

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

Order No. 95/11

July 22, 2011

Before: Graham Lane, C.A., Chairman
Robert Mayer, Q.C., Vice-Chairman

**ORDER RESPECTING SUBPOENA OF
MANITOBA HYDRO EXPORT AGREEMENTS**

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1.0 Executive Summary

The Public Utilities Board (PUB) served a subpoena on Manitoba Hydro (MH) in this General Rate Application (GRA) proceeding. The subpoena requires MH to forthwith deliver to PUB documents listed therein, those being new export agreements between MH and three U.S. counterparties.

In response, MH brought a motion asking PUB to set aside the subpoena or, in the alternative, if the relief requested by MH is not granted seeking a stay of PUB's subpoena, that to allow MH the opportunity to seek leave to appeal the ruling to the Manitoba Court of Appeal.

For the reasons set out herein, PUB has determined that it has jurisdiction to issue a subpoena for production of documents from MH in this GRA process, and, specifically that it has the power to direct production of the documents listed in the subpoena. PUB also finds that in order for it to carry out its mandate in this GRA proceeding, and on the facts and matters under consideration at this time respecting MH's operations and planning, it is necessary for PUB to consider the agreements in order to properly consider the reasonableness of the rate increases sought by MH (for the supply of electric power to MH's domestic customers) as part of MH's overall strategic plan.

Upon receipt of MH's motion and written submission, PUB established a process which included notice to all Interveners of record in the GRA (providing for Intervener submissions by those wanting to participate), to be followed by MH's right of Reply. Interveners' submissions were received from CAC/MSOS, MIPUG and MKO. RCM/TREE provided a brief submission, and MH filed a letter of reply.

In accordance with this Order, MH must now provide the export agreements to PUB; PUB will review them in confidence. If PUB determines that any new issues arise on review of the documents which will materially affect the outcome of its rate order, PUB will give notice of

those issues to MH and the Interveners, and allow further submissions on those new issues by all GRA participants, this to take place within a timeline to be set by PUB.

PUB finds that it is not in the public interest, given the context and present status of this GRA proceeding, to stay its subpoena order. PUB requires the documents as part of its deliberations regarding the pending rate order, and since the evidence is complete and submissions have been received, failure of MH to file the documents will delay the timely final ruling of the Board on pending matters in the GRA process.

2.0 Background

MH filed a GRA on November 9, 2009, seeking among other matters to fix new increased rates for the supply of electricity for all (domestic) customer classes, excluding the area and Roadway Lighting Class. MH specifically seeks a 2.9% increase for the fiscal year 2010/11 and a further 2.9% increase for the fiscal year 2011/12. (In its closing statement, and in addition to finalizing the two interim rate Orders by the PUB, MH extended its rate request to include a further .9 of 1% increase as of August 1, 2011.)

As stated in PUB's pre-hearing procedural Order 30/10:

“The Board must act within its jurisdiction to set fair and reasonable rates in the GRA by balancing financial health and future financial viability of MH with the needs of consumers.”

PUB determined that it would incorporate a comprehensive risk review of MH, this arising from a variety of developments preceding the GRA itself. PUB identified the need to examine MH's material risks since at least 2004, following a costly drought, with rate consequences for Manitoba customers. In this proceeding, and upon hearing submissions of MH and the Interveners as to the need for a risk review, PUB stated in its pre-hearing procedural Order 17/10:

“A review of the risks faced by MH will proceed as an integral part of the Board’s rate review and rate setting jurisdiction. There are a multitude of risks faced by MH as part of its business activities and plans. ... those risks include drought, export markets, interest and exchange rates, labour issues, catastrophic loss of system supply, and changes in accounting standards (IFRS-International Financial Reporting Standards) The Board must satisfy itself that these and other risks to MH are appropriately managed by the Utility, as part of the Board’s rate approval mandate. The Board also needs to be assured that there are no unreasonable risks “lurking” in the future that, if actualized, are likely to result in undue rate implications for the Utility’s Manitoba Consumers.

... the reputation of MH and the confidence of all stakeholders in the Utility is of utmost importance to the Utility and the general public interest.”

One key additional factor precipitating the risk review was the public pronouncement of serious concerns and allegations by a whistleblower consultant who had done work for MH; the whistleblower is known in this process as the New York Consultant (NYC). NYC had sought review processes by the Auditor General and the Ombudsman respecting MH’s operations, none of which were undertaken. NYC, supported by the Ombudsman, then asked PUB to conduct a review, and PUB determined it was well-positioned; given its jurisdiction and its own prior concerns respecting MH’s risks, to incorporate a risk review in the GRA process.

MH’s regulatory rate hearings are always a public process, this in accordance with *The Public Utilities Board Act*. Hearings are mandated to be public, and although PUB may receive materials in confidence, or testimony in camera, such proceedings are typically rare. However, PUB has determined that it will apply its Practice Rule 13, respecting confidentiality of filings, to the documents to be provided under subpoena as set out herein below.

Rule 13 has already been applied in this GRA process respecting redactions sought by MH and NYC upon the filing of a number of risk reports, and the filing (upon subpoena) of a report prepared for MH by KPMG in 2010 (to address risk issues and the assertions of NYC).

PUB has control of its process and may be, and has been, called upon to determine threshold issues of relevance in its rate making capacity. Factors which PUB may consider with respect to rate setting for MH include, as contained in *The Crown Corporations Public Review and Accountability Act* (“CCPRA”):

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,

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs;

(vii) any other payments that are required to be made out of the revenue 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; and

(b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the Board, have an interest in the matter.

Further, section 26(3) of The CCPRA provides that: “*The Public Utilities Board Act applies with any necessary changes to a review pursuant to this Part of rates for services.*”

Section 24(4) of The PUB Act provides:

24(4) The Board, except as otherwise herein 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.

Section 27(2) of *The PUB Act* provides:

27(2) The Board, or any person authorized by the Board to make inquiry or report, may, where it appears expedient,

- (a) enter upon and inspect any place, building, works or other property;*
- (b) require the attendance of all such persons as it or he thinks fit to summon and examine and take the testimony of the persons;*
- (c) require the production of all books, plans, specifications, drawings and documents;*
- (d) administer oaths, affirmations, or declarations, and summon witnesses, enforce their attendance, and compel them to give evidence and produce the books, plans, specifications, drawings and documents, which it or he may require them to produce.*

3.0 MH Export Agreements

PUB Directive 2(g) of PUB Order 116/08 required MH to file all of its proposed export contracts with PUB for review. While MH did not did not seek to vary Order 116/08, it did not comply with the directive. PUB, through its counsel, worked with MH and its counsel to obtain compliance with directives arising in that order, and, subsequently, with respect to additional directives issued in PUB Order 32/09.

As to risk, PUB Orders prior to 2009 directed MH to provide risk analysis reports and a conceptual outline for a comprehensive risk review. In Order 32/09, PUB again directed MH to file its risk reports with PUB and also provide PUB with a conceptual outline for an independent comprehensive risk review by September 1, 2009. These specific directives (in Order 32/09) were also not followed by MH within the timeline directed by the PUB.

Ultimately in November 2009, and as a result of ongoing requests and discussions between PUB counsel and MH counsel, MH filed in confidence (and subject to a redactions review) certain risk reports, which included risk reports authored for MH by NYC, and provided terms of reference for a risk review to be conducted by outside consultants to be selected by MH.

While KPMG was retained by MH to conduct the review, MH changed the terms of reference due to various difficulties with the NYC, and the comprehensive risk review requirement originally sought by PUB were removed from its engagement.

As of the commencement of the GRA in November 2009, MH had still not complied with the 2008 PUB directive to file its proposed export contracts, although PUB counsel had continued to follow up with MH as to timing for compliance with the directive.

PUB's pre-hearing and hearing process for the GRA was conducted from November 2009 until closing submissions of MH and the Interveners which concluded July 7, 2011. In approximately mid June 2011, MH counsel gave notice to PUB counsel that the export agreements would be provided to PUB if PUB members, its counsel and its advisors signed confidentiality agreements drawn up by MH. MH did not attempt to file the export agreements in accordance with the confidential filing process and criteria set out in PUB Rule 13.

PUB Rule 13 states:

13(1) Where, a document is filed with the Board by a party in relation to any proceeding, the Board shall, subject to subsection (2), place the document on the public record.

(2) *The Board may receive information in confidence on any terms it considers appropriate in the public interest,*

(a) *if the Board is of the opinion that disclosure of the information could reasonably be expected*

(i) *to result in undue financial loss or gain to a person directly or indirectly affected by the proceeding; or*

(ii) *to harm significantly that person's competitive position.*

or

(b) *if*

(i) *the information is personal, financial, commercial, scientific or technical in nature; or*

(ii) *the information has been consistently treated as confidential by a person directly affected by the proceeding; and*

(iii) *the Board considers that the person's interest in confidentiality outweighs the public interest in the disclosure of the information.*

(3) *Where disclosure of any document is refused due to a claim for confidentiality and a claim for public disclosure of such documents has been made, the Board shall hear such claim on a motion made under Rule 22, and may*

(a) *order the document be placed on the public record, subject to Subsection 13(5);*

(b) *order the document not be placed on the public record, with such conditions on access imposed as the Board considers appropriate;*

(c) *order an abridged version of the document to be placed on the public record; or*

(d) make any other order the Board finds to be in the public interest.

(4) For purposes of hearing a motion in respect of a disputed claim under Subsection (3), the Board may examine the document or other evidence in question to ascertain whether or not the claim for confidentiality or the claim for public disclosure will be sustained.

(5) Where the Board has decided to place on the public record any part of a document that was filed in confidence in accordance with Subsection 13(2) and 13(3), the party who filed the document shall be given an opportunity to request that it be withdrawn prior to its placement on the public record.

Central to MH's application for the rate increases in this GRA is a plan for new hydro electric generating stations and transmission lines, which is directly and inextricably linked to new long-term export sales agreements with Minnesota Power, Wisconsin Public Service, and Northern States Power (d/b/a Excel Energy). Moreover, MH's preferred capital development sequence sees completion of the next new generating station, called Keeyask, well in advance of Manitoba's domestic service needs to facilitate delivery of power under the export agreements.

But for the capital requirements of MH to build and operate two new generation facilities and a new transmission line (Bi-Pole III) in a period which MH calls "the decade of investment" (with significant ongoing expenditures occurring), there may be no justification for the rate increases sought by MH at the present time.

MH's actual revenues in 2009/10 and 2010/11 are expected to exceed the utility's original projections (initial filing of 2009), and MH has reached its debt/equity target ratio (75:25, debt to equity). MH has asserted that it is in the best financial position in its history.

However, MH continues to seek PUB approval of the original rate increases MH sought for the two fiscal test years (2009/10 and 2010/11) for supply to all of its domestic customers as part of

its plan to support the investments it plans (which will total approximately \$16 billion dollars) for these new capital projects.

MH has testified in the hearing process that ongoing spending on the pre-build requirements for Keeyask, to hold its projected in-service date (for projected delivery of power) to support its plan for export sales, now exceeds \$400 million, though approval of the plan has not been given and a Needs For And Alternatives To (NFAAT) process for review of the capital projects has not been undertaken. Added to these facts are the ballooning costs for these projects, which increased from a total projected cost of \$10.93 billion (based on MH's capital expenditure forecast of 2008) to at least \$16.61 billion as indicated in the current GRA, with no final cost estimate yet pinned down.

On May 25, 2011 during the hearing process, the provincial government made a public announcement of two of the export power deals (between MH and Minnesota Power as well as Wisconsin Public Service), citing benefits to Manitoba and to MH's ratepayers to result. These contracts remain conditional upon various regulatory approvals in both the U.S. and Canada.

Much of the testimony of MH, the Interveners, and the experts that were heard in the GRA process was directly about, or related to, MH's capital plan and the advantages and risks of the plan and of the long-term export agreements. As noted by MH in its submission on this motion, both teams of MH's outside experts (from ICF and KPMG) reviewed the export agreements and testified to them in limited way, as did the independent experts appointed by PUB (the latter to conduct an independent risk review of MH's operations). Until now, PUB, itself, has not been privy to the export agreements, which the Board finds directly impact domestic rates.

4.0 Positions of MH and Interveners

4.1 MH Submissions in Support of its Motion

MH submits that the long-term contracts with U.S. counterparties contain commercially sensitive material and that disclosure of the material may reasonably be expected to cause financial harm or loss to MH. MH further asserts that it is under strict confidentiality provisions with its counterparties to these agreements regarding disclosure. Finally, MH notes that PUB recognized this need for confidentiality in its redactions Order 95/10.

MH also submits that its export agreements are covered under a principle identified as public interest privilege. In support of its position, MH cites a Manitoba Court of Appeal decision in *Manitoba Society of Seniors v. Manitoba* [1988] M.J. 69, on judicial review of a 1988 PUB ruling that revoked a documentary production subpoena issued for documents held by a provincial department. The confidentiality issue was akin to the issue in this case, where an argument advanced was that the bargaining position of MH in negotiations of export rates with U.S. customers could be jeopardized if the documents in that case were required to be disclosed.

Lastly, MH asserts that PUB does not have jurisdiction to compel the production of the export agreements as it does not fall within the scope of PUB's mandate. MH concedes that some information is open to examination by PUB related to the agreements, such as the projected aggregate net revenues from export contracts (to the extent that they impact what MH should be permitted to recover from ratepayers in Manitoba).

As to the specific terms and conditions of the contracts, however, MH asserts they are irrelevant to the GRA, and that ample evidence on these issues has already been received by PUB. MH suggests that PUB should base its decision on the evidence of non-confidential high-level detail provided respecting the export agreements already provided in the hearing process and the testimony of the experts who did examine the export agreements in confidence.

In reply to the Interveners' submissions, MH notes that it is clear that the Interveners want access to the documents and asserts that this is the very outcome it fears (respecting disclosure and the potential for harm). MH argues that neither the subpoena nor PUB Rule 13 provide the comfort that MH and its counterparties require regarding confidentiality.

MH also asserts that the procedural issues before PUB following disclosure of the documents in this process will be unwieldy, costly and time consuming, as PUB would struggle with access issues.

4.2 CAC/MSOS Submissions

CAC/MSOS opposes MH's motion, and challenges the analytical structure of MH's arguments which support its position. CAC/MSOS submits that MH simply ignores the protection offered under PUB Rule 13, and also fails to address evidence provided in the hearing process by RCM/TREE's expert witness (Mr. Wallach) as to the availability of standard regulatory tools to protect commercially sensitive information.

CAC/MSOS also submits that MH's jurisdiction argument is constructed around an allegation that PUB seeks to assume greater jurisdiction by examining the export contracts, which premise says CAC/MSOS is faulty.

CAC/MSOS points out that while MH admits three separate expert witness teams found it necessary to review the agreements, the regulator required to review the evidence and determine the weight if any to be given to the witnesses is said by MH to not need access to the agreements.

CAC/MSOS submits that PUB has jurisdiction to compel production of the documents and that in this circumstance it is appropriate to compel production. However, CAC/MSOS continues to assert that a permitted confidential filing will exclude review by the Interveners and leave them outside the process regarding these documents, and indicates concern as to the potential impact in the hearing outcome that this may create.

CAC/MSOS argues that confidentiality agreements be used to allow intervener access to the documents. Alternatively, CAC/MSOS submits that PUB should identify to the parties any new issues arising from its review of the material and provide MH and the interveners with a right of comment.

4.3 MIPUG Submissions

MIPUG, in its submission on MH's motion, raises timing issues regarding the issuance of the subpoena. MIPUG say that the evidentiary portion of the hearing is over, and any receipt of additional information by PUB now will not fairly allow the interveners the opportunity to consider the evidence, test the evidence, and respond to the evidence.

MIPUG argues that PUB will exceed its jurisdiction if it accepts new evidence after the evidentiary segment of the hearing process is closed.

MIPUG also reserves its right to make arguments respecting the jurisdiction of PUB to consider documents with respect to export revenues when exercising its power to set rates. For now, it neither agrees nor disagrees with MH's submissions on this issue.

MIPUG submits that PUB can deal with issues of relevancy and access to these export agreements as part of MH's next rate application, if it chooses, and suggests that may be the better option. Delay may be caused in the issuance of the current rate order, says MIPUG, and that is not in the interest of Manitobans or ratepayers, and specifically the members of MIPUG. MIPUG notes that its members need certainty in their electricity rates, for the purpose of setting their own corporate budgets.

4.4 RCM/TREE Submissions

RCM/TREE submits that it has consistently argued for a transparent GRA process. RCM/TREE has offered to have its advisors sign confidentiality agreements with MH so that its business

details can remain secure. RCM/TREE also states that generally it believes PUB should have as much information as it can have to reach its decisions.

Beyond the statement of these principles, RCM/TREE sees this matter as between PUB and MH, since the PUB has notified MH and the GRA participants that PUB is willing to receive the exports agreements in confidence.

4.5 MKO Submissions

MKO submits that the principles of transparency ought to be the standard applied to production of information in a regulatory proceeding such as this before the PUB, and that compelling reasons for non-disclosure should be articulated. Also, says MKO, Rule 13 applies to protect such confidential information by an applicant or party.

MKO notes that PUB has jurisdiction to set just and reasonable rates in this GRA, and to compel production of information necessary to arrive at such a determination (in accordance with all of the statutory provisions cited by MKO which come together to create the jurisdiction and procedural powers so required).

In its submission, MKO provides some alternative processes for PUB's consideration, including a preliminary review of the documents by PUB staff, with a report on the review, and the potential for access by Interveners pursuant to an undertaking to keep the information confidential. MKO suggests that this may then lead to a challenge respecting the Rule 13 filing, if any of the Interveners wish to take that step. Finally, MKO requests that if any of its proposed processes are adopted, PUB should allow for further submissions by Interveners.

5.0 Principles of Confidential Filings Before PUB

Rule 13 of PUB's Rules of Practice and Procedure contemplates that documents be placed on the public record of a proceeding, subject only to the exceptions found in Rule 13(2), and a

determination by PUB, within its wide discretion under Rule 13, that the criteria under Rule 13(2)(a) or 13(2)(b), or both have been met, such that the confidential filing, or certain sections of a document will be maintained in a confidential way before PUB within a specific proceeding.

Although rare, PUB has accepted confidential filings in the past, including by MH. PUB will always have access to all relevant filed materials, whether received in confidence or placed on the public record.

Within its jurisdiction, PUB is not required to rely solely upon public filings, and may refer to confidential documentary filings or in camera testimony, to make determinations and to carry out its mandate. Procedural fairness is not denied to interveners, who participate in the regulatory process to assist PUB to come to a determination. Interveners are granted status by PUB to participate, but are not thereby given rights equivalent of litigants in a court process, by way of comparison.

PUB acknowledges the need to conduct this GRA proceeding in as transparent and public way as possible, while balancing the rights of MH as applicant to maintain information as confidential if PUB finds that the criteria in Rule 13(2) have been met.

PUB is satisfied that the key factor for its consideration on application of its power to receive these export agreements in confidence is that PUB has broad discretion under Rule 13(3) to make any order with respect to a document as it finds will be in the public interest.

“Public interest” is not defined within PUB’s Rules; in these circumstances PUB must take into account the context of the proceeding as a whole. Further, public interest with respect to rate regulation and PUB’s jurisdiction includes consideration of the financial viability and wellbeing of MH, as the future of MH affects the prosperity of all Manitobans and impacts directly on rates charged to rate payers.

PUB has already made a finding in PUB Order 95/10 that it is satisfied that disclosure of terms sheets and MH's export contract details are likely to cause financial harm and loss to MH. That ruling stands, and receipt now of the actual export agreements by PUB in confidence is consistent with that ruling.

6.0 Board Findings

PUB finds that it has jurisdiction to compel production of the export agreements as listed in the subpoena served on MH on July 5, 2011. CAC/MSOS and MKO in their submissions have both correctly cited the various provisions of *The Public Utilities Board Act*, *The Manitoba Hydro Act*, and *The Crown Corporations Public Review and Accountability Act*, all of which weave together under Manitoba's legislative plan to establish PUB's jurisdiction and to vest in the PUB the necessary powers for the conduct of its regulatory rate setting for MH.

As MH submitted in its arguments to the Manitoba Court of Appeal in the 2005 case of *Consumers Association of Canada (Man.) Inc. et. al. v. Manitoba Hydro Electric Board* [2005] MBCA 55, and as recounted by Mr. Justice Monnin in his reasons for decision, PUB's jurisdiction is broad under Section 26(4) of the *CCPRA*, and does not mandate a particular level of review or methodology when approving rates.

Monnin, J.A. further summarized MH's position as put forward in that case, saying... "*Accordingly the meaning of these words and the methodologies used are not questions of statutory interpretation and are not questions of jurisdiction.*"

MH now argues that PUB is attempting to extend its jurisdiction over capital project approvals for MH by requiring MH to produce export agreements to PUB for its review in the rate setting application now before it. MH says that its rate setting jurisdiction does not include an ability of PUB to examine the export agreements.

PUB is unable to follow the thread of logic in this submission, or the attempt to refer PUB to cases which have long since established that PUB does not have jurisdiction to approve or direct capital expenditures of MH. PUB accepts that it does not have such jurisdiction.

It is abundantly clear however, to PUB and all in the GRA process, including MH by its own evidence and submissions, that MH's export agreements are tied to the advanced building of its new hydro electric generating stations and transmission capital infrastructure, and that domestic rates are to be directly impacted by the plan as advanced to PUB and as thoroughly examined in the GRA.

All aspects of the pending long term export contracts were part of the testimony of MH, and of its experts ICF and KPMG. MH submits that certain information related to the export agreements may be of use to PUB and is relevant, and that such information regarding aggregate export revenues is already provided. MH in effect is telling PUB, as regulator, what it needs to know in order to make its decision.

If it were up to MH to make the decisions as to what was required by PUB to set rates, there would likely be no need for a rate review process. However, within the legislative framework established by the Province for rate setting over MH, it is clear to PUB that it has wide discretion to consider factors which PUB determines are relevant in accordance with section 26 of The *CCPRA*, and to use its powers as necessary for the conduct of hearings to carry out its mandate.

PUB also notes that until MH was served with the subpoena and thereafter made its formal motion, it was willing to provide PUB with the export agreements in confidence, but only if the PUB and its advisors signed confidentiality agreements with MH. PUB cannot fetter its own discretion to act in the public interest by signing such personal private party agreements.

PUB Members on this hearing panel cannot be compromised and required to bind the PUB itself to the applicant, and be subject to damages clauses for breach as it attempts to properly carry out its statutory jurisdiction.

Indeed, as has been shared with MH, PUB members have signed a Code of Conduct to formally document their longstanding duties in the carrying out of their jurisdiction. The Code requires PUB members to keep confidential information received by them in confidence, and which commitment extends to periods after the members have left the Board. The Code of Conduct is posted on PUB's website. PUB counsel and PUB advisors are under the same duty, pursuant to their retainers with PUB.

To PUB's knowledge there has never been a breach of confidentiality by PUB or its advisors. None has even been alleged.

As noted above, PUB is prepared to receive the export agreements in confidence. High level details respecting the agreements have been considered and tested during the hearing process. PUB will not commence another round of evidence based on the confidential filing of these documents, but it will give notice to MH and the interveners if any new issues arise based on PUB's examination of the documents. In such case, PUB will receive the submissions of the participants on those issues.

PUB is also concerned about further delay in the issuance of the final rate order in the GRA process and accepts the submission of MIPUG that it is in the interest of Manitobans and all ratepayers that rates be fixed with certainty as soon as possible.

PUB therefore exhorts MH to immediately file the export agreements in accordance with the subpoena. Based on this finding, PUB cannot hold that it is in the public interest to stay enforcement of the subpoena and a stay is not granted.

As to timing of receipt of information relevant to an application, PUB is able to remain flexible in its process to ensure that it can have the best information then available in order to make proper decisions to meet its mandate. For example, although in this process the evidentiary portion of the hearing was technically complete, PUB was prepared to accept from MH, as a late filing, a letter from the Minister Responsible for Manitoba Hydro to the Chair of the Manitoba

Hydro Electric Board dealing with the NFAAT process, and which MH placed on the record as part of its closing submissions on July 7, 2011.

MIPUG has argued that PUB does not have this kind of flexibility, and also that it should simply wait until next time, until the next MH GRA process, to obtain this information. PUB disagrees and finds that it does have the power to control its own process. PUB is not acting arbitrarily and as charted in the factual background and context provided herein, it has been attempting to have MH comply with a directive regarding the filing of this documentation since 2008.

PUB has determined that now is the time to examine these export agreements, not later. MH has already spent over \$400 million on Keeyask alone without formal approval of that project, and intends to spend at least \$16 billion dollars to construct Keeyask, Conawapa, and Bi-Pole III, all to facilitate these long-term export agreements in advance of domestic power needs, with one of MH's stated objectives being to offer lower cost electricity to its Manitoba customers than would otherwise be possible without these export agreements and their projected revenues.

PUB finds that these export agreements (as admitted by MH in its very submission in this motion) impact domestic rates. PUB itself needs the contracts to assure itself of the adequacy and fairness of rates (rates presumably to be backed by prudent actions).

With respect to the principle of public interest privilege and the *MSOS* case of 1988, the PUB notes that its role has materially changed since PUB issued its order in that matter. PUB no longer makes recommendations for rates to the Cabinet of the Provincial Government, as was the scheme then. By virtue of *The CCPRA*, PUB fixes rates.

Accordingly to follow the logic from the 1988 ruling, these documents should be available to the final decision maker, now being PUB. PUB is satisfied that the case is not applicable to the current circumstances as a result. Moreover, since PUB is to receive the documents in

confidence and in accordance with the grounds as previously detailed in its Order 95/10, PUB has considered the public interest issue that underscores MH's argument.

PUB wishes to note that it accepts that MH has acted quickly to advance its formal position regarding the subpoena although it has not technically complied by production of the documents. MH has demonstrated that it respects PUB's process, which is important in that PUB's authority as vested in accordance with the legislation must be preserved, and its orders abided.

Having received notice of MH's position and intentions regarding the subpoena on the same day it was served, PUB has chosen not to take steps to enforce the subpoena, and is satisfied that MH has dealt with this issue in a timely and appropriate way.

Finally, PUB required Intervener submissions and MH's Reply on very short notice in its attempt not to delay the GRA completion. PUB thanks all participants for their cooperation in meeting the timelines set for this motion.

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 (Rules). The Board's Rules may be viewed on the Board's website at www.pub.gov.mb.ca

7.0 It Is Therefore Ordered That:

1. Manitoba Hydro's motion to set aside the subpoena issued July 4, 2011 is denied;
2. Manitoba Hydro's motion to stay enforcement of the subpoena is denied;
3. Manitoba Hydro is to file with PUB the documents described in the subpoena forthwith.

THE PUBLIC UTILITIES BOARD

"GRAHAM LANE CA"

Chairman

"H.M. SINGH"

Secretary

Certified a true copy of Order No. 95/11
issued by The Public Utilities Board

Secretary