

February 24, 2014

Mr. H. Singh
The Public Utilities Board
400 - 330 Portage Avenue
WINNIPEG, Manitoba R3C 0C4

Dear Mr. Singh:

**RE: MANITOBA HYDRO NFAT HEARING
RIGHT OF CROSS-EXAMINATION BY IEC COUNSEL**

Manitoba Hydro hereby provides its reply to the letter of Hill Sokalski Walsh Trippier received on Friday, February 21, 2014 with respect to the right of cross-examination by IEC Counsel in the upcoming NFAT process.

With respect to the suggestion that Rule 19 of the PUB Rules of Practice and Procedure providing guidance, we must note that the rule, as quoted in Mr. Monnin's letter specifically refers to "The procedure for **presenting evidence**". Manitoba Hydro notes that this rule has been complied with in the draft schedule in that the IEC's have been given an opportunity to present direct evidence on the content of their reports, to be cross-examined on those reports, and presumably will have the right of re-examination if requested. Rule 19 does not speak to who shall be entitled to cross-examine witnesses on their evidence and as such is not an answer to Manitoba Hydro's objection.

Manitoba Hydro submits that Rule 30 is more directly applicable to this issue. It provides that: "At hearings, parties will be afforded an opportunity to present their evidence and to examine and cross-examine witnesses..." As noted in our earlier correspondence, the IECs are not a party to the proceeding. As also noted, the PUB Rules of Practice and Procedure define "Party" as either an applicant, an Intervener and "for the purpose of these Rules, any other person whom the Board determines to be a party to a proceeding". Manitoba Hydro acknowledges that the Board has the ability to designate parties and to set its own procedure (as set out in Rule 4(1)), however in doing so should be guided by principles that are established and avoid breaking new ground. Only groups which have an interest in the outcome of the proceeding or who represent the interests of a substantial number of ratepayers can logically be said to have an "interest" in the recommendations the PUB will make to the Government and the actions the Government subsequently takes. The IEC are consultants hired because they have expertise. The IECs have ample opportunity to fulfill their designated role of providing analysis of Manitoba Hydro's NFAT filing through their reports as well as explaining their analysis during direct examination and cross-examination by Parties to the proceeding. To extend their role to advocating for their conclusions clearly goes beyond the role envisioned in the Terms of Reference and in judicial or quasi-judicial proceedings generally.

After this hearing, the IECs will presumably go on to other assignments. Whether the Plan is recommended for approval or not cannot matter to any of the IECs. If it in fact does, then they are not independent. They have some bias, or stake, in the hearing which ought to have been disclosed as it goes to the weight of their evidence.

Certainly, in civil trials, and some criminal trials, there is an expectation that experts will provide advice and assistance to the party who retained them when that party cross-examines the experts of an opposing party. However, the experts themselves never ask questions in cross-examination during a hearing. The experts are never allowed to hire their own lawyer who can then ask questions in cross-examination on the instructions, as opposed to advice, of the experts. Counsel for the IECs has offered no example of experts being permitted in a trial or a hearing to step away from their independence, retain their own counsel and weigh into the 'fray' by cross-examining on issues driven by their own interests and agendas.

Cross examination is expected to have a purpose. If the purpose of the IEC cross-examinations is to challenge the expertise of other witnesses for the purpose of enhancing or preserving the reputations of the IEC or to demonstrate that the work of the IECs is superior and ought to be preferred is, that is not a valid reason to grant them the right to cross-examine.¹ Intervenors are free to draw on the work of the IECs, but the IECs were not retained to play the role of yet another Intervenor.

With respect to the fact that the Terms of Reference do not contemplate cross-examination of parties by the IEC's, Manitoba Hydro's position is not focused solely on what the Terms of Reference do not say. In fact, Manitoba Hydro included in its submission a quote from the Terms of Reference which makes clear, in our view, the intent of the Province in establishing the role of the IECs.

"The independent expert consultant(s) shall provide a report(s) to be filed in evidence on the public record, which shall contain their analysis of the submissions filed by Hydro, with sufficient information to satisfy the Panel that the review was conducted with due diligence. The report(s) **shall not draw conclusions as to the needs for or alternatives to the Plan, which is the role of the Panel.**" [emphasis added]

It is clear from the explicit wording in the Terms of Reference that the IECs are not to take a position on the merits of the Plan, or to advance a position in respect of the fundamental questions under consideration before the Board. Their role is specifically defined to provide reports, be available for cross-examination and as a resource to legal counsel. The maxim of *expressio unius* applies to support Manitoba Hydro's position that having specifically defined

1 In Order 30/10 the PUB dealt with the role of a consultant who did not purport to represent the interests of a substantial number of ratepayers or have an interest in the outcome of the proceedings in the context of an Application for Intervenor status: "*The Board is also mindful that an apparent intention of the NYC to defend its reputation and to substantiate the validity of its conclusions is not the proper basis for intervention.*" (page 32) There exists no logic to apply a different standard to the role of an IEC.

these roles, it is proper to interpret the Terms of Reference to exclude the right of cross-examination, which is not expressly granted to the IECs. Alternatively, Manitoba Hydro notes that it is open to the PUB to seek clarification of this matter from the Province.

The suggestion that the fact the IECs were permitted to submit Information Requests is somehow determinative of this question is not persuasive. Indeed, Manitoba Hydro made clear on several occasions its view that the IECs ought to avail themselves of the informal process established for them to gain an understanding of Manitoba Hydro's processes and systems, rather than submitting Information Requests.

Manitoba Hydro read with concern the suggestion that "the simple statement that the IECs are not adverse in interest in any way to Manitoba Hydro runs contrary to the procedural history of this matter." Manitoba Hydro has made its best efforts to be available to and cooperate with the IECs, which is in fact noted in several of the IEC reports. This position taken by counsel for the IECs suggests that this process is either badly damaged, or that the instructions to counsel in respect of this letter are advanced by only one or a small number of IECs. If this is the view of the IECs and their counsel, it suggests that the PUB will have to exercise caution in accepting their views, since by virtue of taking on an adversarial role in this process, the IECs will have sacrificed their independence.

With respect to the response to Manitoba Hydro's comments regarding natural justice, Manitoba Hydro respectfully submits that the right of procedural fairness does not relate to the IECs defending their reports.² Nor should the principles of natural justice be interpreted in the context of an adversarial process (such as those referenced in Mr. Monnin's letter) where each party seeks to advance and then defend its position. This is a fundamental misconstruction of the role of the IEC. Having reviewed the evidence and filed their reports, the IECs ought not to have a position on the issues before the Board (as is specifically noted in the Terms of Reference quoted above) or seek to advance their "positions" through cross-examination.

The suggestion that permitting the IECs to cross-exam Hydro witnesses ought to be allowed because it is a "modest" amount of time certainly should not persuade the Board to allow something that is procedurally incorrect and unjust. Further, given the significant time

² In this regard see PUB Order 30/10, where dealing with a non-party consultant who's reports were to be placed on the record of a PUB proceeding: *The Board wishes to make clear that it does not owe a duty of procedural fairness to third parties whose information comes before it.*" (page 37)

constraints imposed in this process, the time allotted to the IEC's cannot be considered modest. In comparing the time allotted to cross-examination of the Manitoba Hydro panels of witnesses, the IECs are granted **more** time in the schedule than any of the Intervenors.

Yours truly,

MANITOBA HYDRO LAW DIVISION

Per: *m Boyd*

MARLA D. BOYD

Barrister and Solicitor

MDB/

cc: R.F. Peters, Counsel to PUB
C. Monnin, Counsel to IECs
Intervenors of Record