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The Public Utilities Board of Manitoba
Attention: Mr. Darren Christle, Executive Director and Board Secretary
400-330 Portage Avenue
Winnipeg, MB R3C 0C4

Dear Mr. Christle:

Re: Manitoba Hydro 2015/16 & 2016/17 General Rate Application

Thank you for the opportunity to respond to the May 6, 2015 letter of Manitoba Hydro regarding the revised budget of the Coalition.

The Thrust of the Hydro Submission

Leaving polemics aside, the core of Hydro's concerns appear to be based upon:

- the allegation that the Coalition attempted to introduce evidence through its April 28, 2015 letter¹
- the allegation that the independent experts from La Capra are in conflict by allowing themselves to be retained by an Intervenor²
- the concern that budgetary approval is being sought for the depreciation witness Ms Lee outside the pre-hearing process and after the evidence of Ms Lee has been filed³
- the allegation that Ms Lee is not qualified to give her evidence⁴
- the allegation that the Coalition is attempting to introduce evidence through information requests⁵

As a backdrop to these concerns, Manitoba Hydro appears to imply that the Coalition is attempting to circumvent the intent of *Board Order 18/15* by not filing its revised budget until April 28, 2015 and by “actively using” expert consultants when a budget for those consultants has not been approved by the PUB.⁶

1 Letter of Manitoba Hydro, May 6, 2015, p. 2.

2 Letter of Manitoba Hydro, May 6, 2015, p. 5/6.

3 Letter of Manitoba Hydro, May 6, 2015, p. 7.

4 Letter of Manitoba Hydro, May 6, 2015, p. 7.

5 Letter of Manitoba Hydro, May 6, 2015, p. 9.

6 Letter of Manitoba Hydro, May 6, 2015, p. 6.

No reference is made by Manitoba Hydro to the PUB *Rules of Procedure* (the "Rules"). Similarly, no reference is made by Manitoba Hydro to correspondence and conversations with legal counsel for Interveners or the PUB on the subject of the Coalition budget or depreciation evidence.

The Coalition's Response

Rate-making Evidence can only be received through Rules 17 and 30

To put the April 28, 2015 letter of the Coalition in its proper context, it is important to distinguish two of the distinct processes contemplated in the PUB *Rules*.

There is the **evidentiary process** as articulated in key rules such as 14 (information requests) 17 (reception of evidence) 18 (evidence from other proceedings) 26 (applicant's evidence) and 30 (hearing of evidence). This stream creates the evidence upon which the Board ultimately makes its rate decision.

There also is a **procedural component** represented by important rules such as rules 11 (pre-hearing conference and technical conference), 27 (application for intervention), 43 (application for costs). These elements of the *Rules* govern the timing of the hearing, who is able to participate and whether or not these participants are eligible for costs.

Read together and in the context of a rate setting process, Rules 17 (1) and 30 (2) makes it clear that the evidence for the rate setting process is **restricted to** oral evidence, pre-filed evidence and responses to information requests.⁷

The procedural component rules are considerably more flexible given the reality that information presented as part of those discussions does not constitute evidence for the purposes of rate making. In certain cases, the *Rules* expressly contemplate the sharing of technical information that does not constitute evidence for rate making purposes.⁸ In other cases, they implicitly invite a relaxation of more court like procedures.⁹ Information presented as part of the procedural component is clearly **not intended** to constitute evidence for the purposes of ratemaking.

7 Rule 17(1)The Board may receive evidence by: a) sworn testimony or testimony solemnly affirmed; or b) the report of any person directed by the Board to so report; or c) such other manner as may be deemed appropriate by the Board. Rule 30(2)The written evidence of an applicant and an intervener shall be deemed to include its pre-filed evidence and any responses to information requests by that applicant or intervener.

8 Rule 11(2) Where, in the opinion of the Board, the amount, level of detail and complexity of material so warrants, the Board may direct the parties to participate in a **non-evidentiary** technical conference for the purpose of considering: a) a tutorial presentation for interested parties; b) a discussion or workshop style conference to gain an understanding or clarification on a matter; or c) any other presentation or conference style arrangement that will assist the understanding of the Board and interested parties. (emphasis added)

9 See for example Rule 43 b) which speaks to cooperation with other parties. Support for this assertion is often presented as a representation by legal counsel rather through an affidavit.

The Overlap of Process Reform and Hearing Discussions

Over the past year, there has been a broader and evolving dialogue related to process reform that has taken place both inside and outside the formal hearing process. The process reform dialogue has clearly overlapped with the actual hearing process during pre-hearing conferences, motions and closing submissions.¹⁰ Indeed, the Board will recall that an important element of Hydro's submissions in the pre-hearing conference focused on the importance of making the regulatory process less costly.

There also has been a clear understanding that process reform was ongoing, that there could be miss-steps and that all parties and the regulator should show a commitment to helping the process evolve.

The April 28, 2015 Letter of the Coalition

Manitoba Hydro takes issues with the provision to the PUB of:

- the Distribution System Plan filing guidelines of the OEB
- an Asset Health backgrounder of the Canadian Electrical Association, and
- a link to the OEB filing of Power Stream

In understanding the Coalition's motivation in providing this information to the Board, it is important to understand the three objectives underlying the the April 28, 2015 letter of the Coalition:

- seek permission to revise the budget of the Coalition
- pre-emptively address any concerns that the Coalition had failed to act responsibly in ultimately choosing not to provide evidence from La Capra and Dr. Booth, and
- move the process reform dialogue forward

¹⁰ Both Manitoba Hydro and MPI have made ample use of the pre-hearing conference to discuss process reform in recent years. The motion related to information requests in the most recent MPI GRA clearly related to process reform. In the most recent MPI GRA, some elements of the closing submission of the Coalition related to process reform.

These objectives are made clear at the outset of the Coalition's letter where it notes the nature of the proposed budget revisions, highlights its desire to show that it acted reasonably and indicates a desire to move the hearing reform process forward:

To the knowledge of legal counsel for the Coalition, this proceeding marks the first Hydro hearing in more than twenty year involving Coalition members in which they have **chosen not to bring expert evidence already approved** on a preliminary basis by the PUB. Given the unusual nature of this budget revision, we have taken the liberty of providing a detailed explanation of the rationale for the changes in the budget of the Coalition. We also share guidance from other jurisdictions and research which **may assist in future filings**.¹¹ (emphasis added)

Sections 43 and 44 of the *Rules* impose a duty to act reasonably on Intervenors. At the heart of the April 28, 2015 letter was an effort by the Coalition to justify the reasonableness of what was an uncharacteristic choice by the Coalition.

The Coalition expected the PUB would be disappointed to learn that neither La Capra or Dr. Booth would be called to give evidence. It was concerned that the Board's disappointment might damage its assessment of Coalition representations in this proceeding as well as affect the ultimate cost award. The Coalition wished to act proactively by providing a thoughtful explanation of the facts leading to its decision not to call its evidence.

In preparing its explanation, the Coalition expected that Hydro would respond by citing the thousands of information responses provided and the many volumes of evidence shared. Anticipating this tactic and recognizing that issues related to capital asset management and asset health indices are relatively new to PUB proceedings, the Coalition chose to share background information relating to both the asset health management process itself and the type of disclosure which might reasonably be expected.

To defend the reasonableness of its choices, the Coalition wished to show what meaningful disclosure looked like and to contrast the volume of paper provided by Hydro with the potential insight available in other jurisdictions. The information it shared was the same information it had asked for from its experts after receiving their advice that they could not form an opinion on the merits of the Hydro claims. The Coalition found this information helpful in understanding why its experts were facing challenges and it fully expected the Board also would find it helpful in assessing the reasonableness of the Coalition's choices.

The Coalition would note that the information provided served an additional purpose in highlighting a key potential pre-filing requirement for future proceedings. Based on discussions with Board advisers and staff over the course of the ongoing process reform dialogue, our clients have formed the impression that the Board would welcome advice on how to improve pre-hearing filing with a goal of achieving a more probing and efficient hearing process.

¹¹ Coalition letter of April 28, 2015, p. 1.

Our clients share the disappointment that they are unable to bring independent witnesses to test a proposed \$500 M in annual expenditures. They believe that the time to get started on an improved filing for the next GRA is now and that the material filed will assist in moving that discussion forward.

Our client admits to being more than a little surprised by Hydro's allegation that the Coalition is trying to adduce evidence through the back door.

There was no attempt to characterize this information as ratemaking evidence within the ambit of Rule 17(1) and 30(2). The Coalition's letter is clearly a process letter and the Board is perfectly capable of distinguishing between ratemaking evidence and "non evidentiary" information adduced for a different purpose.

La Capra – independent experts and confidential information

In terms of La Capra, Hydro argues that it is inappropriate for a consultant to go from an independent role with access to Hydro's information to providing advice to an Intervenor who is clearly adverse to Manitoba Hydro and who unsuccessfully sought access to that same confidential information.

With respect, our client believes that Manitoba Hydro misunderstands the role of independent experts. The Coalition fully expects that any individual it retains will meet the dual criteria of being expert in their respective field and of providing independent advice based upon the evidence. Indeed, the Coalition often hires experts such as Mr. Harper or La Capra who have experience working with industry, government and consumers with the expectation that this will enhance the perception of their independence.

While Hydro is certainly free to retain experts for more partisan purposes, an express element of any discussion the Coalition has with its experts is the importance of providing their own expert views and not catering to the positions of the client. The role of La Capra does not change when it is hired by the Coalition. It is still obliged to provide independent advice to the Coalition based upon the evidence.

The Coalition would note that it is not uncommon for independent witnesses to be retained by different parties in different processes with the expectation that any information obtained as a result of previous retainers would be kept confidential. As just one example a number of years ago, CAC Manitoba retained Mr. Philippe Dunsky to provide independent advice to the PUB on issues related to low income energy efficiency. In the course of that proceeding, he was exposed to confidential information related to CAC Manitoba.

Shortly after that hearing, he was retained by Manitoba Hydro and then by the Provincial Government in which he was undoubtedly exposed to confidential information possessed by both those organizations. Mr. Dunsky was then retained by the GAC and CAC Manitoba for the purposes of the 2013 GRA hearing and the NFAT. It was understood between Mr. Dunsky, CAC Manitoba and GAC Manitoba that no confidential information related to Manitoba Hydro or the Province would be shared.

To similar effect, experts from the Intergroup firm work closely with Manitoba Hydro in environmental proceedings related to major hydro-electric generating projects while other witnesses from the Intergroup firm work closely with the Manitoba Industrial Power Users Group on issues related to hydro rate applications. There can be no doubt members of this firm are exposed to confidential information relating to hydro and to industrial producers. There also can be no doubt that these individuals exercise their professional integrity and maintain these confidences.

Hydro appears to imply that the Coalition is using La Capra to obtain access to confidential information which it could not otherwise access. Such a suggestion does a disservice to the facts, to the professional reputation of the Public Interest Law Centre and to the professional reputation of La Capra.

Hydro is well aware that legal counsel for the Coalition was offered access to confidential hydro filings during the NFAT process but declined due to ethical concerns. Hydro is well aware that counsel for the Coalition has received confidential Hydro information in the past, provided that information under seal to the PUB and expressly declined to use them in past proceedings. Hydro also is well aware of the stellar reputation of the La Capra firm.

La Capra – the practical realities

Manitoba Hydro also suggests that Mr. Cochis and Mr. Kordonis should be disqualified from providing independent advice to the Coalition based upon their roles in the NFAT.

Hydro correctly observed that the Coalition indicated during the pre-hearing that the witnesses in the NFAT hearing would not be the witnesses in the Hydro GRA. Although not noted by Manitoba Hydro, the Coalition also commented in its letter of February 5, 2015 that “the core analysis will not be done by either Mr. Peaco or Mr. Athos.” This is still the case. The Coalition will rely upon Mr. Cochis and Mr. Kordonis. Neither individual testified during the NFAT hearing.

In terms of their work during the NFAT:

- Dimitrios Kordonis worked on the transmission technical appendix of the report which focused on reviewing and assessing the impact of the proposed transmission enhancements proposed by MH in its NFAT filing
- Alex Cochis reviewed the export contracts related to the NFAT and contributed to the technical appendix related to those agreements
- Neither Mr. Cochis nor Mr. Kordonis were witnesses in the NFAT

Assessing the reasonableness of Hydro's transmission positions in the NFAT and the financial benefits derived from their commercialization as well as evaluating the export contracts is unrelated to the assessment of the sustaining capital expenditures.

We are advised by La Capra that “neither Mr. Kordonis nor Mr. Cochis relied upon any

confidential information from the NFAT in their evaluation of the issues in this case.” Mr. Kordonis and Mr. Cochis also indicate that:

We fully understand that we are bound by the confidentiality agreements that we executed in the NFAT case and, as we always do, will honour those agreements.

As the PUB will be aware, there is a tight market for sustainable capital expertise. The Coalition was fortunate to be able to retain experts of the quality of La Capra. The Coalition information requests have already exposed meaningful challenges in Hydro's capital expenditure process. The hearing would greatly benefit from La Capra's continued analytic support.

The Delay in Filing the Coalition Budget

Manitoba Hydro quite correctly notes that the Coalition did not file a revised budget on February 20, 2015. However, it fails to share its knowledge of any subsequent discussions relating to the challenges the Coalition was experiencing with its budget.

The failure to file a revised budget on February 20, 2015, is my responsibility. It was simply an oversight given many competing demands. When the Coalition became aware of this oversight in March 2015, it offered an apology.

The challenge for the Coalition by early March, 2015 was in determining what the La Capra budget would look like and whether or not Dr. Booth would be called to give evidence. While the original La Capra placeholder budget was premised upon an estimate of \$80,000 US, the lack of access to Hydro models meant that if evidence was to be filed, the budget would have to be much larger.

Delays in the filing of sustainable capital information responses compounded the challenges in developing an estimate. As noted in the Coalition email to Manitoba Hydro of March 15, 2015:

Dear Odette and Brent:

We had hoped to finalize our La Capra budget this week.

One of the challenges is that because of the delay in the provision of the information responses, we do not have a handle on the work remaining to be done or whether further motions will be necessary. Unless we are mistaken, less than 20% of the ir responses relating to La Capras questions have been filed.

Once we have received the responses and completed our additional information requests, we can turn our minds more fully to the finalization of the budget. I am sorry for the delay in responding to your request. BW

After receiving the first round information responses and noting the dearth of substantive information provided, the dilemma then became whether the Coalition could even file evidence or whether a much smaller budget should be presented. As noted in a Coalition email of April 6, 2015:

We will file a revised GRA budget after reviewing second round information requests. Sadly, it may be that the motion of Brent is not necessary. Without casting stones, there is not currently a robust record on which to file evidence. BW

The Coalition also provided periodic updates to PUB counsel about ongoing challenges in developing a budget estimate.

While the Coalition acknowledges my error in failing to provide an estimate on February 20, 2015, it strongly disagrees with any suggestion by Manitoba Hydro that it was demonstrating any disrespect to the PUB process.

The Coalition also is unclear of what, if any, prejudice Hydro has suffered. The Coalition is free to retain any experts for assistance it wishes. However, those experts cannot testify nor can the Coalition receive intervenor funding for their advice in the absence of a Board Order. The risk in terms of a cost award is borne by the Coalition and La Capra.

Issues related to La Capra CVs and blended fee

The CVs of the independent La Capra experts will be filed tomorrow. It was my oversight that they were not filed at an earlier date.

Our clients believe the blended fee for La Capra is entirely appropriate and consistent with the approach taken with past witnesses such as Mr. Dunsky. It allows the consulting firm in question to provide optimal service at a price that is intended to respect PUB tariffs.

We suspect the fee sought by La Capra is a lower fee than charged for the NFAT hearing. We would note in the event that expert evidence is required for future proceedings, those hourly rates are likely to exceed PUB tariff rates.

The Evidence of Ms Lee

Manitoba Hydro implies the Coalition and MIPUG were attempting to side step the orderly hearing process through the retention of Ms Lee. Hydro's concern appears to be with both the choice to present Ms Lee as a witness and with the request by the Coalition that consideration be given to funding her evidence.

The Coalition acknowledges that it did not present a budget for Ms Lee at the pre-hearing conference and simply said it would support MIPUG as required. The Coalition did not provide a budget because it expected that alternate arrangements would be made either through MIPUG or perhaps through Board assistance. This is consistent with the normal practice of the Coalition and MIPUG to divvy up responsibility for certain key issues,

The Coalition notes the correspondence of Mr. Hacault dated May 8, 2015 outlining its compliance with PUB direction. It also observes clear evidence of a dialogue between PUB Counsel, MIPUG and Manitoba Hydro relating to the potential of an agreed Statement of Facts on depreciation issues.

Flowing from the pre-hearing conference, the PUB Order and correspondence related to the potential for an Agreed Statement of Facts, it was clear to the Coalition that MIPUG was likely to retain a depreciation expert such as Ms Lee. Based on access to the same information, the Coalition finds it difficult to fathom that Hydro was surprised by her retention.

In terms of the apparent allegation that the Coalition sought to sidestep an orderly process in terms of seeking Intervenor funding, the Coalition begs to differ. While Ms Lee has a significantly longer relationship with MIPUG, her first contact with the Coalition was less than a week before her evidence was filed.

The events relating to the retention of Ms Lee and the proposed budget revision came together in a very short time period in April with Ms Lee being interviewed by the Coalition on the Tuesday, instructions being sought on the Wednesday, a draft budget being prepared and shared on the Thursday and evidence being filed on the Friday. The evidence focused on policy questions consistent with the clear intent of the PUB to avoid an extensive technical discussion similar to that presented by Mr. Kennedy during the 2013 GRA.

The Coalition believes it would be erroneous to suggest there was any attempt to surprise Hydro or side step the hearing process. In terms of Ms Lee, the Coalition made a sincere effort to bring an important witness to the hearing when prior plans proved untenable. This is a unique event which is unlikely to be repeated. Administrative tribunals are gifted with appropriate flexibility to address such cases.

The Qualifications of Ms Lee

The Coalition does not believe Hydro's challenge to the qualifications of Ms Lee is credible. Ms Lee has over 30 years of distinguished public service in which she was relied upon to provide expert advice and evidence in Florida. She is a named co-author of a leading depreciation manual and has instructed on the subject. While Hydro is free to challenge her expertise in a *voire dire* at the hearing, her credentials certainly place her on an equal or higher footing than Mr. Kennedy.

Information Requests

Hydro objects to the presentation of certain materials to the MIPUG witness during information requests. Strangely, Hydro does not object to a similar technique being used in information requests posed to the GAC by the Coalition.

The Coalition believes Hydro's commentary regarding information requests is misplaced and that the Coalition's, conduct is consistent with well established practice before this tribunal.

The Coalition notes that it is highly unusual for a party to object to a question posed to another party. It is certainly open to MIPUG or the GAC to refuse to answer the information request or to refuse to incorporate document into their information request on the grounds that they are not familiar with the document or they do not consider it relevant to a matter in issue. In those circumstances, the document does not become part of the evidentiary record. Rule 30(2) makes it clear that it is only the answer to the information request that becomes evidence.

The PUB is an administrative tribunal with its own unique practice. Historic practice before the tribunal includes a number of circumstances where parties may attempt to introduce documents or calculations to the record. During the discovery process, these have involved:

- reference to media articles in information requests (we have seen this undertaken by the PUB and intervenors)
- reference to learned studies or the practice and findings of other tribunals in information requests (we have seen this undertaken by intervenors including the Coalition)

During the oral evidence portion of the hearing, these have included:

- the presentation of calculations in a book of documents during cross examination (we have seen this undertaken by the PUB)

- the presentation of calculations in an exhibit during cross examination (this is commonly undertaken by legal counsel for the Coalition but only after having the calculations confirmed by the witness)
- the presentation of prior writings of an expert witness during cross examination (this is commonly undertaken by legal counsel for the Coalition to impeach inconsistent statements)
- the presentation of learned articles during cross examination (this is commonly undertaken by legal counsel for the Coalition in circumstances where the expert acknowledges familiarity with the text)

The Coalition also notes that from time to time, Manitoba Hydro in the course of oral evidence has made reference to written reports which were not pre-filed. A notable example from a few years ago involved references to an industry trade publication on rising construction costs.

These examples are consistent with historic regulatory practice. The PUB is a master of its own practice. The Hydro argument is devoid of merit.

Conclusion

Our client has asked us to refrain from commenting upon the tone of Hydro's letter.

We would simply observe that rate payers are facing significant rate pressures relating to choices made by Hydro. The Coalition seeks to test the foundation for these rate pressures in key areas including sustaining capital and depreciation. Its budget is designed to provide necessary support for meaningful consumer participation.

Thank you for the opportunity to respond to Manitoba Hydro.

Yours truly,


BYRON WILLIAMS
DIRECTOR

BW/sk

cc. The Coalition
Manitoba Hydro
All other interested parties