

MANITOBA) **Order No. 115/15**
)
THE PUBLIC UTILITIES BOARD ACT) **November 17, 2015**

Before: Régis Gosselin, B ès Arts, M.B.A., C.P.A., C.G.A., Chair
Richard Bel, B.A., M.A. , M.Sc.
Dr. Hugh Grant, Ph.D. (Economics)
Marilyn Kapitany, B.Sc. Honours, MSc.

**ORDER WITH RESPECT TO AWARD OF COSTS
TO THE MANITOBA METIS FEDERATION (MMF) FOR
MMF's INTERVENTION AT**

MANITOBA HYDRO's 2014/15 & 2015/16 GENERAL RATE APPLICATION

INTRODUCTION

By this Order, the Public Utilities Board (Board) approves an award of costs of \$136,935.94 to the Manitoba Metis Federation (MMF).

The MMF intervened in the Board's deliberation of Manitoba Hydro's 2014/15 and 2015/16 General Rate Application.

MMF Application

The MMF filed a Cost Application with the Board on August 31, 2015.

Subsection 56(1) of *The Public Utilities Board Act* provides:

Cost in discretion of board

56(1) The costs of, and incidental to, any proceeding before the board are in the discretion of the board, and may be fixed in any case at a sum certain or may be taxed.

In exercising its discretion, the Board is guided by Rule 43 of the Board's *Rules of Practice and Procedure*:

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.

The Board approved Intervener status to the MMF in the Board's Procedural Order (Order 18/15) dated February 9, 2015.

MMF's original budget and applied for costs are outlined in the Table below:

| MMF Budget and Costs for Manitoba Hydro 2014/15 & 2015/16 GRA | | | |
|--|---------------------|---------------------|---------------------|
| | Budget | Actual | Difference |
| Legal Costs - Darcy & Deacon | | | |
| K. Saxberg | | | |
| fees | \$44,916.00 | \$19,010.50 | -\$25,905.50 |
| GST | \$2,245.80 | \$950.53 | -\$1,295.28 |
| RST | \$3,593.28 | \$1,520.84 | -\$2,072.44 |
| Subtotal | \$50,755.08 | \$21,481.87 | -\$29,273.22 |
| D.T. Masi | | | |
| fees | \$13,677.00 | \$73,220.00 | \$59,543.00 |
| GST | \$683.85 | \$3,661.00 | \$2,977.15 |
| RST | \$1,094.16 | \$5,857.60 | \$4,763.44 |
| Subtotal | \$15,455.01 | \$82,738.60 | \$67,283.59 |
| J. Saunders | | | |
| fees | \$3,525.00 | \$0.00 | -\$3,525.00 |
| GST | \$176.25 | \$0.00 | -\$176.25 |
| RST | \$282.00 | \$0.00 | -\$282.00 |
| Subtotal | \$3,983.25 | \$0.00 | -\$3,983.25 |
| Disbursements - legal | | | |
| | \$3,300.00 | \$2,123.05 | -\$1,176.95 |
| GST | \$165.00 | \$106.15 | -\$58.85 |
| Subtotal | \$3,465.00 | \$2,229.20 | -\$1,235.80 |
| SUBTOTAL LEGAL | \$73,658.34 | \$106,449.67 | \$32,791.33 |
| Consultants | | | |
| G. Matwichuk | | | |
| fees | \$6,690.00 | \$4,404.25 | -\$2,285.75 |
| GST | \$334.50 | \$220.21 | -\$114.29 |
| RST | \$0.00 | \$0.00 | \$0.00 |
| Subtotal | \$7,024.50 | \$4,624.46 | -\$2,400.04 |
| Disbursements | | | |
| Subtotal G. Matwichuk | \$7,024.50 | \$4,624.46 | -\$2,400.04 |
| J. Oppenheim (in CDN dollars) | | | |
| fees | \$37,107.20 | \$51,207.94 | \$14,100.74 |
| GST | \$0.00 | \$0.00 | \$0.00 |
| RST | \$0.00 | \$0.00 | \$0.00 |
| Disbursements | \$2,048.00 | \$96.77 | -\$1,951.23 |
| Subtotal J. Oppenheim (CDN) | \$39,155.20 | \$51,304.71 | \$12,149.51 |
| SUBTOTAL CONSULTANTS | \$46,179.70 | \$55,929.17 | \$9,749.47 |
| Digitran fees | \$0.00 | \$2,521.26 | \$2,521.26 |
| TOTAL BUDGET | \$119,838.04 | \$164,900.10 | \$45,062.06 |

Note: Total invoiced legal hours amounted to 514.9 hours.

In Procedural Order 18/15 the Board approved the MMF as an Intervener but limited the scope of the MMF intervention to the examination of rate impacts on the following customer groups:

- Rural customers;
- Low-Income customers;
- All-electric customers; and
- Small to medium businesses (which may include customers in the General Service Small and General Service Medium rate classes.

The Board also approved a budget for the MMF of no more than 350 hours for legal counsel and \$50,000 for expert consultants. Based on the MMF's initial budget, as submitted to the Board on February 18, 2015, the MMF is over budget by approximately \$45,000 in its Application for costs.

The Metis community forms a significant portion of Manitoba's population comprising approximately 140,000 individuals spread throughout the Province. As such the MMF contends it represents a substantial number of residential and business customers of Manitoba Hydro.

In its Application the MMF suggested that it contributed to the GRA review process in a constructive and meaningful way, identified numerous issues of concern, and provided evidence, information, recommendations and perspectives that the Board may not otherwise have considered. The MMF also cooperated with other interveners, including the Consumers Association of Canada (Manitoba) Inc, Winnipeg Harvest, the Green Action Center (GAC), the Manitoba Keewatinowi Okimakanak Inc. (MKO), and the City of Winnipeg. The MMF contended they made best efforts to remain within the scope of the review as directed by the Board and their consultants were directed to avoid duplication with other intervener consultants.

Including disbursements, the MMF is over budget in legal cost by \$32,791.33. The MMF suggested actual legal costs were greater than budgeted amounts due to a number of factors including:

- Additional hearing days (four additional hearing days)
- Managing the large number of Information Requests, including time spent to manage Information Requests not answered by Manitoba Hydro
- Reviewing Information Requests posed by the MMF as well as other interveners
- Reviewing other intervener evidence
- Managing extensive evidence on bill assistance programs and depreciation methodologies that was not accounted for in the budget
- Reviewing rebuttal evidence and the closing submission provided by Manitoba Hydro

The MMF also suggested that significant effort was required on the part of MMF and its counsel to understand the issues associated with a GRA since the MMF had never appeared before the Board as an intervener. The MMF suggested they were not aware of the extent of information typically reviewed at a GRA. To mitigate legal costs, the MMF suggested legal costs were reduced by the use of junior legal counsel at reduced hourly rates versus that of more senior legal counsel. Senior legal counsel was only used to provide guidance and mentorship. In addition, legal counsel services provided by counsel at the commencement of maternity leave were not included in legal fees.

With respect to MMF consultants, consulting costs exceed MMF's original budget by \$9,749.47. The MMF noted that although consultant costs exceeded budgeted amounts, total consultant fees did not exceed the Board's allowed consultant cost of \$50,000 if the US exchange rate for Mr. Oppenheimer was not considered. Once the exchanged rate was included, the MMF consultant budget totalled \$55,929.17 which exceeded the Board's \$50,000 budgeted amount.

Manitoba Hydro Comments

Legal Costs

Manitoba Hydro highlighted MMF legal costs exceeded MMF's budgeted amount by \$32,791.33 (including disbursements) and is 164.9 hours over the maximum of 350 hours approved by the Board in Order 18/15. Hours for junior legal counsel alone were 418.4 hours which by itself exceeded the Board's approved hours of 350. Manitoba Hydro acknowledged that issues addressed in a GRA are complex but questioned whether rate payers should be funding the costs for educating legal counsel, especially when this amount constitutes more than 150 hours over the amount approved by the Board.

Manitoba Hydro also compared legal counsel hours from other interveners participating in the GRA and noted total billed time by other intervener lawyers was substantially less than the hours billed by the MMF.

Consultants

Manitoba Hydro highlighted total consultant costs of \$55,928.46 exceeded the Board's approved consulting cost of \$50,000.

Manitoba Hydro did not object to Mr. Matwichuk's costs of \$4,624.46 which was \$2,400.4 less than budgeted.

With regards to Mr. Oppenheim's costs, Manitoba Hydro noted that Mr. Oppenheim did not submit any expert evidence and was not subject to cross examination yet his costs exceeded that of Green Action Centre's consultant who provided expert evidence and appeared at the hearing. Mr. Oppenheim's time was entirely in support of reviewing GRA material and preparing a substantial number of information requests.

MMF Response to Manitoba Hydro Comments

In response to Manitoba Hydro comments, the MMF contends the additional hours over the Board-approved 350 hours of legal time does not relate to time spent for educating legal counsel but rather contingencies not known to MMF at the time MMF revised budget. These contingencies included:

- Additional hearing days (four additional hearing days)
- Additional time to consider the large number of information requests
- Time required to consider issues such as bill assistance and depreciation
- Time required for reviewing and responding to Manitoba Hydro's refusal to answer selected information requests.
- Time to review rebuttal evidence

The MMF also contends that additional time was required to familiarize themselves with Hydro business operations, programming, technical issues, terminology and financial reporting documentation. According to the MMF this additional time was a reasonable expenditure in light of the fact the MMF was new to the GRA process.

The MMF took exception to Manitoba Hydro's comparison of legal time claimed by other intervenor counsel such as from GAC, and MKO for review of the GRA. The MMF argued these intervenors are very familiar with Hydro operations and have extensive knowledge of the issues within a General Rate Application.

Regarding MMF expert consultants, the MMF argued that Manitoba Hydro's comparison of experts who are involved in reviewing different matters and issues is of little utility to the Board and not comparable.

BOARD FINDINGS

The Board has reviewed the Cost Application provided by the MMF as well as comments from Manitoba Hydro and the MMF's response to Manitoba Hydro comments. The Board believes the MMF made a reasonable contribution that was relevant to the proceeding which enhanced the understanding of the issues before the Board. Further, it is the view of the Board that the MMF participated in the hearing in a responsible manner and co-operated with other interveners to avoid duplication in their intervention.

With respect to legal costs, the Board is disappointed that total legal hours (and resulting costs) substantially exceeded the Board's approved time allotment of 350 hours. The Board was very specific in its Procedural Order (Board Order 18/15) that legal costs were not to exceed 350 hours. At no point during the proceedings was the Board advised by the MMF or its counsel of budget stresses and the need for additional resources.

The scope of the MMF's intervention was limited to the examination of rate impacts on the following customer groups:

- Rural customers;
- Low-Income customers;
- All-electric customers; and
- Small to medium businesses (which may include customers in the General Service Small and General Service Medium rate classes)

The Board believes that 350 hours of legal time is reasonable for the examination of these matters. The Board also notes that the MMF did not provide expert evidence during this proceeding. The MMF made this decision in light of the Board's decision to restrict the scope of Demand Side Management (DSM) expenditures to the test years only. Given this scope of work, the Board believes 350 hours of legal time was appropriate. The MMF claimed their budget was exceeded largely due to additional

hearing time, time required to review and manage the large number of Information Requests, and time spent to review rebuttal evidence and prepare closing submissions. The Board finds these additional contingencies, as suggested by the MMF, difficult to understand. The MMF participated in the recent Needs for and Alternatives to (NFAT) review of Manitoba Hydro's preferred development and as such was aware of the Board's processes. The Board's Procedural Order also clearly defined two rounds of information requests and the submission of rebuttal evidence. As to the volume of information filed, historic GRAs are online and available to review should the MMF wish to understand the volume of information filed and issues addressed by the Board. The Board also notes that other intervener legal counsel costs were substantially less than that of the MMF.

The MMF also suggested that "additional time was required by the MMF and its counsel to familiarize and acquaint themselves with Hydro's business operations, programming, technical issues, terminology and its financial documentation and records in light of the fact the MMF had never appeared before as an intervener in any prior general rate application". The MMF however made no reference to this required time in their budget submissions.

The Board is willing to award additional legal time to Mr. Masi to accommodate the four additional days of hearing time plus four additional days of preparation time. This amounts to 64 hours of additional legal time assuming eight hours per working day. This additional time raises the budget limit for legal time to 414 hours (350 hours approved by the Board in Order 18/15 plus 64 additional hours).

The Board will therefore approve legal costs of \$84,097.70 (taxes and disbursements included).

As to the MMF consultant costs, the Board is disappointed consultant costs exceeded the Board's specified budget of \$50,000. The MMF stated additional time for Mr.

Oppenheim was largely the result of the volume of information to review and additional time to examine the issue around bill affordability and data gaps in Manitoba Hydro's evidence. The Board notes however that Mr. Oppenheim did not present expert evidence and as such was not cross-examined by parties. The MMF states Mr. Oppenheim's testimony was not warranted in light of the decision by the Board to limit the scope of the review of DSM expenditures to the test years only. This should have reduced Mr. Oppenheim's budget given the change in scope of work.

The Board finds the cost for Mr. Matwichuk to be reasonable for time spent prior to the issuance of the Board's procedural Order 18/15. Manitoba Hydro had no objections to Mr. Matwichuk's costs.

The Board will maintain MMF's consulting budget to \$50,000 (plus taxes and disbursements). The Board approves \$4,404.25 for Mr. Matwichuk and \$45,595.75 for Mr. Oppenheim for a total of \$50,000.00 in professional consulting fees. The Board will also approve the Digitran fees of \$2,521.26 for copies of hearing transcripts. The MMF should be aware that digital copies of hearing transcripts are generally posted on the Board's website. These should be used whenever practical.

A summary of the awarded costs is provided in the table below.

| | Awarded Costs |
|---|----------------------|
| Legal Costs - Darcy & Deacon | |
| K. Saxberg | |
| fees | \$0.00 |
| GST | \$0.00 |
| RST | \$0.00 |
| Subtotal | \$0.00 |
| D.T. Masi | |
| (414 hours at \$175/hour) fees | \$72,450.00 |
| GST | \$3,622.50 |
| RST | \$5,796.00 |
| Subtotal | \$81,868.50 |
| J. Saunders | |
| fees | \$0.00 |
| GST | \$0.00 |
| RST | \$0.00 |
| Subtotal | \$0.00 |
| Disbursements - legal | \$2,123.05 |
| GST | \$106.15 |
| Subtotal | \$2,229.20 |
| SUBTOTAL LEGAL | \$84,097.70 |
| Consultants | |
| G. Matwichuk | |
| fees | \$4,404.25 |
| GST | \$220.21 |
| RST | |
| Subtotal | \$4,624.46 |
| Disbursements | |
| Subtotal G. Matwichuk | \$4,624.46 |
| J. Oppenheim (in CDN dollars) | |
| fees | \$45,595.75 |
| GST | |
| RST | |
| Disbursements | |
| \$96.77 | |
| Subtotal J. Oppenheim (CDN) | \$45,692.52 |
| SUBTOTAL CONSULTANTS | \$50,316.98 |
| Digitran fees | \$2,521.26 |
| TOTAL | \$136,935.94 |

Based on the above, the Board will approve an award of costs of \$136,935.94 to the MMF.

APPENDIX "A"

The Board will assign the 414 hours of approved legal time to Mr. Masi who was the primary legal counsel to the MMF and participated in the hearings through the duration of the GRA.