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**THE PUBLIC UTILITIES BOARD ACT** ) **Order No. 19/12**  
 ) **February 17, 2012**  
 )

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

**MANITOBA HYDRO'S APPLICATION  
TO REVIEW AND VARY ORDER 5/12**

**AND**

**MANITOBA INDUSTRIAL POWER USERS GROUP'S  
APPLICATION TO REVIEW AND VARY ORDER 5/12**

## 1.0 Executive Summary

By this Order, the Public Utilities Board (Board or PUB) dismisses both Manitoba Hydro's (MH or Utility) Application and Manitoba Industrial Power Users Group's (MIPUG) Application to Review and Vary Order 5/12.

## 2.0 Background

### Order 5/12

In Board Order 5/12 (issued January 17, 2012) MH's average consumer rate increases were finalized at 1.9% effective April 1, 2010 and a further 2.0% effective April 1, 2010. (Order 5/12 – which is to be read in conjunction with Order 99/11 are both available through the Board's office or from its website [www.pub.gov.mb.ca](http://www.pub.gov.mb.ca).)

Additionally, in Order 5/12, the Board denied MH's request that the \$1.3 million of Temporary Billing Demand Concessions provided to a limited number of commercial and industrial customers be 'forgiven' (i.e. written off against income, to deplete MH's retained earnings).

### MH's Request to Review and Vary Order 5/12

On February 14, 2012 MH requested the Board Review and Vary Order 5/12 by:

- i) Increasing the finalized rate adjustments effective April 1, 2010, from 1.9% to 2.9% - an additional 1% equates to approximately \$11 million/year of additional revenue; and
- ii) 'Forgiving' the \$1.3 million of Temporary Billing Demand Concessions such that the limited number of commercial and industrial customers

which received Temporary Billing Demand Concessions do not have to pay back their temporary demand rate concessions.

The grounds on which MH relies in requesting the Board to Review and Vary Order 5/12 include – new facts have arisen since the close of the evidence at the 2010/11 and 2011/12 General Rate Application, and, according to the Utility the Board made errors in jurisdiction and facts.

### MIPUG's Request to Review and Vary Order 5/12

MIPUG has, on February 15, 2012, also requested the Board to Review and Vary Order 5/12, also by 'forgiving' (i.e. make permanent) \$1.3 million of Temporary Billing Demand Concessions.

The grounds on which MIPUG relies in requesting the Board to Review and Vary Order 5/12 include that the Board erred:

- In stating that MH failed to provide requested information;
- In determining MH lost revenue as a result of the Temporary Demand Billing Concessions; and
- By failing to find that MH's rate design for the General Service Large and General Service Medium customers is not just and reasonable.

### **3.0 PUB Act and PUB Rules of Practice.**

MH's and MIPUG's Applications to Review and Vary Order 5/12 are made pursuant to *The Public Utilities Board Act* (Act) and the Board's Rules of Practice (Rules). The legislation, in section 44, provides:

## ORDERS OF THE BOARD

### ***Power to order partial or other relief***

44(1) *Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief.*

### ***Review of orders***

44(2) *The board may require a re-hearing of an application before making any decision thereon.*

### ***Varying order***

44(3) *The board may review, rescind, change, alter, or vary any decision or order made by it.*

The Board's Rules of Practice pertaining to Applications to Review and Vary include Rule 36 as follows:

### ***Review***

36. (1) *The Board may, on its own initiative or on application by a person, review, rescind, change, alter or vary any decision or order by it.*
- (2) *An application for a review under subsection (1) must be in writing and contain the following:*

- a) *a clear and concise statement of facts relevant to the application;*
  - b) *the grounds on which the application is made;*
  - c) *a brief explanation as to the nature of the prejudice or damage that has resulted or will result from the order, decision or direction;*
  - d) *a brief description of the remedy sought; and*
  - e) *the applicant's name, address in Manitoba, telephone number, fax number and, if available, e-mail address.*
- (3) *An application for a review must be filed and served on the parties to the proceeding for which the order or decision of the Board was made within 30 days of the date of the order or decision.*
- (4) *The Board shall determine, with or without a hearing, in respect of an application for review, the preliminary question of whether the matter should be reviewed and whether there is reason to believe the order or decision should be rescinded, changed, altered or varied.*
- (5) *After determining the preliminary question under subsection (4), the Board may:*
- a) *dismiss the application for review if,*
    - i) *in the case where the applicant has alleged an error of law or jurisdiction or an error in fact, the Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness of the Board's order or decision; or*

*ii) in the case where the applicant has alleged new facts not available at the time of the Board's Hearing that resulted in the order or decision sought to be reviewed or a change of circumstances, the Board is of the opinion that the applicant has not raised a reasonable possibility that the new facts or the change in circumstances as the case may be, could lead the Board to materially vary or rescind the Board's order or decision;*

*or*

*b) grant the application; or*

*c) order a hearing or proceeding be held.*

*(6) If the Board orders a hearing be held under subsection (5), it shall issue a Notice of Review, and a new hearing or proceeding will be held in accordance with these rules as determined by the Board.*

*(7) A notice of review under subsection (6) must contain the same information as is contained in a notice of hearing.*

*(8) No application for review may be made in respect of:*

*a) a decision or order made by the Board as a result of a review under this section; or*

*b) a decision or order of the Board which has been appealed to the Court of Appeal.*

- (9) *The Board may at any time, without a hearing or notice of review correct typographical errors, errors of calculation and similar errors made in any of its orders or decisions.*

#### **4.0 Board Findings**

The Board has determined, in respect of both MH's and MIPUG's Applications for Review and Variance of Order 5/12, that the matters raised should not be reviewed and there is no reason to believe the Order or decisions should be rescinded, changed, altered or varied.

The Board will dismiss both MH's and MIPUG's Applications for Review as they have not raised a substantial doubt as to the correctness of the Board's Order or decisions.

As for MH's ground that new facts have arisen, not available at the time of the Board's hearing, the Board is of the opinion that MH has not raised a reasonable possibility that the new facts and the changed circumstances could lead the Board to materially vary or rescind the Board's Order or decisions.

Approximately six weeks before the end of MH's 2011/12 fiscal year, MH suggests that its latest unfiled and untested financial forecast of annual net income (for the year ending March 31, 2012) gives rise to a significant change in circumstances that it says strongly supports its request for an additional and approximate \$11 million/year additional revenue, that to be raised through an extra 1% rate increase.

As noted in Order 5/12, MH's Integrated Financial Forecast (IFF) 09-1 forms the basis for MH's Rate Application before the Board.

Based on that IFF, MH acknowledged that it was now in the best financial position in MH's sixty year history, as was found by the Board in Order 5/12: (page 27).

While MH has not made its case for the higher rate increases it requested, its financial position, arising from its Operating Results for the years ending March 31, 2010, 2011, and 2012, is significantly better than when MH filed its GRA (this in both MH's own assessment and the assessment of the Interveners).

For the fiscal year ending March 31, 2010, MH forecast \$121 million of Net Income, while its actual Net Income was \$43 million greater, or \$164 million. For the fiscal year ending March 31, 2011, MH forecast \$78 million of Net Income, while its actual net income was \$65 million greater, or \$143 million. Finally, for the fiscal year ending March 31, 2012, MH forecast \$87 million Net Income, while in its latest Quarterly Financial Report MH now projects Net Income at least \$42 million greater, at \$130 million.

MH now appears to be asserting that its November 29, 2011 public news release and accompanying Second Quarter Financial Report – which indicated:

“Based on current conditions, Manitoba Hydro is forecasting that net income will continue to improve over the balance of the fiscal year and should exceed \$130 million by March 31, 2012.”

-was materially wrong.

Even with MH's new February 14, 2012 projected net income for the fiscal year ending March 31, 2012, MH's financial position, over the past three fiscal years and including the rate increases finalized by the Board, is approximately \$80 million better than when MH filed its General Rate Application.



MH's rates are usually set on a prospective basis – following the testing of the various revenue and expense assumptions. While the \$11 million of annual revenues that would be derived from the additional 1% rate increase now sought by MH is a significant amount, the other identified changes in circumstances that MH outlines would best be explained and tested in MH's next General Rate Application.

As noted in Order 5/12, MH has indicated that the Utility will likely be seeking further rate increases, effective April 1, 2012. This becomes all the more of concern as MH's Review and Vary Application also suggests that the Utility's Net Income for fiscal 2012/2013 and 2013/2014 will decline significantly below fiscal 2011/12's Net Income.

The Board still awaits MH's advice, as required by Directive 7 of Order 5/12 (page 222), regarding MH's intention respecting a GRA for the 2012/13 fiscal year.

In the interim, the overall rates to consumers have not mathematically changed – with the rate differential between what was approved on an interim basis and what has been finalized in Order 5/12 to be quantified by MH and remain as an interim rate, with the associated revenues being accumulated by customer class with accrued interest in a temporary deferral account. Should it be MH's intention to seek further rate increases for the 2012/13 fiscal year, the use of those monies may be an issue for determination during such a GRA.

It is not in the public interest to embark on a further process, all at the expense of the ratepayer, to investigate the components of what MH terms changed circumstances. Those matters are properly for MH's next prospective rate application.

While MH repeatedly alludes to the Board's dissatisfaction with its capital plans as being the cause for the Board to deny the full amount of the requested rate increases, MH is incorrect. Taken as a whole, the record of the GRA record only supports just and reasonable rates at the levels finalized by the Board.

MH submitted that the 'Additional Information' (updated IFFs, alternative development scenarios and export commitments) sought by the PUB is beyond the jurisdiction of the PUB, and further that it is not relevant to the test years.

The Board's review of MH's initial rate Application, the evidence and the Board's findings in Order 99/11 and in Order 5/12, detail not only MH's own submission as to the link between the MH's current rate request and its capital expansion plans, which are directly tied to its long term export contracts, but also explain both the immediate and ongoing impact of MH's strategy on the financial health of the utility and the impact on its present revenue requirements, which by mathematical necessity leads to the doorstep of today's domestic ratepayers.

In its Application to Review and Vary, MH states "As a result of not being provided with the requested Additional Information, the PUB elected to align rate increases with forecast rates of inflation." (page 4) MH goes on to state "By electing to base its decision on a single factor indicator, inflation, the PUB neglected to fulfill its duty to consider multiple factors impacting rates" (page 5). MH goes on to claim that the Board's decision was "punitive in the circumstances."

Manitoba Hydro's statements are not an accurate characterization of the Board's Order. As stated at page 26 of Order 5/12, the Board's determination was based "on the totality of the evidence before the Board, including MH Senior Vice President Mr. Warden's testimony that MH "is now in its best financial position in the Utility's history".

The determination of what are just and reasonable rates involves a complex balancing of competing factors. Key principles and objectives underlying the determination of a just and reasonable rate in the public interest are discussed at pages 26 and 27 of Order 5/12. Board Order 5/12 does not represent a punishment to MH for failing to

provide additional information. The Order granted reflects the Board's judgment based on the record as a whole and taking into account the Utility's onus.

A determination that MH has not met its onus, as was made by PUB in Order 5/12, should not be regarded as punitive. In the 2004 and 2008 MHydro General Rate Applications, the Board similarly concluded that MH had not met its onus of establishing that the proposed rates were just and reasonable. On those occasions, MH was granted a rate increase higher than what it had proposed. Those past decisions of the Board are an important factor in Manitoba Hydro now being in, according to MH's Mr. Warden, "its best financial position in the Utility's history." (page 26 of Order 5/12)

Since 2004/05, over \$950 million in additional revenue has been realized by MH from Board-approved domestic rate increases (this represents over one-third of MH's retained earnings to date.) (page 71, Order 5/12)

Respecting MH's and MIPUG's requests to Review and Vary the final decision related to Temporary Demand Billing Concessions.

As the Board held in Order 126/09 (pp. 12-15):

The quantum of revenue loss to MH is unknown, and, from a qualifying customer's perspective there will be uncertainty as to whether any interim order will be confirmed or varied, with the potential of requiring the repayment of any concessions when it comes time to finalize the Order.

Therefore, rather than approving MH's proposed "demand billing concessions", that would expose qualifying customers to the risk of full repayment being required upon finalization, this at a later date, the Board finds that it is in the public interest to provide for

immediate “cash flow” relief to qualifying customers, and, subsequently, to examine and determine whether the relief should be altered or made permanent (ie. deferred amounts written off by MH) when this interim Order is finalized.

Under this Order, and based on MH’s calculation as proposed in its Application, there would be an immediate deferral of a portion of the qualifying customers electricity bills, to be carried at the equivalent of MH’s cost of short-term borrowing as interest on that deferral. MH’s cost of short-term borrowing was recently forecast at the 2009/10 Centra Gas General Rate Application as being approximately 1.5% (0.5% plus the 1.0% provincial debt guarantee fee).

Through such approved relief, the cash flow positions of recession-affected qualifying customers will be enhanced while still protecting MH’s overall revenue base (and reducing the risk to qualifying firms that, on finalization of this Order, repayment would be required). With cash retained, rather than being required to meet MH’s full electricity bills, qualifying firms will have more funds to maintain payrolls and other expenses while awaiting the recovery of their businesses.

Any such firms reporting taxable income would also gain from the Board’s approved deferral, as the full cost of electricity billing, including the deferred portion with interest, should be deductible for tax purposes. In the case of a loss, a firm may be able to carry back losses to prior periods and recover past paid income taxes.

Unless determined to be “forgiven” or “written off by MH” at the hearing to finalize this Order, the Board approved deferred payments would become payable at a to-be-defined future date, which may be dependent upon either an overall “end” to the recession or the “recovery” of the firms that qualify for the deferral.

By deferring a portion of the qualifying customer’s electricity bill, the customer is in essentially the same position as if an interim demand billing concession, as proposed by MH, is granted. The interim relief to the customer would not, pursuant to MH’s proposal, be finalized until a later date and therefore such relief could be rescinded and made repayable in whole or in part. Likewise, the Board ordered deferral of a portion of the energy bill is subject to finalization and perhaps future “forgiveness”, at a later date when additional information will be available to the Board, MH, and other interested parties.

Some of the additional information that the Board may consider for finalization of this Order includes:

(a) will/should there be a requirement for a qualifying customer to file, or have reviewed, its financial information? In short, there is no “income test” in MH’s proposal or formula. Rather, MH has focused on the impact of its rate structure on GSM and GSL customers’ ‘per unit cost of energy’ as a result of changes in operational behaviour. Customers able to reduce their peak billing demand in relation to reduced levels of energy consumption will not experience an increase in the average per unit cost of energy and will, therefore, not qualify for relief. It remains an open question as to whether a firm that is still

profitable in this time of economic downturn should qualify for any forgiveness of the amount deferred.

While it was an open question for the Board, and rather than provide evidence as to profitability (or lack thereof), MH did not obtain, review or provide such financial information. Instead MH chose to consider the issue an anomaly under the current rate structure.

As the demand costs incurred by MH are real, to forgive recovery of \$1.3 million of those costs amounts to a cross subsidization of the proposed receiving customers that, based on the evidence, the Board was unable to conclude was in the public interest.

If it is truly a rate design failure, as suggested, MH should propose permanent solutions at the next GRA.

MH's and MIPUG's grounds, based upon alleged errors of jurisdiction and errors of fact or mixed law and fact, do not merit review pursuant to Board Rule 36. As to MH's and MIPUG's current requests respecting Order 5/12, the Board is not satisfied that MH has raised a substantial doubt as to the correctness of the Board's Order or decision.

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 Rules may be viewed on the Board's website at [www.pub.gov.mb.ca](http://www.pub.gov.mb.ca).

#### **5.0 IT IS THEREFORE ORDERED THAT:**

1. MH's Application to Review and Vary Order 5/12 BE AND IS HEREBY DISMISSED.

