

MANITOBA
THE PUBLIC UTILITIES BOARD ACT

Order No. 91/13

August 9, 2013

Before: Régis Gosselin, B.A., C.G.A., M.B.A., Chair
Larry Soldier, Member

**ORDER IN RESPECT OF REVIEW & VARY APPLICATIONS BY
PIMICIKAMAK, THE MANITOBA PUBLIC INTEREST RESEARCH GROUP,
AND THE MANITOBA MÉTIS FEDERATION ARISING OUT OF THEIR DENIAL
OF INTERVENER STATUS IN ORDER 67/13**

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1.0.0 EXECUTIVE SUMMARY

By this Order, the Board dismisses applications by Pimicikamak and the Manitoba Public Interest Research Group (MPIRG) to review and vary Order 67/13, which dismissed applications by the respective applicants to obtain Intervener status in the Needs For and Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan (PDP). The Board makes no ruling on each applicant's ability to form a coalition with approved Interveners or to appear before the Board as a Presenter.

By this Order, the Board also grants an application by the Manitoba Métis Federation (MMF) to vary Order 67/13 to reverse a ruling that MMF is to meet its legal requirement from internal sources and indicate that the Board is generally prepared to entertain a budget and costs submissions from MMF that include costs for legal counsel. In granting MMF's application, the Board relied on affidavit material indicating that MMF's in-house legal counsel was hired on a 2 ½-month term position that expires on July 31, 2013 and that MMF does not have any core funding or other funding sources available to continue such a position.

2.0.0 IT IS ORDERED:

1. That the application by Pimicikamak to review and vary Order 67/13 **BE AND IS HEREBY DISMISSED.**
2. That the application by the Manitoba Public Interest Research Group to review and vary Order 67/13 **BE AND IS HEREBY DISMISSED.**
3. That the application by the Manitoba Métis Federation to review and vary Order 67/13 **BE AND IS HEREBY GRANTED** and the Manitoba Métis Federation may proceed to apply for costs that include the costs of meeting its legal requirements for the NFAT Review. However, no specific costs or budget for legal work are approved by this Order.

3.0.0 REVIEW & VARY APPLICATION BY PIMICIKAMAK AT CROSS LAKE ("PCL")

3.1.0 The Original Board Order

In Order 67/13, the Board found that:

PCL is a party to Treaty 5 and is a remaining signatory to the Northern Flood Agreement.

PCL's mandate is to ensure the fulfillment of Treaties and Agreements for the economic and social benefit of its members.

In addition to its written Application for Intervener Status, and oral submissions, the Board also received a letter dated May 29, 2013 from PCL's legal counsel clarifying certain aspects and terms of PCL's Application for Intervener Status.

3.5.2 Board Findings

The Board will not grant intervener status to PCL.

The Board finds the following issues identified by PCL to be within the scope of the NFAT Terms of Reference:

(a) Domestic electricity rates as a consequence of Manitoba Hydro's Preferred Development Plan (PDP);

(b) Whether Manitoba Hydro's PDP is aligned with the Clean Energy Strategy, and Sustainable Development Principles;

(c) Alternate energy sources and energy conservation;

(d) The MISO [Midcontinent Independent System Operator] energy market into which Manitoba Hydro exports electricity; and

(e) Socio-economic benefits and impacts on Manitobans, aboriginal communities and Northern communities;

However, these issues are duplicitous of issues identified by other Interveners including CAC, GAC and MKO and are not limited to any specific First Nation. Accordingly, for the same reasons Intervener Status was denied to Peguis, the Board will not grant PCL Intervener Status. PCL will be able to seek a coalition with

approved Interveners as to in-scope issues and make its own final submissions on those issues. Any such proposed Coalition, for PCL or any other party, would have to be detailed and submitted to the Board for approval in respect of the specific issues to be addressed, the proposed consultants for those issues, and their specific budgets.

The following issues identified by PCL are not within the scope of the Terms of Reference of the NFAT Review:

- (a) PCL's access to new alternative energy sources;*
- (b) Effects of hydro-electric generating stations on PCL's lands and waters;*
- (c) Whether Manitoba Hydro's Preferred Development Plan (PDP) reduces economic opportunities for PCL members;*
- (d) Whether lack of disclosure and lack of accurate information about Hydro development in Manitoba has affected PCL;*
- (e) Effects of previous development of generating stations on PCL's culture, social and economic conditions; and*
- (f) Definition of "new green energy" for export sales.*

While these outside the scope of the NFAT Terms of Reference, the Board does not make any finding as to the validity or the merits of such issues. There may be avenues, other than the NFAT Review for consideration of these issues.

Manitoba Hydro advises that impacts of the development on specific First Nations (whether PCL or other First Nations) and mitigation of these impacts will not be included in Manitoba Hydro's NFAT Application. Rather, Manitoba Hydro indicates those issues will be addressed either through the Clean Environment Commission (CEC) process in the Environmental Impact Statement or in Section 35 consultations by the Federal Government and the Provincial Government as it relates to specific projects. Likewise, Manitoba Hydro advises that Lake Winnipeg Regulation is also the subject of a CEC review.

3.2.0 Pimicikamak's Application to Review and Vary

Pimicikamak requests the Board to review and vary Order 67/13 on the following grounds:

1. That the Board committed errors of law by:
 - (a) violating the rules of procedural fairness;
 - (b) misconceiving the nature and purpose of Pimicikamak's intervention as it relates to the Terms of Reference; and
 - (c) granting others Intervener status on the basis of applicants' previous experience with being an intervener before the PUB, and then finding Pimicikamak's application duplicative of those others.

2. That the Board committed errors of fact or mixed fact and law by:
 - (a) mischaracterizing Pimicikamak's status;
 - (b) mischaracterizing or misrepresenting Pimicikamak's application for Intervener status and the issues it intended to raise; and
 - (c) finding other Interveners had the capacity to speak on issues Pimicikamak in its application intended to address.

Pimicikamak relies on the following arguments in its application to review and vary Order 67/13:

1. It was a breach of procedural fairness that the Intervener Request Form did not provide sufficient space and, except for section 14(c) did not permit applicants to use additional pages if necessary, that an undue time limit for submissions of ten minutes was placed on Pimicikamak at the Pre-Hearing Conference, that Pimicikamak was not given an opportunity to reply to Manitoba Hydro's response to its application, that the time given to prepare for the Pre-Hearing Conference

was inadequate, and that the Board did not provide funding to Pimicikamak to prepare its submissions and allow legal counsel to attend the Pre-Hearing Conference.

2. The Board did not properly consider the different perspectives that each Intervener application would bring to the issues and should have applied the precautionary principle, allowing an Intervener even if there could be a duplication. Pimicikamak states that it is in the best position to speak to a number of the issues it raised that are within the scope of the Terms of Reference.
3. The Board placed undue weight on the fact that the Interveners approved in Order 67/13 have a history of past intervention with the Board in granting them Intervener status, and erred in subsequently finding that Pimicikamak's evidence was duplicative.
4. The Board mischaracterized the following issues raised by Pimicikamak, and that as characterized by Pimicikamak, the first two issues are properly within the scope of the NFAT Review:
 - (a) Pimicikamak's issue "Ensuring that there is public, credible data and information before the PUB concerning the new generating stations and that there is a solid scientific and economic basis for the decision making regarding the [Preferred Development Plan (PDP)]" was mischaracterized as "whether lack of disclosure and lack of accurate information about Hydro development in Manitoba has affected [Pimicikamak]";
 - (b) Pimicikamak's issue "Defining 'new green energy' for export sales and for inside Manitoba, especially in relation to northern and aboriginal communities" was mischaracterized as "definition of 'new green energy' for export sales"; and

- (c) Pimicikamak's issue "Analysis of the regulatory, economic and energy systems in the American States who would purchase Manitoba energy as a basis for the NFAT Review" was mischaracterized as "the MISO market into which Manitoba Hydro exports electricity".
5. The Board erred in finding that the following three issues, as framed by Pimicikamak, were duplicative of issues raised by other intervenor applicants:
- (a) Whether the PDP is aligned with the Clean Energy Strategy and Sustainable Development Principles;
 - (b) Analysis of the regulatory, economic, and energy systems in the American States who would purchase Manitoba energy as a basis for the NFAT Review; and
 - (c) Ensuring that there is public, credible data and information before the PUB concerning the new generating stations and that there is a solid scientific and economic basis for the decision making regarding the PDP.
6. Pimicikamak is an aboriginal people separate and distinct from the Cross Lake First Nation, which is a band under the *Indian Act*. Pimicikamak is not a member of Manitoba Keewatinowi Okimakanak Inc. (MKO) and MKO does not represent Pimicikamak's rights or interests.

3.3.0 Board Findings

The Board dismisses Pimicikamak's application to review and vary Order 67/13, as it is not satisfied that Pimicikamak's application to review and vary raises any issues that would warrant a reversal of the Board's decision to deny Intervener status to Pimicikamak.

While the Board's Rules of Practice and Procedure allow the Board to approve Interveners to participate in hearings before the Board, the power to permit interventions

is procedural and discretionary in nature. Intervener status cannot be obtained as of right. In ruling upon applications for Intervener status, the Board is guided by the perspective that Interveners bring to Board hearings, and whether that perspective is one that will assist the Board in making a decision that is in the public interest. Pimicikamak's application for Intervener status was evaluated in this light.

Pimicikamak's identity as an aboriginal people does not confer upon it any special procedural rights in the NFAT Review, as the Terms of Reference expressly remove aboriginal consultation pursuant to section 35 of the *Constitution Act* from the Board's mandate.

While Pimicikamak's application states that "Pimicikamak is not a member of MKO and MKO does not represent Pimicikamak's rights or interest", the Board notes that Pimicikamak's application states that the Cross Lake First Nation is a subset of and subordinate to the Pimicikamak government, "being more like an administrative arm (for *Indian Act* matters) of the Pimicikamak government." Since the Cross Lake First Nation is a member of MKO, the Board is not convinced by Pimicikamak's argument that MKO cannot represent the perspective of the Pimicikamak in this NFAT review, and that Pimicikamak's perspective is sufficiently unique to justify the exercise of the Board's discretion to award them Intervener status in addition to the Intervener status awarded to MKO as an umbrella organization.

The Board is not persuaded by Pimicikamak's argument that it placed undue weight on MKO, the Consumers' Association of Canada (Manitoba) Inc. (CAC), the Green Action Centre (GAC) and the Manitoba Industrial Power Users Group (MIPUG) having been Interveners in the past. While this was one of the factors considered by the Board, Order 67/13 also noted that CAC has contact with approximately 14,000 consumers in 2011/12 and that:

As an organization representing 65,000 Treaty First Nation citizens in Northern Manitoba ... MKO is well positioned to represent the interests of First Nations in the NFAT Review.

Pimicikamak notes, in its application, that it did not intend to narrow the issue of “public, credible data and information” to the impacts on Pimicikamak. However, Pimicikamak has not provided the Board with evidence that it speaks on behalf of other affected First Nations, aboriginal peoples, or ratepayers. While the Board accepts Pimicikamak’s correction that it intended to raise the definition of “new green energy” for energy sold within Manitoba, and that it intended its analysis of the regulatory, economic and energy systems in the American States who would purchase Manitoba energy to extend to markets outside of MISO, these corrections are not sufficient to persuade the Board to exercise its discretion to grant Intervener status to Pimicikamak. With respect to the definition of “new green energy” in Manitoba, the Board is of the view that the approved Interveners are equipped to address any issues related to Manitoba’s Clean Energy Strategy and the principles of sustainable development. With respect to the regulatory, economic and energy systems in the American States, the Board notes that the Terms of Reference do not refer to any planned Manitoba Hydro export contracts with non-MISO states. As such, the distinction drawn in Pimicikamak’s application to review and vary does not change the Board’s consideration of the matter.

However, the Board rejects Pimicikamak’s submission that the Board did not approve any other Interveners to deal with issues now further explained by Pimicikamak, noting that:

- CAC was approved to speak to the reliability of Manitoba Hydro’s forecast related to load, capital costs, export revenues, and enhanced transmission capacity as well as the analytical consideration of alternatives to Manitoba Hydro’s PDP, including risk diversification, energy efficiency and non-hydroelectric options such as natural gas and wind, as well as the sustainability of Manitoba Hydro’s PDP;
- GAC was approved to speak to the marginal costs of the PDP compared to alternatives, including DSM;
- MMF was approved to speak to financial and economic risks;

- MIPUG was approved to speak to risks including long term financial and economic risk and the financial liability of Manitoba Hydro, as well as alternatives such as DSM.

The Board does not accept Pimicikamak's arguments that Pimicikamak was denied procedural fairness because the Intervener Request Form was too short, Pimicikamak was provided with insufficient time to prepare an application and make oral submissions at the Pre-Hearing Conference on May 16, 2013, and Pimicikamak was not provided with a right of rebuttal to Manitoba Hydro's responding submissions. The Board notes that Pimicikamak was subject to the same procedural framework as all other applicants for Intervener status, and that the procedure complied with the Board's Rules of Practice and Procedure.

In its application to review and vary Order 67/13, Pimicikamak asked that if the Board denies the application, Pimicikamak should be provided with a 15-day extension to file the information requested in sections 4.2.0, 4.3.0, and 4.4.0 of Order 67/13. No such extension is needed as Pimicikamak has been included in MKO's submissions for approval of consultants, expert witnesses and budgets.

4.0.0 REVIEW & VARY APPLICATION OF THE MANITOBA PUBLIC INTEREST RESEARCH GROUP (MPIRG)

4.1.0 The Original Board Order

In Order 67/13, the Board found that:

As no issues identified by MPIRG are within the scope of the Terms of Reference from the NFAT Review, MPIRG will not be granted Intervener Status in the NFAT Review.

Specifically, the Board finds that the following issues identified by MPIRG are not within the scope of the Terms of Reference of the NFAT Review:

- (a) The environmental and social and cultural consequences of Manitoba Hydro's Preferred Development Plan (PDP) on specific communities;*
- (b) The economic arrangements between First Nations and Manitoba Hydro; whether best practices were followed or creative alternatives to such economic arrangements exist;*
- (c) The impacts of the PDP on Aboriginal and Treaty rights;*
- (d) Culture;*
- (e) Traditional knowledge in the planning and management of the proposed PDP;*
- (f) The impacts of past Manitoba Hydro developments; and*
- (g) Intangible cultural heritage issues.*

While such issues are not within the scope of the NFAT Review, the Board makes no findings in respect of the validity, merits or importance of such issues. The NFAT Review is not the forum to examine these issues. Members of the MPIRG have testified before the Clean Environment Commission, so MPIRG is familiar with the scope of issues before the environmental regulator.

4.2.0 MPIRG's Application to Review and Vary

The Manitoba Public Interest Research Group (MPIRG) submitted a letter, prepared by Dr. Peter Kulchyski, indicating that:

If the PUB has an appeals process, please take this letter as a notice of appeal.

In accordance with the Board's Rules of Practice and Procedure, the Board considers MPIRG's letter to be an application to review and vary Order 67/13.

In its letter, MPIRG makes the following arguments:

1. MPIRG does not consist of 12 university-based researches as was found by the Board in Order 67/13, but rather of six university-based researchers and six respected northern indigenous community members;
2. MPIRG indicated that it wanted to address items 2(h), 2(i) and 2(j) of the Terms of Reference, even if its proposal for intervener status clearly did exceed the boundaries of the Terms of Reference;
3. Unlike MKO, which represents aboriginal communities that have signed partnership agreements with Manitoba Hydro, MPIRG can take a critical position;
4. There is no overlap in the perspectives of MPIRG, MKO, Pimicikamak and Kaweechiwasik Inninuwuk; and
5. MPIRG wants to focus on the economic liabilities that may come with continued underestimation of the value of aboriginal and treaty rights.

4.3.0 Board Findings

The Board dismisses MPIRG's application to review and vary Order 67/13.

As the Board noted in section 3.3.0 above, the granting of Intervener status pursuant to the Board's Rules of Practice and Procedure is discretionary.

While MPIRG states, in its application to review and vary, that it “wants to focus on the economic liabilities that may come with continued underestimation of the value of aboriginal and treaty rights,” issues of aboriginal consultation are outside the scope of the Board’s NFAT Terms of Reference.

Although MPIRG’s initial written application for Intervener status did not refer to items 2(h), 2(i), and 2(j) of the Terms of Reference, the Board takes note of MPIRG’s intention to address them and finds that they would be in scope. However, the Board is not satisfied that the approved Interveners, all of whom are umbrella groups, cannot sufficiently address those issues, even if there may be differences in perspective. As such, the Board is not prepared to review and vary Order 67/13 to grant MPIRG Intervener status.

The Board makes no ruling at this time on MPIRG’s ability to form a coalition with approved Interveners or to appear before the Board as a Presenter.

5.0.0 REVIEW & VARY APPLICATION OF THE MANITOBA MÉTIS FEDERATION (MMF)

5.1.0 The Original Board Order

In Order 67/13, the Board ruled that:

The Board will not approve MMF's consultants or budgets at this time. MMF along with other approved Interveners will need to refine their intended scope of participation, which will be constrained by the issues approved by the Board for MMF as well as the requirement for avoidance of duplication with other Interveners. The resulting proposed consultants and budgets must be revised and resubmitted for Board review and approval. The Board will expect MMF to utilize internal resources to meet its coordination and legal requirements.

5.2.0 MMF's Application to Review and Vary

On July 10, 2013, MMF submitted an application to review and vary Order 67/13, specifically to allow MMF to apply to the Board for costs to meet its legal requirements and not be required to utilize internal resources to meet those requirements. In support of its application, MMF submitted an affidavit by MMF's Executive Director, swearing that MMF's in-house Legal Counsel was hired by MMF for a term position commencing on May 8, 2013 and ending on July 31, 2013, and that MMF has no other in-house legal counsel. MMF's Executive Director further attested that MMF has no core funds or other funding sources dedicated to fund the position of in-house Legal Counsel and as such will not have money available to fund the legal requirements to fully participate as an Intervener in the NFAT Review.

5.3.0 Board Findings

The Board accepts MMF's evidence that MMF's in-house legal counsel, was hired on a term position expiring on July 31, 2013 and that MMF does not have core funding or other funding sources dedicated to the position.

On the basis of MMF's evidence, the Board will vary Order 67/13 to indicate that the Board is generally prepared to entertain costs submissions by MMF that include costs incurred to retain legal counsel. However, by this Order the Board makes no finding that approves any budget submitted by MMF or that MMF is actually entitled to legal costs. Such matters will be adjudicated together with the budget and costs submissions of the other approved Interveners.

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 PUBLIC UTILITIES BOARD

"RÉGIS GOSSELIN, BA, CGA, MBA"
Chair

"HOLLIS SINGH"
Secretary

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