

**MANITOBA**  
**THE PUBLIC UTILITIES BOARD ACT**  
**THE MANITOBA HYDRO ACT**  
**THE CROWN CORPORATIONS PUBLIC**  
**REVIEW AND ACCOUNTABILITY ACT**

**Order No. 143/10**

**December 29, 2010**

Before:     Graham Lane, C.A., Chairman  
              Robert Mayer, Q.C., Vice-Chair  
              Leonard Evans, LLD, Member

**MANITOBA HYDRO GENERAL RATE APPLICATION**  
**INTERIM COSTS ORDER**  
**FOR INTERVENER CONSUMERS' ASSOCIATION OF CANADA**  
**(MANITOBA) INC. /MANITOBA SOCIETY OF SENIORS**

---

## **1.0 Background**

Two interveners, Southern Chiefs Organization (SCO) and Consumers' Association of Canada (Manitoba) Inc./Manitoba Society of Seniors (CAC/MSOS) seek interim costs in this Manitoba Hydro (MH) GRA proceeding.

On November 10, 2010, the Public Utilities Board (Board) gave directions to all interveners and to MH as to the process it will employ to consider interim costs. The Board received submissions from SCO and CAC/MSOS in accordance with the defined process and has considered both. The Board has also received submissions from MH. The submissions and the supporting materials submitted by SCO and CAC/MSOS are on the record of the GRA proceeding and filed with the Board.

In the unique and unusually complex nature of this matter, with delays which have led to a GRA process which is now scheduled to take 16 months to the end of the oral hearing, the Board determined in November 2010 that it was prepared to consider submissions for interim costs by qualifying interveners, this on a limited basis and upon specified conditions.

The Board concludes that it has jurisdiction to make an order of interim costs. By this order the Board grants interim costs to CAC/MSOS as described in the conclusion section below and pursuant to the schedule attached to this order.

## **2.0 SCO Request and Submission**

SCO's submission is described and dealt with in a companion Order. SCO did not make a submission on the Board's jurisdiction to make an interim costs award.

### **3.0 CAC/MSOS Request and Submission**

CAC/MSOS seeks reimbursement of its consultants / experts fees billed to date amounting to \$146,512.25. In support of its request CAC/MSOS filed the following:

Submission of November 16, 2010

Attachment “A” – partial/interim costs sought – Manitoba Hydro 2010-2011 GRA

Consultant’s spreadsheet and attachment “B-1” – Manitoba Hydro 2010-2011 GRA

Calculations for interim cost application for preparation work only done by experts to October 31, 2010

Consultant’s spreadsheet attachment “B-2” – statement of costs of Econalysis Consulting Services dated November 11, 2010

Attachment “B-3” – request for payment for services rendered by Wayne Simpson billing date November 10, 2010

Attachment “B-4” – statement of account Carter Research Associates Inc. dated November 12, 2010

Attachment “B-5” – invoice of J.D. McCormick Financial Services Inc. dated November 15, 2010

Attachment “B-6” – statement of account Stephen Johnson Chartered Accountants dated November 15, 2010

Attachment “C” – submission re: the Board’s jurisdiction to order interim or partial costs

CAC/MSOS original PUB intervener request form and attachments

CAC/MSOS submits that the Board has jurisdiction to make an award of interim costs, notwithstanding the reasons for decision of Mr. Justice Huband in the 1982 Manitoba Court of

Appeal Chambers decision in *MSOS .v. The Greater Winnipeg Gas Company* 1982 Carswell Man 208. In the *MSOS* case, Mr. Justice Huband, on an application for leave to appeal held, in part, that Section 56 of *The Public Utilities Board Act*, (The PUB Act) does not include jurisdiction to award costs on a preliminary basis.

CAC/MSOS notes firstly the provisions of The PUB Act including sections 24(4), 56(1) and (2), and 44(1), which provisions support the Board's jurisdiction to make an interim award of costs in this proceeding.

CAC/MSOS argues that the decision in *MSOS* is no longer "good law" in Manitoba, given the Supreme Court of Canada's decision in *British Columbia (Minster of Forests) v. Okanagan Indian Band*, 2003 CarswellBC 3040, wherein the majority of the Court held that the power to award interim costs is inherent in the equitable jurisdiction of a section 96(superior) court.

CAC/MSOS submits that Section 24(4) The PUB Act vests in the PUB all of the powers of the Section 96 court in Manitoba and therefore, the discretion to make an award of interim costs. Combined with the other sections of The PUB Act, CAC/MSOS argues, the jurisdiction exists for the Board to grant interim costs in a proceeding and submits that the discretion ought to be exercised in this exceptional case in order to reimburse CAC/MSOS for its consultant's costs paid or payable to the Board's directed cut off date.

CAC/MSOS notes that the oral hearing portion of the GRA is scheduled to start seven months later than scheduled when it retained its experts. The circumstances of the case are also said to be extraordinary, in that the complexity of the issues and volume of information have necessitated a significantly higher expenditure of time than in an ordinary MH GRA.

The process delay coupled with the substantial costs incurred has imposed a significant financial burden on CAC/MSOS and its experts. CAC/MSOS submits that their experts work largely on contingency with only 25% of their costs being guaranteed, while making an extraordinarily

valuable contribution to the hearing. MH's experts, CAC/MSOS contrasts, have costs certainty as they are paid when invoices are rendered.

CAC/MSOS also remarks that the oral portion of the hearing can be expected to last between 20 to 40 days and will take somewhere between 2 and 4 months to complete, further delaying the usual 'end of hearing process' cost recovery for several more months.

CAC/MSOS submits that it has already made a substantial contribution to the hearing through an extensive series of Information Requests which have addressed the issues identified as relevant by the Board and as outlined in detail in CAC/MSOS's submission. CAC/MSOS has strived to ensure that the record contained better disclosure by MH through formal requests regarding specific information requests and the KPMG Report, and CAC/MSOS also pursued updated filings by MH to ensure the record of the proceeding contained the most current information.

CAC/MSOS notes that with one small exception, it has met all filing deadlines. It has sought to minimize disputes with MH over disclosure and has attempted to expedite the IR process. CAC/MSOS says that it is a non-profit group of organizations that requires cost funding, as found by the Board in past proceedings.

Finally, CAC/MSOS says that it has carefully monitored the expert's expenses and allocation of time. Its experts have stayed within budget as shown in the CAC/MSOS submission.

#### **4.0 MH's Submission**

Manitoba Hydro provided a submission challenging the jurisdiction of the Board to grant interim costs by letter of November 23, 2010, and, therefore, it opposes the granting of costs to CAC/MSOS. In response to the late filing of the SCO submission, MH replied by submission letter dated November 30<sup>th</sup> and received by the Board on December 2<sup>nd</sup>, opposing the SCO

request for interim costs, both in principle on the jurisdiction issue as well as on the merits of the particular request.

MH submits that pursuant to the *MSOS* decision, the Court of Appeal has found that the Board does not have jurisdiction under Section 56 to make a preliminary award of costs. MH submits that this ruling continues to bind the PUB and therefore no jurisdiction exists to award interim costs.

MH also cites an Ontario case, *Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee Inc.*, 1985 CarswellOnt 386 (Leave to appeal to the Ontario Court of Appeal refused) which followed the 1982 *MSOS* decision, and which MH argues is similar to the current facts respecting the interim costs in the GRA application. MH relies on a quotation from the *Hamilton Wentworth* decision, in which the Ontario Supreme Court makes the finding that in effect, intervener funding was granted by the tribunal and not interim costs. That Court found that the tribunal's jurisdiction did not extend to allow it to award interim costs.

Therefore, MH opposes the jurisdiction of the Board to grant any interim costs, and also the specific costs being sought in this case by CAC/MSOS, although MH had no specific objections to the invoices or consultants detail submitted by CAC/MSOS.

## **5.0 Board Findings**

The Board finds that it has jurisdiction to award interim costs, and accepts the argument of CAC/MSOS respecting the progression of the law beyond the limited review of the Board's jurisdiction found in the Manitoba Court of Appeal Chambers decision of 1982, as applied by the Ontario Supreme Court in 1985.

The majority of the Supreme Court of Canada (SCC) in *Okanagan* held that it is within the discretion of superior courts in Canada to award interim costs. Also of note from the *Okanagan* case is the majority's reflection on the factors which may support interim cost orders, in rare cases, where the matters at issue are of broad public interest, such that the ruling will be important beyond the confines of the particular case and its parties.

The SCC set forth the criteria for an interim costs award on a public interest matter, including impecuniosity of the party seeking such costs, the merit of their case, and the public import of the case beyond the scope of the specific situation. While these criteria do not govern the PUB's exercise of discretion, they come closest to the nature of the approach taken by the PUB in its costs determinations.

Section 24(4) of The PUB Act states:

24(4) 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.

On a plain and ordinary reading of the section, the same powers and discretion regarding costs awards which exist in the Manitoba Court of Queen's Bench exist for the PUB.

Further Section 56 specifically provides that "the costs of, and incidental to, any proceeding before the Board are in the discretion of the board." The Board has considered the ordinary meaning of the phrase "incidental to", and finds that it means "connected with" or "related to". This section is worded broadly, the Board finds, and supports broad discretion in the Board to control its process and exercise discretion including over timing of payment of costs. Section 44 of The PUB Act allows the board to make interim orders. There is no prohibition in The PUB

Act with respect to the nature of interim orders which it may make, or any words of limitation on the Board's discretion respecting costs except for Section 56. The Board finds that all of the relevant sections of The PUB Act must be read harmoniously in order to further the objectives of its regulatory responsibilities.

The Board further identifies a factual distinction between the 1982 *MSOS* case, where the prospective intervener sought a guarantee of advance funding in order to commit to participation in the process, and this case where the applicant interveners already have standing and have already been actively participating in the existing process. The pre-oral hearing phase of the GRA, and work completed by participants in that phase, is a significant portion of the overall process, and is part of the proceeding. Therefore the *MSOS* case is distinguished from these facts and if that case remains applicable it is not, on its facts, comparable.

The Board therefore finds that it has jurisdiction to award interim costs within its discretion, and in accordance with the provisions of The PUB Act as set out in the submission of CAC/MSOS. However, the Board recognizes that its role is much different than the role of the courts in litigation. This MH GRA proceeding is not a dispute between parties or adjudication on matters at issue between litigants asserting their rights. The PUB's role is in this respect not comparable to court proceedings in which the traditional concept of costs awards have developed.

In addition to the power to exercise its discretion respecting the awarding of costs within a proceeding, The PUB Act grants power to the Board to set its own rules of process. The Board established costs criteria to support its work in carrying out its varied regulatory mandates. The Board's Rules also provide it with the power to vary its regular rules of procedure in any given proceeding.

The standard criteria for an award of costs before the PUB (as compared to the criteria set out in the *Okanagan* case for an award of costs in a public interest court proceeding) under PUB Rule 43 are:



43. In any proceeding the Board may award costs to be paid to any Intervener who has:

- a) made a significant contribution that is relevant to the proceeding and contributed to a better understanding, by all parties, of the issues before the Board;
- b) participated in the hearing in a responsible manner and cooperated with other Interveners who have common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
- c) insufficient financial resources to present the case adequately without an award of costs; and
- d) a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of the ratepayers.

Costs may include the consultant's fees under the rules, such fees typically being part of the costs that have been approved for interveners upon completion of previous MH GRA proceedings. The Board's standard costs rules are found at Part IV, Rule 43 to 46 of its Rules of Practice and Procedure, available on the PUB website. The Board is satisfied that upon the submissions and invoices filed by the intervener it can apply its regular criteria as listed above to discern if an interim costs award ought to be granted. Nothing in this order precludes an intervener from making a further request for interim costs, or from seeking to recover costs at the conclusion of the hearing process from the start of their involvement in the MH GRA, even if amounts currently submitted are not approved at this time.

Turning to the facts, the Board finds that the current situation supporting the exercise of its discretion to consider an award of interim costs is rare and exceptional. This GRA which combines the regular MH rate application and the first comprehensive MH risk management review has created an unprecedented hearing. Delays in the timetable, in the unique circumstances of this proceeding, will require interveners to carry the burden of third party consulting or experts fees for well beyond what the Board or any participant would have

reasonably envisioned. Alternatively, it may be that consulting or experts fees billed remain unpaid.

The Board understands that MH's third party consultants have been paid on an ongoing basis. Fairness in this complicated and extended process, in these special circumstances, led to the Board's decision to consider interim costs, but only for consultants or experts fees reimbursement where fees are paid or payable on actual invoices issued; only where the Board's criteria has been met; and only upon the Board's exercise of discretion as to amounts allowed on an interim basis.

The Board finds that CAC/MSOS has demonstrated that it meets the Board's criteria for an award of interim costs. CAC/MSOS has actively participated and has already brought value to the process, and has been proactive in seeking to resolve disclosure issues with MH, as well as pursuing updated MH filings to assist the process as a whole. CAC/MSOS has prepared extensive IRs on all of the relevant issues identified by the Board as part of this proceeding and although the Board agrees with MH that quantity does not always equal quality, there is no indication on the Board's review of the CAC/MSOS IRs that they are misguided or unfocused. CAC/MSOS has also already participated in interim processes within this GRA and its submissions have been of assistance to the Board.

CAC/MSOS has a track record of being vigilant with its expenditures, and has proven here that it is currently under its proposed budget for consultants. The invoices specify the work performed by each consultant and invoiced to the cut off date. MH has filed no objection to the particulars of interim reimbursement sought by CAC/MSOS.

CAC/MSOS has been found by the Board to qualify as an intervener which has insufficient resources to present its case without an award of costs. That status continues. This intervener represents a significant element of rate-paying consumers in Manitoba.

It must also be said that CAC/MSOS's experts who have completed the billed work to date, which is the subject matter of this interim costs order, are known to the Board and their contributions have been found useful previously. The Board gains a degree of confidence from this well known intervener and its consultants' track record. These consultants, the Board finds, should not be made to wait several more months for reimbursement of at least a portion of their fees for services rendered, due to the nature and length of this matter.

The Board chooses to exercise a measure of caution in this ruling, in that the full extent of the contribution of this interveners consultants, even for work already performed, will not be capable of final assessment until completion of the oral hearing. The Board therefore allows costs to CAC/MSOS of \$74,000; approximately 50% of the consultants' invoices as submitted.

## **6.0 Conclusion**

The Board exercises its jurisdiction to award interim costs to CAC/MSOS amounting to \$74,000, being approximately 50% of its consultants invoices as filed with the Board, which shall be payable by MH within 15 days of the signing of this order. This interim cost award is based on the rare and exceptional circumstances of this groundbreaking multi-faceted, lengthy GRA process and is not to be seen as a precedent for future costs awards in Board proceedings.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at [www.pub.gov.mb.ca](http://www.pub.gov.mb.ca).

**7.0 IT IS THEREFORE ORDERED THAT**

1. Consumers' Association of Canada (Manitoba) Inc. and Manitoba Society of Seniors BE AND IS HEREBY awarded costs of \$74,000. with respect to its intervention at the Manitoba Hydro 2010/11 & 2011/12 General Rate Application hearing.
2. Costs shall be payable by the Manitoba Hydro within 15 days of the date of this Order.

THE PUBLIC UTILITIES BOARD

“GRAHAM LANE, CA”  
Chairman

“H. M. SINGH”  
Acting Secretary

Certified a true copy of Order No. 143/10  
issued by The Public Utilities Board

\_\_\_\_\_  
Acting Secretary