

August 11, 2014

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

Dear Mr. Singh:

Re: MPI 2015 GRA – Motion to compel production of information requests

CAC Manitoba is in receipt of the first round information responses of Manitoba Public Insurance (MPI) in which the crown monopoly declined to answer many of the information requests presented by Public Utilities Board (PUB) advisors and by interveners.

The refusal by MPI to respond to relevant and material information requests raises four fundamental concerns:

- it deprives the PUB of the information required to set “just and reasonable rates” in the public interest;
- it deprives interveners of the ability to fully participate in this proceeding and materially prejudices their ability to prepare expert evidence in a timely manner;
- it causes inordinate expense and delay; and,
- it suggests a surprising lack of insight into the regulatory process by MPI.

Relief Sought

Given its concern that the unprecedented actions by MPI will fundamentally impair the ability of the PUB to determine whether the proposed rate increase is just and reasonable, CAC Manitoba seeks the following relief:

- Direction from the Board compelling MPI to produce full and adequate responses to all of CAC Manitoba's first round IRs as well as the first round responses of the PUB advisors;¹
- A determination by the Board that MPI has not complied with Rule 16(a) of the PUB Rules of Practice and Procedure (Rules) given its failure to provide specific reasons supporting its contention that many of the information requests posed by CAC Manitoba and the PUB advisors were not relevant;
- Amendments to the current schedule given the delays caused by the inadequacies in the first round IR responses; and,

¹ As required by Section 15(1)(a) of the PUB Rules of Practice and Procedure. CAC Manitoba has not reviewed the information requests of other interveners but recognizes the same relief may well be applicable to their information requests.

- Direction from the Board that all costs related to the inadequate IR responses by paid by MPI.

In the sections below, CAC Manitoba addresses the specific relief sought and the basis for this relief.

Overview

On June 16, 2014, Manitoba Public Insurance filed its general rate application (2015 GRA) with the Public Utilities Board (PUB). The Crown monopoly proposed a 3.4% overall Basic Insurance rate increase effective March 1, 2015.

On July 9th, 2014, the PUB held a pre-hearing conference to consider applications for intervener status and set a tentative schedule for the MPI 2015 GRA. Responses to the first round information requests of the majority of interveners were due on July 31, 2014.

In late July 2014, a letter was distributed on behalf of Mr. Dan Guimond to the PUB and all interveners advising that MPI had made a unilateral decision to respond only to those first round IRs which it deemed relevant. According to the letter, all other information requests would receive the following boilerplate response (the boilerplate):

Basic insurance rates are set prospectively based on pro forma financial projections of expenses and revenues and actuarial modeling. This information request has no bearing on the reasonableness of the financial projections or actuarial modeling used to determine rates effective March 1, 2015. This is consistent with the Corporation's understanding of the PUB's mandate as stated in The Crown Corporations Public Review and Accountability Act and by the Court of Appeal. Considerable information of an operational nature was provided in the filing, though rate setting does not entail an operational review or audit of Manitoba Public Insurance. For these reasons, the Corporation declines to incur the additional staff effort and operating expenses associated with responding to this information request.

As a result of the unilateral choice by MPI, at least 130 of CAC Manitoba's first round IRs and/or portions of their IRs received the boilerplate paragraph in lieu of a response. This figure does not take into account IRs that were unanswered for other reasons. It also does not take into account the unanswered IRs of the PUB and other interveners which, according to the MPI letter, made up approximately 40% of total IRs.

Jurisdiction of the Board

Just and Reasonable Rates – Regulatory Precedent

MPI takes the peculiar position that the Board's jurisdiction is limited to “the reasonableness of the financial projections or actuarial modeling”. However, based upon prior determinations of this Board, the statutory scheme and many decades of jurisprudence, it is clear that the jurisdiction of the Board is much broader.

By virtue of s. 26 of the *Crown Corporation Public Review and Accountability Act* as well as s. 77 of the *Public Utilities Board Act*, the jurisdiction of the PUB is to “fix just and reasonable rates” in the public interest. As noted in *PUB Order 5/12*², the concept of public interest in these circumstances includes a consideration of both: 1) the financial health of the utility as well as 2) the impact of rates on consumers.³

The weighing of the interests of the utility and consumers is not to be conducted within a vacuum, but rather, must include a broad consideration of the makeup and the impact of rates in both the short and long term. This requires an analysis of appropriate cost allocation, the necessity and prudence of projected incurred costs as well as the revenue requirements of the Corporation:

*...the final rate order should address both short-term test year revenue requirements and the long-term issues facing MH that are of concern to the PUB...*⁴

*The Board's role ... must involve ensuring that MH's forecasts are reasonably reliable, ensuring that actual and projected costs incurred are necessary and prudent, assessing the reasonable revenue needs of the Corporation in the context of the overall general health of MH, determining an appropriate allocation of costs between classes, and setting just and reasonable rates in accordance with statutory objectives.*⁵

This broad scope of review has been highlighted by our Court of Appeal in *Consumers' Association of Canada (Man.) Inc. et al. v. Manitoba Hydro, Electric Board* (leave application):⁶

*The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate.*⁷

The appropriateness of this broad scope of inquiry is supported by findings from the Supreme Court of Canada and the Federal Court of Appeal:

² PUB Order 5/12, *A Final Order With Respect to Manitoba Hydro's Application for Increased 2010/11 and 2011/12 Rates and Other Related Matters*.

³ PUB Order 5/12, *A Final Order With Respect to Manitoba Hydro's Application for Increased 2010/11 and 2011/12 Rates and Other Related Matters*, pg 25:

Beyond debate is the Board's jurisdiction and mandate to set just and reasonable rates for MH that are in the public interest. The public interest includes consideration of the fiscal health of the Utility as well as the impact of rates on consumers.

See also pg 26:

... the Board's jurisdiction to fix just and reasonable rates carries with it the need to meet the general public interest made up of (1) the interests of ratepayers and (2) the financial health of the utility.

See also *Consumers' Association of Canada (Man.) Inc. et al. v. Manitoba Hydro, Electric Board*, 2005 MBCA 55, para 65 [*CAC v Hydro*]:

The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest.

⁴ PUB Order 5/12, *A Final Order With Respect to Manitoba Hydro's Application for Increased 2010/11 and 2011/12 Rates and Other Related Matters*, pg 26.

⁵ PUB Order 5/12, *A Final Order With Respect to Manitoba Hydro's Application for Increased 2010/11 and 2011/12 Rates and Other Related Matters*, pg 27.

⁶ 2005 MBCA 55, paras 63, 65.

⁷ *Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro, Electric Board*, 2005 MBCA 55, para 63.

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested.⁸

*To put the matter another way, when the cost of service methodology is used to determine just and reasonable tolls, if the Board does not permit the Mainline to recover its costs because it has understated the Mainline's cost of equity capital, the Mainline will be unable to earn a fair return on equity. The tolls will therefore not be just and reasonable from the Mainline's point of view. On the other hand, the tolls must also be just and reasonable from the point of view of the Mainline's customers and the ultimate consumers who rely on service from the Mainline. Therefore, customers and consumers have an interest in ensuring that the Mainline's costs are not overstated. As respondents' counsel pointed out, there are numerous costing issues that may be subject to challenge. Questions may arise about, among other things, **the allocation of costs between the Mainline and other divisions of the appellant; whether costs have been, or are being, prudently incurred; and whether the Mainline's compensation plans are reasonable.** And, specific to this appeal, customers and consumers have an interest in ensuring that the Mainline's cost of equity is not overstated.⁹ (emphasis added)*

Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed.¹⁰

The CCPRAA provides a broad ambit for inquiry

The broad ambit of inquiry related to the fixing of just and reasonable rates is reinforced by consideration of the statutory scheme. Under the authority of *The Crown Corporations Public Review and Accountability and Consequential Amendments Act*,¹¹ the Board may consider the following factors:

26(4)

⁸ *Enbridge Gas v Att. Gen. of NB*, 2012 NBQB 267 (CanLII) para 12, citing *Northwestern Utilities Ltd. v Edmonton (City)*, 1929 CanLII 39 (SCC), [1929] SCR 186. Note that *Northwestern Utilities Ltd* currently appears to enjoy a monopoly in its service area. It is not clear whether that was the case at the time of the decision. Note also that *Enbridge 2012* was appealed in *Enbridge Gas New Brunswick Limited Partnership et al v The Attorney General in and for the Province of New Brunswick*, 2013 NBCA 34 (CanLII), however, this appeal does not impact its use in this motion.

⁹ *Transcanada Pipelines Ltd v National Energy Board*, 2004 FCA 149 (CanLII), 2004 FCA 149, para 34, cited with approval in *Enbridge Gas v Att Gen of NB*, 2012 NBQB 267 (CanLII), para 13. Note that *Enbridge 2012* was appealed in *Enbridge Gas New Brunswick Limited Partnership et al v The Attorney General in and for the Province of New Brunswick*, 2013 NBCA 34 (CanLII), however, this appeal does not impact its use in this motion.

¹⁰ *Atco Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4, 1 SCR 140, para 62 (per Bastarache, SCJ, for the majority). Note that *Atco Gas & Pipelines Ltd.* is a monopoly service provider.

¹¹ *The Crown Corporations Public Review and Accountability and Consequential Amendments Act*, SM 1988-89, c 23 [*The Crown Corp Act*].

(a) ...

(i) the amount required to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs;

(vii) any other payments that are required to be made out of the revenue of the corporation,

(viii) any compelling policy considerations that the board considers relevant to the matter,

(ix) any other factors that the board considers relevant to the matter; and

(b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the board, have an interest in the matter.¹²

Further, in the case of a review of MPI's rates for service:

*The Public Utilities Board may take into consideration, in addition to factors described in subsection (4), **all elements of insurance coverage affecting insurance rates.***¹³
(emphasis added)

This evidence may be procured through MPI's original filing, the IR process, cross examination, intervener evidence, oral testimony, or, where necessary, through an order by the PUB requiring the production of documents relating to the proceeding:

*The board, except as herein otherwise provided, as respects the attendance and examination of witnesses, the amendment of proceedings, the production and inspection of documents, the enforcement of its orders, the payment of costs, and all other matters necessary or proper for the due exercise of its powers, or otherwise for carrying any of its powers into effect, has all such powers, rights, and privileges as are vested in the Court of Queen's Bench or a judge thereof.*¹⁴

¹² *The Crown Corporations Public Review and Accountability and Consequential Amendments Act*, SM 1988-89, c 23, s 26(4).

¹³ *The Crown Corporations Public Review and Accountability and Consequential Amendments Act*, SM 1988-89, c 23, s 26(5).

¹⁴ *The Public Utilities Board Act*, CCSM c P280, s 24(4).

...

The board, or any person authorized by the board to make inquiry or report, may, where it appears expedient, ...

(c) require the production of all books, plans, specifications, drawings and documents;¹⁵

...

(1) Where, in an application, intervention, motion or response to an information request, a party refers to a document which the party intends to rely on in the proceeding, that party shall attach a copy of that document to its evidence.

(2) The Board, on its own initiative or upon motion by any party may order any person or party in a proceeding to produce any document relating to the proceeding.

(3) Any party who fails to comply with an order pursuant to subsection (2) shall be deemed to be in breach of the said order.^{16 17}

The Board's power to compel evidence is further supported in *Public Utilities Board v Manitoba Public Insurance Corp et al*,¹⁸ where the Court of Appeal found that the PUB has the authority to order the disclosure of specific information relating to a rate application:

... In fact, the PUB has authority to require that the MPIC disclose specific information in relation to a specific rate application. I note, for example, the authority found in ss. 24(4) and 27(2)(c) of The PUB Act and s. 12 of the Rules of Practice and Procedure of the PUB (see Appendix A). The PUB could exercise that authority to order the disclosure of specific information and/or documentation and then the MPIC would be obligated to respond.¹⁹

The Flawed Objection of MPI

Arbitrary and inconsistent

The July 31, 2014 letter from MPI along with its limited IR responses demonstrate a fundamental misreading of the PUB rules, statutes and caselaw²⁰ as well as an impoverished and incomplete understanding of the rate setting process.

The unilateral decision to limit responses to those requests deemed by MPI to relate to "the reasonableness of the financial projections or actuarial modeling" has resulted in the arbitrary application²¹ of inappropriate parameters. These parameters are inconsistent with the PUB's

¹⁵ *The Public Utilities Board Act*, CCSM c P280, s 27(2).

¹⁶ *Public Utilities Board Rules of Practice and Procedure*, s12. See also *Public Utilities Board v Manitoba Public Insurance Corp et al*, 2011 MBCA 88, para 48.

¹⁷ See also *Public Utilities Board v Manitoba Public Insurance Corp et al*, 2011 MBCA 88, para 48.

¹⁸ 2011 MBCA 88.

¹⁹ *Public Utilities Board v Manitoba Public Insurance Corp et al*, 2011 MBCA 88, para 48.

²⁰ See "Jurisdiction of the Board" above.

²¹ See, for example, CAC (MPI) 1-5, 1-30, 1-50, 1-51, 1-60 which represent a few of the 2015 GRA IRs posed by CAC Manitoba which directly impact basic rates as well as MPI's financial forecasting. Even assuming the more restrictive

mandate and jurisdiction as well as past practice.²²

Failure to meet onus

According to the PUB Rules of Procedure, MPI is required to provide full and adequate response to each information request that it receives. Where it refuses to respond based on allegations of irrelevance, MPI is required to provide specific reasons:

15. (1) Subject to Subsection (2), where an information request has been directed to a party and served on that party in accordance with the Board's directions, the party shall:

a) provide a full and adequate response to each information request on a separate page or pages, or, by agreement between the parties by electronic means; and

16 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;

Providing only a boilerplate paragraph, MPI has failed to respond to approximately 40% of the total number of first round IRs. This paragraph does not constitute a full and adequate response. In accordance with the Rules, the onus falls on MPI to provide specific reasons outlining why it believes each IR is not relevant.

The provision of a boilerplate statement does not constitute specific reasons as intended by the Rules. As such, MPI has failed to meet its onus. In the respectful view of CAC Manitoba, given the failure of MPI to comply with the intent of Rule 16(a), it should be directed to respond to all first round IRs filed in the 2015 GRA for which the boilerplate response was provided.²³

Relevance

According to the Supreme Court of Canada in *R v J-L.J.*,²⁴ "the concept of relevance provides a low threshold".²⁵ In order to meet this threshold, one must demonstrate that the evidence at issue "has a logical tendency to contribute to a finding about a material fact."²⁶

definition of just and reasonable applied by MPI these information requests clearly require a response. However, MPI declined to do so.

²² See, for example, CAC (MPI) 1-6, 1-7, 1-13, and 1-45 which represent just a few of the 2015 GRA IRs posed by CAC Manitoba which have historically received responses through the IR process and which MPI has refused to respond to.

²³ While CAC Manitoba has not specifically reviewed the information requests of other interveners, it suspects this position also should apply to their information request.

²⁴ [2000] 2 SCR 600.

²⁵ *R v J-L.J.*, [2000] 2 SCR 600, para 47. See also *R v Candir* [2009] OJ No 5485 (CA), para 48:

The threshold of relevance is not high.

²⁶ David Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law Inc., 2011), pg 29:

Relevance need not establish a material fact on its own. It is enough to pass the relevance threshold to

Within the current proceedings, a relevant information request is one that might logically contribute to a finding about a material fact relating to the determination of whether the proposed rates are just and reasonable.²⁷ As the Board held in *Order 5/12*, the determination of whether rates are just and reasonable may involve consideration of:

- whether forecasts are reasonably reliable,
- whether the actual and projected costs incurred are necessary and prudent;
- the reasonable revenue needs of the Corporation in the context of the overall general health of MH;
- an appropriate allocation of costs between classes; and.
- setting just and reasonable rates in accordance with statutory objective.

The criteria set out in s. 26(4) of the *CCPRAA* provide further guidance to the broad areas of relevant inquiry.

By failing to provide specific reasons supporting the contended irrelevance of the IRs in question, MPI has failed to meet its onus under the Rules. This failure gives rise to a presumption that all IRs should receive full and adequate responses.

The IRs presented by CAC Manitoba and those provided by PUB advisors logically contribute to the determination of just and reasonable rates and deserve a full and adequate response.²⁸ Information requests of particular concern are set out in the attached spreadsheet (Appendix A).

Amend schedule

MPI's failure to provide full and adequate responses to approximately 40% of first round information requests has resulted in a deficient record. As a consequence of the unprecedented behaviour of MPI, the foundation for proper decision making does not exist. Moreover, the failure of MPI to provide relevant information responses has impaired both the ability of CAC Manitoba to determine whether expert evidence is required as well as the preparation of any evidence that might be required.

As one practical example, a determination of whether expert evidence is required would ordinarily be made by CAC Manitoba after review of the first round information requests.

admissibility that the evidence has a logical tendency to contribute to a finding about that material fact.

See also *R v J-L J*, [2000] 2 SCR 600, para 47:

Evidence is relevant "where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence" (D. M. Paciocco and L. Stuesser, The Law of Evidence (1996), at p. 19).

²⁷ Note that the threshold required in demonstrating this relevance is a low one, *R v J-L J*, [2000] 2 SCR 600, para 47.

²⁸ CAC Manitoba has not reviewed the information requests of other intervenors.

Given the current state of the record, CAC Manitoba is not in a position to give direction to its experts and is unlikely to be in a position to do so until proper responses to first round information requests are received. Given the wide gaps in the record, it is not unreasonable to expect that CAC Manitoba will not have received full and adequate response to its first round information requests until the second week of September.

In order to protect the integrity of the 2015 MPI GRA process, it is the respectful view of CAC Manitoba that MPI must be compelled to meet its obligations under the Rules and must provide full and adequate response to all outstanding first round IRs.

The provision of proper responses will require additional time on behalf of MPI, interveners and the PUB. In order to provide for these additional efforts, CAC Manitoba would propose the following measures:

- MPI provide full and adequate response to all outstanding first round IRs;
- The PUB and interveners be provided the opportunity to pose third round IRs relating to MPI's outstanding IR responses from the first round; and,
- The current schedule be amended in recognition of the delays caused by the outstanding IR responses and the prejudice to intervenor evidence that has resulted.

Based on the current timetable provided in Board Order No. 81/14, CAC Manitoba would recommend the following updated schedule:

14/08/14	MPI to be in receipt of second round information requests relating to answered information requests	Thursday
22/08/14	MPI to provide responses to first round, unanswered information requests	Friday
23/08/14	MPI to publish reminder notice and any amendments to application	Saturday
08/09/14	MPI to file responses to second round information requests	Monday
08/09/14	MPI to file and serve any further amendments to application, if required	Monday
08/09/14	MPI to be in receipt of third round information requests	Monday

	relating to delayed first round information requests	
18/09/14	MPI to file responses to third round information requests	Thursday
26/09/14	Intervenors to file pre-filed testimony to all parties	Friday
26/09/14	Parties to file any motions	Friday
01/10/14	Intervenors to be in receipt of information requests from all parties	Wednesday
01/10/14	Board to hear all motions	Wednesday
07/10/14	Intervenors to provide responses to all information requests	Tuesday
07/10/14	Board decision on motions, meeting among Counsel, if required	Tuesday
10/10/14	MPI to file rebuttal evidence	Friday
15/10/14	Hearing commences	Wednesday

Costs

As a result of the failure by MPI to provide answers for a significant number of CAC Manitoba's IRs, Counsel and experts for CAC MB have been required to expend significant additional time responding to this deficiency. These efforts have included:

- Client briefing;
- Expert briefing;
- A thorough review of all IRs that were not responded to, including a review of MPI's historical treatment of similar IRs; and,
- The drafting of a lengthy motion and appendix.

CAC Manitoba requests that the PUB, as per its authority under section 45 of the Rules, direct MPI to cover all additional costs associated with its inadequate treatment of first round IRs.

Conclusion

Manitoba Public Insurance is a crown corporation that acts within a provincial monopoly. In the absence of a competitive market, the primary protection for ratepayers is the PUB process.

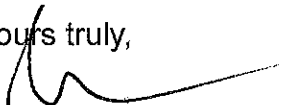
In order to give meaning to this process, the PUB and interveners must have access to relevant information.

MPI has failed to meet its onus under the Rules by failing to provide full and adequate response to approximately 40% of first round IRs and by neglecting to provide specific reasons for this failure. In order that the deficiencies of MPI be remedied, CAC Manitoba requests the following relief:

- Direction from the Board compelling MPI to produce full and adequate responses to all of CAC Manitoba's first round IRs as well as the first round responses of the PUB advisors;
- A determination by the Board finding that MPI has not complied with Rule 16(a) of the PUB Rules of Practice and Procedure by failing to provide specific reasons supporting its contention that many of the information requests posed by CAC Manitoba and the PUB advisors were not relevant;
- Amendments to the current schedule given the delays caused by the inadequacies in the first round IR responses; and,
- Direction from the Board that all costs related to the inadequate IR responses be paid by MPI.

Thank you for the opportunity to make these submissions and for your consideration of these comments.

Yours truly,



MEGHAN MENZIES
Counsel to CAC MB



BYRON WILLIAMS
Counsel to CAC MB

cc. CAC Manitoba
Interveners
PUB Counsel
Manitoba Public Insurance

Enclosures