Order (the "Impugned Decision"), the Hearing Panel briefly set out the history of the DSM initiatives, including the requirement that Yukon Energy was to make a formal application to the Board before expanding the DSM program elements beyond those approved in 2014 or extending the programs beyond 2015. The Hearing Panel said the following about the expenditures that had already been spent, both on the previously approved programs and the new programs:

> 478. Despite the Board determination that DSM projects were only approved up to 2015, [Yukon Energy] has continued with program expenditures beyond that point and has forecast continued DSM expenses during the test period. [Yukon Energy] 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 [Yukon Energy]'s rate base.
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> 479. [Yukon Energy] 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 [Yukon Energy] must apply to the Board before expanding its DSM program beyond the elements approved in that order. Accordingly, the Board finds that [Yukon Energy]'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 [Yukon Energy]'s rate base.

[17] The Hearing Panel did, however, approve one DSM cost for inclusion in the rate base in the Impugned Decision. In May 2016, Yukon Electrical (carrying on business as ATCO Electric Yukon) had applied for approval of forecast revenue requirements for the test years of 2016 and 2017, and the Board approved inclusion in its rate base the costs related to LED streetlight installations that were not end-of-life conversions. As a result, the Hearing Panel considered similar expenditures by Yukon Energy to be prudent expenditures for inclusion in its rate base.

[18] The Hearing Panel then made the following comments in the Impugned Decision about DSM costs forecast to be spent in the future:

> 482. The Board is not persuaded that [Yukon Energy] should continue to operate DSM projects. [Yukon Energy] has indicated the benefits of expanding the program and submitted that its programs have met or exceeded key performance indicators. However, the Board notes that the Yukon government has DSM incentive programs in place, and the Board is of the view that it is better to leave DSM projects to government, rather than having ratepayers fund these projects. For these reasons, the Board is of the view that continuation of DSM programs by [Yukon Energy] is not necessary. Accordingly, the Board denies [Yukon Energy]'s requests to continue with any DSM programs other than end-of-life streetlight conversions as discussed above.

[19] In its review application, Yukon Energy asserted that the Hearing Panel had made the following three errors of law in the Impugned Decision:

(a) failing to determine Yukon Energy's rate base in accordance with the requirements of s. 32 of the *Act*;

(b) taking into account irrelevant considerations in concluding that the DSM costs were imprudently incurred; and

(c) failing to consider Yukon Energy's evidence in relation to its DSM costs.

[20] The Review Panel dismissed Yukon Energy's review application because it had not shown on a *prima facie* basis that the Hearing Panel had committed any of the asserted errors of law. The Review Panel held that the Hearing Panel had provided its reasons for not considering the DSM costs to be prudent, that the

Hearing Panel did not take into account any irrelevant considerations and that Yukon Energy had not shown that the Hearing Panel had ignored evidence.

Issue on Appeal

[21] Justice Grauer granted leave to appeal the Review Order on the question of law of whether s. 32 of the *Act*, together with the 1995 Rate Policy Directive, required the Board to have undertaken a further prudency analysis of DSM costs.

[22] The parties are in agreement that, pursuant to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the standard of review to be applied to the Review Order is one of correctness. There is also no issue as to the appropriateness of giving the Board standing to make submissions on the merits of this appeal: see *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44 at paras. 41–62.

[23] Although the appeal is from the Review Order, it is common ground that the real issue is whether the Hearing Panel erred on a question of law in making the Initial Order. If the Hearing Panel did err in that manner, then the Review Panel erred by failing to have found that the Hearing Panel made such an error.

Discussion

[24] Yukon Energy says that the Board failed to comply with s. 3 of the 1995 Rate Policy Directive because it did not review the DSM costs by assessing the evidence demonstrating the prudency of the costs in accordance with principles established in Canada for utilities. Yukon Energy also says the Board erred by considering irrelevant factors; namely, the failure to comply with the 2014 direction to obtain pre-approval of DSM costs and the view that it was better to leave the DSM projects to the Yukon government.

[25] Section 32(1) of the *Act* requires 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". The phrase "used or required to be used" indicates that there is a distinction

between property that is used and property that is required to be used. In my opinion, the wording gives the Board a discretion to include in a rate base any property that is used to provide service or to include only property that is required to be used for the provision of the service.

[26] Similar wording is contained in other utilities legislation, including the legislation considered in *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2015 ABCA 295, leave to appeal ref'd (2016), [2015] S.C.C.A. No. 474, a decision relied upon by the Review Panel in dismissing Yukon Energy's review application. In that case, a number of utilities had "stranded" assets that were no longer required to provide the service of the utilities. The Alberta Court of Appeal dismissed appeals from a decision of the Alberta Utilities Commission that the assets were to be removed from the utilities' rate bases when they ceased to provide service even if they had not been fully depreciated.

[27] Justice Paperny said the following about the discretion given by the phrase "used or required to be used":

> [158] 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.

[28] Between 1991 and 1995, when s. 5 of the 1991 Rate Policy Directive was in force, the Board was required to include reasonably incurred DSM costs in the rate base. However, after the 1995 Rate Policy Directive was enacted without a provision equivalent to s. 5, the Board was entitled to exercise the discretion under s. 32(1) of the *Act* to refuse to include DSM costs in the rate base if it concluded that the DSM programs were not required to be used to provide its service to the public. If the Board exercised its discretion in this regard, it was not required to assess the prudency of the costs incurred by Yukon Energy on DSM programs under s. 32(3).

[29] At the hearing of the appeal, Yukon Energy conceded that the Hearing Panel did possess this discretion but submitted that it did not make its decision by exercising the discretion. Rather, Yukon Energy says the Board made its decision not to approve the DSM costs that had already been incurred for one reason only: the lack of pre-approval. With respect, I am of the view that this is an overly narrow reading of the Board's decision.

[30] On a reading of the Impugned Decision as a whole and in the context of the Board's previous decisions, it is my view that the Hearing Panel was not conducting a prudency assessment under s. 32(3) of the *Act* but, rather, was exercising its discretion under s. 32(1). The Board had never received the policy paper it had directed to be filed and exercised its discretion in 2013 not to include DSM costs in the rate base. It did exercise its discretion to include some DSM costs in the rate base in 2014 but, in directing Yukon Energy to make a formal application before incurring DSM costs after 2015, the Board warned Yukon Energy that it would not necessarily include DSM costs in the rate base after 2015. In para. 482 of the Impugned Decision, the Hearing Panel reached the conclusion that continuation of DSM programs was not necessary.

[31] In concluding the continuation of DSM programs was not necessary, the Hearing Panel was effectively making a determination under s. 32(1) that DSM programs were not required to be used to provide service to the public. Hence, the Hearing Panel had a discretion not to include the costs of such programs in Yukon Energy's rate base, and it exercised its discretion not to do so except with respect to the LED streetlight installation program which it felt obliged to approve because it had approved a similar program for Yukon Electrical. In exercising its discretion under s. 32(1), it was not an irrelevant consideration for the Hearing Panel to take into account that the Yukon government had DSM programs in place.

[32] In my view, the Hearing Panel used the word "prudently" in paras. 478 and 479 of the Impugned Decision in the sense that Yukon Energy had not acted prudently by incurring these DSM costs at its own risk when it had been put on

notice that the Board was not committing to include any DSM costs in the rate base beyond the end of 2015 unless it gave prior approval. It was not assessing the prudency of the costs themselves.

[33] As the Hearing Panel was entitled to exercise its discretion under s. 32(1) to decline to approve DSM costs to be part of Yukon Energy's rate base, and as the Hearing Panel did not take into account any irrelevant factors in exercising its discretion, I conclude that it did not commit an error of law. The Hearing Panel was entitled to decline to approve any of the DSM costs for inclusion in the rate base other than the LED costs it did approve. It follows that the Review Panel did not make an error of law in dismissing Yukon Energy's review application.

Disposition

[34] It is for these reasons that I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Lyons"