

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

**Order No. 144/10**

**December 29, 2010**

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

**MANITOBA HYDRO GENERAL RATE APPLICATION**  
**INTERIM COSTS ORDER**  
**FOR INTERVENER SOUTHERN CHIEFS ORGANIZATION**

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## **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 would use to consider interim costs.

The Board has received submissions from SCO and CAC/MSOS in accordance with the defined process and has considered both sets of submissions. The Board has also received a Reply submission from MH on each request. The submissions and the supporting materials submitted by SCO and CAC/MSOS are on the record of these proceedings and are 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 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 denies SCO's request for interim costs. SCO retains the right to seek interim costs in future, as its circumstances warrant, or it may seek costs in accordance with the Board's regular process upon the conclusion of the hearing.

## **2.0 SCO Request and Submission**

SCO has requested reimbursement for experts and consultants fees as well as legal fees, although the Board directed in its November 10, 2010 process letter that it would only consider

reimbursement for interim costs respecting experts or consultants fees incurred by an intervener. SCO filed with the Board the following:

Submission letter of Rath & Company dated November 29, 2010;

Original PUB Intervener Request Form and attachments

Invoice 851555 of McCullough Research, LLC

Invoice 851560 of McCullough Research, LLC

Invoice 851571 of McCullough Research, LLC

Invoice 851577 of McCullough Research, LLC

Two finance charge statements of McCullough Research, LLC

Six Invoices of Rath & Company Barristers and Solicitors.

The invoices and finance charge statement amount to a total claim of \$42,427.17

SCO notes that the current PUB MH GRA process is unprecedented. This is not just a General Rate Application, says SCO, but an investigation into MH's risk management, and risk assessment of the integrated power system management and operations of MH. SCO says that what needs to be stressed is continual disclosure and transparency of such a system.

SCO indicates its request for interim costs is not about payment of counsel fees. The request is about justifying the funds expended to date for a process that does not ensure continual disclosure or transparency or fair recognition of First Nations Aboriginal and Treaty rights and interests. SCO notes that its goal in participating in this process is to ensure that these interests are represented, recognized, appreciated and honoured throughout the GRA and the Risk

Review. SCO voices the concern that it is challenging to justify the costs associated with participation when MH continually fails to seriously consider First Nations concerns and fails to provide for disclosure or transparency. An award of interim costs is required, SCO submits, as a check on such disclosure and to support SCO's ongoing representation.

SCO has submitted invoices of its consultant, McCullough Research, which SCO says it has paid. SCO has also submitted the invoices of its legal counsel, Rath and Company. SCO says that it has addressed the criteria for costs as requested by the Board. SCO submits that it represents ratepayers and consumers that are severely impacted by adverse effects of MH projects. SCO states that this is particularly significant given the government's (no specific jurisdiction identified) constitutional obligations to uphold and honour Aboriginal and Treaty rights.

SCO also asserts that it has taken steps in this pre-oral hearing stage of the proceeding to avoid duplication and to reduce cost. SCO submits that its participation to date has been responsible and of value and that it has consistently worked within deadlines, or has asked for extensions well in advance if required.

SCO submits that it does not have sufficient funds to support its participation throughout the remainder of the PUB process. SCO confirms that it represents the interests of 33 Bands covering more than 78,000 Band Members who pay for electricity provided by MH.

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

CAC/MSOS also seeks an award of interim costs, and addressed the legal issue of the Board's jurisdiction to grant interim costs as part of its submission. The synopsis of CAC/MSOS's

position and MH's reply on jurisdiction may be found in the companion cost order for CAC/MSOS.

The Board determines that it has jurisdiction to grant interim costs on the grounds set out in the CAC/MSOS companion costs order.

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

Manitoba Hydro's submission on jurisdiction is found in the CAC/MSOS companion costs order and will not be repeated here. MH opposes jurisdiction in the PUB to award interim costs.

In response to the late filing of the SCO submission, MH replied by 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 states that SCO's materials are insufficient to permit the Board to be satisfied that its costs criteria are met. MH notes that the legal services invoices are not sufficiently detailed to allow for proper review, including disbursements. Duplication of effort might have occurred, says MH, although without further information it is difficult to address this issue.

MH also submits that the SCO consultant's invoices are insufficiently detailed. Also, a number of entries on the consultant's invoices, says MH, appear to be unrelated to the GRA, causing further concern and casting further doubt on the ability of the Board to consider an interim award to reimburse such costs. Finally, MH opposes recovery of the consultant's financing charges.

Therefore, MH opposes the jurisdiction of the Board to grant any interim costs, and also the specific costs being sought in this case by SCO.

## 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 SCO has not demonstrated that it meets the Board's criteria for an award of interim costs.

The written submission made by SCO on the costs criteria identified by the Board falls short of the proof required to award interim costs. As to Board costs criterion number 1, and on the issue of the value of contributions made by SCO to date, the general statement on the Treaty and Aboriginal rights of these consumers and ratepayers is insufficient, given that these issues are not readily identifiable as existing matters under consideration by the Board in this GRA proceeding.

It may be that these issues will be found to be relevant at the conclusion of the process, but the general statement as to SCO's contribution is not causally tied to the work completed in the GRA process to date and therefore does not support a payment of interim costs.

Board criterion number 2 requires the intervener to prove responsible participation. While it appears that SCO has attempted to avoid duplication of efforts in certain stages of the pre-oral hearing process, the invoices submitted for consultants services are either vague or contain ambiguities as to the recorded services and their application to this process.

The Board accepts in this regard MH's critique of the invoices as currently presented, which cast doubt on the recoverability of all charges. It may be possible for further and better detail to be provided in future, and the Board does not rule out recovery of these invoiced amounts, or some part of them, if the necessary clarification can be provided. Overall, the Board finds that the detail submitted does not support an award of interim costs.

While the Board acknowledges the submissions of SCO on the remaining costs criteria as to insufficient resources of SCO and its assertion of a substantial interest in the proceeding based on its broad representation, the Board has decided that it is not necessary to review these two criteria for purposes of this order. SCO remains a full intervener, and will be in a position to advance its arguments respecting these criteria when it next seeks costs in this proceeding.

## **6.0 Conclusion**

The Board has jurisdiction to award interim costs, but does not approve the interim costs requested by SCO. SCO retains the right to seek interim costs in future, as its circumstances warrant, or it may seek costs in accordance with the Board's regular process upon the conclusion of the hearing.

