

Motion to Compel Evidence

*Submission of Consumers'
Association of Canada (Manitoba)
August 22, 2014*

Relief Sought

- Provide full and adequate response
- Determination initial response of MPI not in compliance with Rules 15 and 16
- Amend Schedule
- Costs

Key Issue

- The MPI argument **strikes at the heart** of an essential regulatory role
- The MPI claim is inconsistent with over one hundred years of precedent:
 - *Nevertheless one standard of reasonable rates can be fairly said to outrank all others in the importance attached to by experts and by public opinion alike - the standard of cost of service, often qualified by the stipulations that the relevant cost is necessary cost or cost reasonably or prudently incurred. . . . But the cost standard has the widest range of application. . . .*
 - Bonbright, *Principles of Public Utility Rates* Tab 14, p. 70, see also (2nd ed), p. 109.
 - *A cost standard of rate making has been most generally accepted in the regulation of the levels of rates charged by private utility companies. But even more significant is the widespread adherence to cost, or to some approximation of cost, as a basis of rate making under public ownership.*
 - Bonbright, *Principles of Public Utility Rates* Tab 14, p. 70,
- Inadvertent Red Herrings

Points of Agreement

- Statutes read harmoniously
- The PUB has expertise in rate setting:
 - “The setting of rates, and the **elements that are to be considered in doing so**, require a **specialized knowledge** and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at.” (emphasis added)
 - *CAC/MSOS v. Manitoba Hydro*, 2005 MBCA 55, para 67 (Monnin in Chambers)
- PUB has jurisdiction to compel disclosure
 - *Public Utilities Board v. Manitoba Public Insurance Corp. et. al.*, 2011 MBCA 88

Cabinet Prescribes Rates after the PUB Approves

- *The Manitoba Public Insurance Corporation Act, s. 33(1) (c), 33(1.1) (Tab 1, p 2-3),*

Rates are Approved by the PUB under *The PUB Act*

- The CCPRAA provides for a review of basic rates by the PUB **under the Public Utilities Board Act.**

Sections 26 (1), 26 2 c, and 26 (3), Tab 2, p. 6.

The *PUB* Act

- Power of PUB to compel information
 - section 24/27 (Tab 3, p. 10)
- Insight into legal standard the PUB is to apply in the rate setting process:
 - 77 – The board may, by order in writing after notice to, and hearing of, the parties interested,
 - (a) **fix just and reasonable individual rates**, joint rates, tolls, charges, or schedules thereof, as well as commutation, mileage, and other special rates that shall be imposed, observed, and followed thereafter, by any owner of a **public utility** wherever the board determines that any existing individual rate, joint rate, roll, charge or schedule thereof or commutation, mileage, or other special rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential;
 - (Tab 3, p. 11)

Role of the PUB as Modified

- approving (not fixing)
- just and reasonable rates
- for MPI (not a public utility)

The Radical Claims of MPI

- “the PUB erred in indicating its role is to ensure actual and projected costs incurred are necessary and prudent”
 - (Motion Brief, page 12 of 20)
- “The role of the PUB is not to determine if these costs are just and reasonable.”
 - August 18 Response to Information Request PUB 1-75 (a, b), p. 13.

The Radical Claims of MPI (cont'd)

- The highly unusual claim of MPI is inconsistent with:
 - The well established practices of the PUB and judicial consideration of these practices
 - The well established practices of other Canadian regulators
 - Well established regulatory principle
 - Over one hundred years of jurisprudence
 - The language of CCPRAA

Well Established Precedent of PUB

- Well established precedent of PUB:
 - Ensuring forecasts are reasonably reliable
 - Ensuring that actual and projected costs incurred are necessary and prudent
 - Assessing the reasonable revenue needs of the Corporation (Basic) in the context of the overall health of the Corporation
 - Determining an appropriate allocation of costs between classes
 - Setting just and reasonable rates in accordance with statutory objectives
 - (Board Order 5/12 (Hydro), Tab 4, p. 15

The Fatal Concession of MPI

- “MPI agrees with all points but one. . . MPI respectfully considers the PUB erred in indicating its role is to ensure actual and projected costs incurred are necessary and prudent”
 - (Motion Brief, page 12 of 20)
- A legitimate but fatal concession

Mandate for Efficiency

- “The Board continues to have significant concerns about the Corporation’s **operating expenses**, and finds that it must **control** its expenses. The Board also has concerns with respect to the Corporation’s **staffing levels**. The Board requires that the Corporation review its efficiencies on a go-forward basis, take steps to rein in its operating expenses and file with the Board staffing and cost control results at the next GRA.” (emphasis added)
 - (Board Order 151/13, Tab 5, p. 18)
- “The Board requires that the Corporation **review its efficiencies** and directs MPI to file at next year’s GRA a five-year IT strategic plan, including a cost-benefit analysis, justifying its current and future IT expenditures.” (emphasis added)
 - (Board Order 151/13, Tab 5, p. 18)

Mandate for Efficiency (cont'd)

- “The Board orders that MPI file, at the next GRA, a benchmarking framework, along with benchmarking indicators to which the Corporation intends to be held accountable.”
 - (Board Order 151/13, Tab 5, p. 18)
- “The Board finds that MPI has not fully established that the current portfolio of Road Safety expenditures is prudently and reasonably optimized to maximize value to ratepayers or to minimize economic and social costs of collisions. The Board orders that MPI provide certain specific Road Safety information and analyses at next year’s GRA hearing.”
 - (Board Order 151/13, Tab 5, p. 19)

Mandate for Efficiency (cont'd)

- MPI makes management decisions
- The PUB makes rate setting approvals
- “Of course, the regulated firm that wishes to lard its executives with luxurious cars and lavish offices is still free to do so. However, the associated expenses should be borne by the company's shareholders alone.”
 - Lesser, *Fundamentals of Energy Regulation*, (2013), Tab 17, p. 84.

Manitoba Courts Acknowledge the Cost Approval Role of the PUB

- “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.” (emphasis added)
 - CAC/MSOS v Manitoba Hydro (2005), Tab 7 para 63. (Per Monnin, J.A. In Chambers), p. 30.
- “The role of the PUB under the Accountability Act is not only to protect consumers from **unreasonable charges**, but also to ensure the fiscal health of Hydro.” (emphasis added)
 - CAC/MSOS v Manitoba Hydro (2005), Tab 7 para 64. (Per Monnin, J.A. In Chambers), p. 30 see also *CMMG v PUB* [1995], paras 20 “rubber stamping” and 23 “protect consumers from unreasonable charges” cited at page 8 of the August 18, 2014 brief of MPI

Manitoba Courts Acknowledge the Cost Approval Role of the PUB (cont'd)

- “Arguably, by the Orders, the Board has gone beyond **reviewing and approving (or disapproving) Basic rates and costs**, and has made an order essentially affecting a non-Basic line of business.” (emphasis added)
 - *MPI v. PUB* (2011). Tab 9, para 51 [Freedman J.A. In Chambers], p. 39.

Consideration of Prudence is Consistent with other Regulators

- “One of the OEB's principal functions is to set “just and reasonable” rates that utilities may collect from ratepayers for utility services.”
- “The OEB's current rate-setting process establishes base rates for each distribution utility through a comprehensive review of the utility's costs as detailed in its rate application.”
 - OEB, *Energy Sector Regulation – A Brief Overview*, Tab 10, p. 42

Consideration of Prudence is Consistent with other Regulators (cont'd)

- “If the Commission decides that any of the costs claimed by the utility in its application are not reasonable or prudent, it may disallow the recovery of those costs in customer's rates.”
 - BCUC, *Understanding Utility Regulation*, (2002), Tab 12, p. 60.

Consideration of Prudence is Consistent with other Regulators (cont'd)

- “The CCAA does not grant any specific power to the PUB to assess benchmarking.”
 - MPI Motion Brief, p. 17.

Prudence and Necessity

- “Nevertheless one standard of reasonable rates can be fairly said to **outrank all others** in the importance attached to by experts and by public opinion alike - the standard of **cost of service**, often qualified by the stipulations that the **relevant cost is necessary cost or cost reasonably or prudently incurred**. . . But the cost standard has the widest range of application. . .” (emphasis added)
 - Bonbright, *Principles of Public Utility Rates* Tab 14, p. 70, see also (2nd ed), p. 109.
- A cost standard of rate making has been most generally accepted in the regulation of the levels of rates charged by private utility companies. **But even more significant is the widespread adherence to cost, or to some approximation of cost, as a basis of rate making under public ownership.** (emphasis added)
 - Bonbright, *Principles of Public Utility Rates* Tab 14, p. 70.

The Efficiency Principle

- “**Computation** and allocation of costs lies at the heart of the tasks of a regulatory agency's administration of the just and reasonable standard.” (emphasis added)
 - Goodman, Vol 1, Tab 15, p. 75.
- “A rate in a **noncompetitive market** is excessive if it is likely to produce a profit that is unreasonably high for the insurance provided or **if expenses are unreasonably high** in relation to services provided.” (emphasis added)
 - Property and Casualty Model Rating Law, vol 4, NAIC (1993) – National Association of Insurance Commissioners.
 - See also Lesser, *Fundamentals of Energy Regulation*, (2013), Tab 17, p. 84.

Principles Accepted in Canadian Law

- These Principles are well accepted in Canadian Law
 - “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.”
 - TCPL v NEB (2004), FCA, p. 89

Review of CCPRAA Reinforces Relevance

- 26(4) In reaching a decision pursuant to this Part, The Public Utilities Board may
 - (a) take into consideration
 - (i) the amount **required** to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,
 - (v) any **other reserves that are necessary for the maintenance, operation, and replacement of works 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;
- 27(3) Where the Public Utilities Board is satisfied that the circumstances of a corporation have changed substantially, The Public Utilities Board may, of its own motion or on the application of the corporation or an interested person, review an order made pursuant to this section and modify the order in any manner that The Public Utilities Board considers **reasonable and justified** in the circumstances.

Determining Relevancy

- “The concept of relevance provides a low threshold”... Does the evidence have “a logical tendency to contribute to a finding about a material fact.”
 - *R. v. J.-L.J.*, [2000] 2 SCR 600, para 47, Tab 21.
- Board Order 5/12 (Hydro), Tab 4, p. 27
 - Ensuring forecasts are reasonably reliable
 - Ensuring that actual and projected costs incurred are necessary and prudent
 - Assessing the reasonable revenue needs of the Corporation (Basic) in the context of the overall health of the Corporation
 - Determining an appropriate allocation of costs between classes
 - Setting just and reasonable rates in accordance with statutory objectives
- S. 26(4) of CCPRAA
 - (i) the amount **required** to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,
 - (v) any **other reserves that are necessary for the maintenance, operation, and replacement of works 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;

MPI Resistance to IRs Grounded in Fundamental Misapprehension of PUB Role in Setting Just and Reasonable Rates

- A frail analytic edifice undermined by a fundamental misapprehension of the law

Relief Sought

- Provide full and adequate response
- Determination initial response of MPI not in compliance with Rules 15 and 16
- Amend Schedule
- Costs

Rate regulation is the price of monopoly