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Manitoba Hydro
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ATTN: Patti Ramage/Marla Boyd

ATTN: Christian Monnin / Michael Weinstein

Re: NFAT – Cross-Examination by IEC Counsel

On February 18, 2013, Manitoba Hydro filed a motion seeking a ruling from the Public Utilities Board (“Board”) as to whether legal counsel for the Independent Expert Consultants appointed pursuant to the NFAT Terms of Reference (“IEC Counsel”) would have a right to cross-examine witnesses at the NFAT. The Board further received a response from IEC Counsel dated February 21, 2014, and a reply by Manitoba Hydro dated February 24, 2014.

Manitoba Hydro’s Motion

Manitoba Hydro submits that cross-examination by IEC Counsel is inappropriate. It states that neither the NFAT Terms of Reference nor the Board’s Rules of Practice and Procedure contemplate cross-examination by legal counsel for an independent expert. It further argues that the Independent Expert Consultants (“IECs”) appointed pursuant to the NFAT Terms of Reference do not have an interest in the outcome of the proceeding, are not adverse in interest to Manitoba Hydro, and as such are not “parties” to the hearing as the term is generally understood. As such, the only reason they would wish to cross-examine is to defend their reputation and argue that their own evidence should be preferred over that of the parties to the hearing. According to Manitoba Hydro, allowing IEC Counsel to cross-examine jeopardizes the independence and impartiality of the IECs.

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Lastly, Manitoba Hydro argues that had it known that the IECs, through IEC Counsel, would have a right of cross-examination, Manitoba Hydro would not have provided them with the level of access to Manitoba Hydro staff and documentation that was provided.

IEC Counsel's Position

IEC Counsel submits that Rule 19 of the Board's Rules of Practice and Procedure states that the process for presenting evidence shall be the same for applicants, interveners, and independent witnesses. Rule 4(1) also allows the Board to issue procedural directions which prevail over any inconsistent provision in the Rules of Practice and Procedure. According to IEC Counsel, the NFAT is unlike any other proceeding before the PUB, which may require special procedures.

According to IEC Counsel, the NFAT Terms of Reference require the IECs to critically examine a list of issues surrounding Manitoba Hydro's Preferred Development Plan, which means that at least some of their evidence may be construed as adversarial by Manitoba Hydro. The NFAT should be guided by the public interest of the Province of Manitoba, and permitting cross-examination would allow the IECs to fulfill their obligation to critically examine all evidence.

Lastly, IEC Counsel states that without a reciprocal right of cross-examination, Manitoba Hydro and the approved interveners would be able to attack the findings of the IECs without the IECs having an opportunity to test the evidence used to attack their findings. IEC Council submits that the rules of natural justice must be considered in light of the particular tribunal at issue, and that in the context of the NFAT, fairness requires that the IECs be provided with a reciprocal right of cross-examination.

Disposition

The Board will permit cross-examination by IEC Counsel with respect to evidence adduced by Manitoba Hydro or Intervener witnesses that contradicts IEC analysis or findings. However, consistent with the IEC's status as independent witnesses without a partisan agenda, the right of cross-examination will be limited to addressing factual or analytical matters affecting IEC evidence.

The NFAT hearing is a unique process insofar as it is not based on an application by a utility for approval of rates or other relief within the Board's jurisdiction. Although a formal process of evidence and cross-examination will be followed, the NFAT has not been structured to be an adversarial hearing. Manitoba Hydro is not attempting to obtain approval from the Board. Rather, the Province has asked the Board to review the current Preferred Development Plan of a Crown corporation utility by availing itself of Section 107 of *The Public Utilities Board Act*. Manitoba Hydro should have a similar interest in permitting a thorough testing of its Plan for the benefit of both the utility and the Province. In the Board's view, the public interest demands that the best available evidence be placed before the Board in order to enable the Board to make fully informed recommendations to the Province.

Neither the NFAT Terms of Reference nor the Board's Rules of Practice and Procedure are determinative of whether IEC Counsel should have a right of cross-examination. However, as noted in IEC Counsel's submission, and as has repeatedly been noted by the Board, the Board sets its own process, and may rely on Rule 4(1) of the Rules of Practice and Procedure if warranted.

While the Board accepts that the IECs do not have a vested interest in the outcome of the NFAT proceeding, the Board notes that in the absence of a limited right of cross-examination by IEC Counsel, there would be a procedural asymmetry between Manitoba Hydro and the registered Interveners on the one hand, and the IECs on the other hand. Manitoba Hydro's rebuttal and the Intervener evidence are all filed after the IEC reports, and these parties will all have a right to challenge the IECs' analysis through cross-examination. While the IECs would have an opportunity to comment on Manitoba Hydro's rebuttal and the Intervener evidence in the IEC direct testimony, in the absence of a right of cross-examination they would effectively be precluded from challenging or testing any contradictory evidence delivered after they filed their reports. To that extent, the Board finds that a limited right of cross-examination is necessary.

However, although IEC Counsel fulfills the role of an independent legal counsel, his role is not to usurp or duplicate the role of Board Counsel to test all available evidence before the Board. As such, IEC Counsel's right of cross-examination will be limited to addressing factual or analytical matters affecting IEC evidence. The Board further notes that IEC Counsel will be expected to abide by the timelines set for cross-examination in the NFAT hearing schedule and avoid duplication of examination conducted by counsel who precede him in cross-examination.

Yours truly,

"Original signed by"

Kurt Simonsen
Associate Secretary

KS/jl

Cc: Patti Ramage / Marla Boyd – Manitoba Hydro
Christian Monnin/ Michael Weinstein – IEC Counsel
Bob Peters / Sven Hombach – Board Counsel
Interveners of Record