Manitoba Hydro

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June 25, 2018

Mr. D. Christle
Secretary and Executive Director
Public Utilities Board
400-330 Portage Avenue
Winnipeg, Manitoba
R3C 0C4

Dear Mr. Christle:

RE: MANITOBA HYDRO APPLICATION TO REVIEW AND VARY ORDER 59/18 AND 68/18 – REPLY TO INTERVENOR SUBMISSIONS

Manitoba Hydro filed a Review and Vary Application of Orders 59/18 and 68/18 on May 30, 2018 pursuant to section 36 of *The Public Utilities Board Rules of Practice and Procedure*. By way of a letter dated June 1, 2018, the Public Utilities Board ("PUB") set forth a process which invited Intervenors to provide written submissions on or before 4:30 pm on June 18, 2018. Manitoba Hydro is in receipt of the written submissions on behalf of the Assembly of Manitoba Chiefs ("AMC") submitted on June 17, 2018, as well as written submissions on behalf of the Manitoba Keewatinowi Okimakinak Inc. ("MKO"), Green Action Centre ("GAC"), Manitoba Industrial Power Users Group ("MIPUG") and Winnipeg Harvest and the Manitoba Branch of the Consumers Association of Canada ("Consumers Coalition") submitted on June 18, 2018.

Pursuant to the PUB's correspondence dated June 1, 2018, Manitoba Hydro is herein providing its Reply to Intervenor submissions. Manitoba Hydro's Reply is divided into the issues as set forth in its Review and Vary Application.

Bill Affordability and First Nation On-Reserve Residential Class

Directive 6 of Order 59/18 states:

> **Manitoba Hydro create a First Nations On-Reserve Residential customer class. This customer class is to receive a 0% rate increase for the 2018/19 Test Year, such that the rate for this class will be maintained at the August 1, 2017 approved Residential rate. A 0% rate increase is to also apply to First Nations Residential customers in the diesel zone communities.**

As part of its Application to Review and Vary Directive 6, Manitoba Hydro requested the PUB immediately stay the operation of Directive 6 as it relates to the First Nation On-Reserve Residential

class and First Nations Residential customers in the Diesel Zone communities pending the PUB's decision on the Review and Vary application and pending the decision of the Manitoba Court of Appeal should a stated case or appeal be necessary. By letter dated June 1, 2018, the PUB denied Manitoba Hydro's request to stay the operation of Directive 6.

Appropriateness to Review and Vary Order 59/18

In its response submission, MKO argues that Manitoba Hydro's Review and Vary Application is in fact an appeal and that it is not up to the PUB to hear an appeal to over-rule its previous Orders. In addition MKO argues that Manitoba Hydro had a right and an obligation if the Board Orders were wrong to appeal each and every one of them to the Manitoba Court of Appeal.[1] MKO has failed to acknowledge that a party is generally obliged to exhaust its remedies before an administrative tribunal prior to seeking to appeal or judicially review the administrative tribunal's decision.[2] Absent exceptional circumstances, any party must pursue all effective remedies available within the administrative process prior to proceeding to court.

MKO submits that this review and vary application is inappropriate because the PUB cannot grant Manitoba Hydro's application as the PUB cannot "over-rule" previous Board Orders.[3] With respect, that is not an exceptional circumstance justifying immediate recourse to the Court of Appeal. Questions of an administrative body's jurisdiction do not constitute exceptional circumstances.[4] With the filing of a Review and Vary Application, Manitoba Hydro is in fact exhausting the administrative remedy available to it pursuant to the PUB's Rules of Practice and Procedure.

Appropriateness of Request for the PUB to Exercise its Discretion to State a Case

MKO submits that the PUB should not exercise its discretion pursuant to section 58.4(1) of *The Public Utilities Board Act* to state a case. The Intervenor argues that there is no reason to ask the Court of Appeal for guidance as the PUB Board has not wavered in its opinion.[5]

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[1] Response Submission of Manitoba Keewatinowi Okimakanak Inc. to Manitoba Hydro Review and Vary Application, pg. 3, paragraph 9.

[2] Judicial Review of Administrative Action in Canada, Volume 2, Chapter 3:2310 – "Accordingly, like statutory appeals to a court, the general rule now is that rights of appeal to an administrative tribunal or other administrative remedies should be exhausted before resorting to judicial review proceedings, unless there is concurrent or overlapping jurisdiction, or the cost and inconvenience of so doing outweighs the benefits, or there are other "exceptional circumstances"". See for example: *Harelkin v University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Turnbull v Canadian Institute of Actuaries*, 1995 CanLII 6265 (MB CA); *Dorn v. Association of Professional Engineers and Geoscientists (Man.)*, 2014 MBCA 25.

[3] Response Submission of Manitoba Keewatinowi Okimakanak Inc. to Manitoba Hydro Review and Vary Application at paragraphs 3-5, and 9.

[4] *President of Canada Board Services Agency and Attorney General of Canada v C.B. Powell Ltd.*, 2010 FCA 61 at paragraphs 33, 37 – 45; *Turnbull v Canadian Institute of Actuaries*, *supra* at page 9.

[5] Response Submission of Manitoba Keewatinowi Okimakanak Inc. to Manitoba Hydro Review and Vary Application at paragraph 11.

Neither section 58.4 of *The Public Utilities Board Act* nor the jurisprudence surrounding stated cases require that the PUB express inconsistent opinions on its jurisdiction prior to stating a case. This is not a relevant consideration in determining whether to state a case to the court of Appeal pursuant to section 58.4. Further, MKO has failed to acknowledge that in Order 59/18 the PUB Board was not unanimous on Directive 6. Board Member Ring issued a dissenting opinion and articulated reasons for that dissent.

The Manitoba Court of Appeal considered the exercise of the PUB's discretion to state a case in *Public Utilities Board v. Manitoba Public Insurance Corp. et al.*[6] In that proceeding, the PUB stated a case relating to its jurisdiction to require disclosure from Manitoba Public Insurance during a general rate application. That issue had been the source of on-going disputes between the insurance provider and the regulator. The PUB had consistently asserted its jurisdiction to request the disclosure for over 20 years.[7] The Court of Appeal, at paragraph 47, stated:

> On the issue of the appropriate procedure for stating a case, the preferable course would be to have a question in the stated case that is based on an issue that actually arises before the PUB in a specific hearing, such that it raises a discrete question that is specific to a particular issue related to a real factual situation that has been presented or will be presented. The court must be provided with the necessary context to permit it to provide the answer to the question put before it. The court will not entertain or answer a stated case where the question is abstract, hypothetical, speculative or overly broad.

While the PUB has previously indicated its view that it had the jurisdiction to order a bill affordability program such as a lower-income rate, it was only in Order 59/18 that it actually directed Manitoba Hydro to do so. Manitoba Hydro submits that Order 59/18 now raises a question that is specific to a particular fact situation and provides the necessary context to permit the Court of Appeal to provide its direction. The PUB should, in this case, exercise its discretion to state a case to the Court of Appeal.

The PUB's Authority to Set Just and Reasonable Rates

The Consumers Coalition submits that in approving Manitoba Hydro's rates for service, the PUB is mandated to fix just and reasonable rates that are not unduly discriminatory, citing section 77 and 82 of *The Public Utilities Board Act* in support of its position.[8] MIPUG also argues that PUBs authority is derived in part from section 77 (a) of *The Public Utilities Board Act*.[9] AMC further argues that section 82(1) of *The Public Utilities Board Act* prohibits unjust or unreasonable classification in the setting of rates and that this section necessarily extends to judgments about the justness or reasonableness of

[6] *Public Utilities Board v. Manitoba Public Insurance Corp. et al.*, 2011 MBCA 88.
[7] Public Utilities Board v. Manitoba Public Insurance Corp. et al., *supra* at paragraphs 7-8.
[8] Letter from the Public Interest Law Centre dated June 18, 2018, pg. 1
[9] Manitoba Industrial Power Users Group Response to Manitoba Hydro's Review and Vary Request of PUB Order 59/18, pg. 3.

classification as well.[10] While not disagreeing with the notion that rates must be just and reasonable (a common law duty), submissions arguing that the PUB's authority is in any way derived from sections 77 and 82 of *The Public Utilities Board Act* completely ignores section 2(5) of *The Public Utilities Board Act* which limits the PUB's jurisdiction as set forth in Part IV of *The Crown Corporations Governance and Accountability Act*.

While section 2(1) deals with the application of *The Public Utilities Board Act* generally, section 2(5) of *The Public Utilities Board Act* specifically deals with the application of *The Public Utilities Board Act* as it relates to Manitoba Hydro. Section 2(5) is clear that subject to Part IV of *The Crown Corporations Governance and Accountability Act*, the provisions of *The Public Utilities Board Act* do not apply, to Manitoba Hydro except as they relate to the conduct of a public hearing in respect of an application made to the PUB under subsection 38(2) or 50(4) of *The Manitoba Hydro Act* and subsection 83(4) of *The Public Utilities Board Act* and the regulations made thereunder.

While Intervenors have referenced part a) of section 77 and section 82 for purposes of arguing the PUB's authority in setting "just and reasonable rates" and the "justness and reasonableness of classifications", the argument that the PUB's authority arises from these sections is non-sensical as these sections clearly conflict with the section 2(5) of *The Public Utilities Board Act* and the intent of Part IV of *The Crown Corporation Governance and Accountability Act* that the PUB's role is limited to setting rates for service. If sections 77 and 82 of *The Public Utilities Board Act* are to apply to Manitoba Hydro, then the PUB's powers would include jurisdiction over all matters referenced in the subparts of section 77 and 82. This is clearly not the case.

For example, Section 77(b) of *The Public Utilities Board Act* allows the PUB to fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed thereafter by any such owner. This clearly conflicts with the limitation that the PUB's role is in setting rates for service and further conflicts with amongst others, section 15.0.1(1) of *The Manitoba Hydro Act* which provides the authority to the Lieutenant Governor in Council to make regulations adopting reliability standards, section 15.0.2 of *The Manitoba Hydro Act* which provides the authority for Manitoba Hydro to make standards for the reliability of the electric system in Manitoba, and section 28(1) which permits Manitoba Hydro to establish regulations as to the supply of power.

Section 82 of *The Public Utilities Board Act* allows, amongst other things, the PUB to order a utility to not withhold or refuse any service that can reasonably be demanded or furnished (sub-part (d)), to require a utility to obtain authority from the PUB for the issuance of stocks, stock certificates, bonds or other evidence indebtedness payable in more than one year from the date thereof (sub-part(f), and requires approval of the PUB in order to sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof, or merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with that of any other public utility or its owner (sub-part (h)). Each of these allowances conflict with section 2(5) of *The Public Utilities*

[10] AMC Written Submission, pgs. 6-7.

Board Act, and further conflicts with sections of *The Manitoba Hydro Act* which allows others to exercise those same powers.

For example, Section 16 (1)((i) of *The Manitoba Hydro Act* provides Manitoba Hydro the ability to sell, lease or otherwise dispose of the property to a subsidiary with the approval of the Lieutenant Governor in Council. Section 15.3(1) provides that the government cannot present to the Legislative Assembly a bill to authorize or effect a privatization unless the voters are put a question in a referendum. Section 33 of *The Manitoba Hydro Act* provides Manitoba Hydro the ability to issue notes, bonds debentures or other securities for the purpose of the corporation or for any other related business venture and may, through the Minister of Finance sell or otherwise dispose of the notes, bonds, debentures or securities.

The statutory scheme set forth by the legislature would be inoperable if Intervenors arguments regarding the application of sections 77 and 82 were to be accepted. In order to accept Intervenors arguments with respect to the applicability of section 77 and 82 and ensure the legislative scheme remains operable, the other sub-parts of the sections would have to be parsed. The parsing of legislation is not permitted. As correctly noted by Consumers Coalition, statutory authority must be read in a manner consistent with the underlying objective of the statutory scheme and "not sliced and diced".[11] Had the legislature intended that section 77 and 82 apply to Manitoba Hydro, it would have specifically referenced those sections under section 2(5) of *The Public Utilities Board Act*.

Jurisdiction to Establish New Customer Classes (A consideration of Terms and Conditions of Service)

GAC argues that the evidence presented by multiple parties was that the Province has shown no signs of intervening to provide a solution to low-income affordability and that a solution by the utility is needed and that no witness expressed confidence that the problem would be solved by the Province.[12] AMC argues that there are ways in which on-reserve residents are in a different position with respect to electricity services including poverty rates[13], housing conditions, building codes[14], the amount of electricity consumed on reserve than off reserve[15], and that the alternative to switching to

[11] Letter from the Public Interest Law Centre dated June 18, 2018, pg. 5
[12] GAC Letter dated June 18, 2018 – Response to Manitoba Hydro Application to Review and Vary, pg. 3
[13] While the Winnipeg Free Press Article cited by AMC states that 96% of 53 First Nation reserves have median incomes below the poverty line, the article also cautioned that the figures were not a full picture of on-reserve incomes as many of the communities registered so few residents that Statistics Canada had to suppress data out of concern for privacy. This is similar to the situation encountered by Manitoba Hydro in its 2014 Residential Energy Use Survey which reported that 64.8% of on-reserve First Nations customers were defined as LICO-125 however the sample size was insufficient to draw conclusions representative of the First Nation customer base.
[14] While AMC cited Ms. Morrison's testimony at transcript pg. 2673, Ms. Morrison corrected her testimony to clarify that Canadian Mortgage and Housing Corporation has a code compliance for the on-reserve non-profit housing program which requires First Nations to complete a declaration for those non-profit housing program homes and attest that all units which are constructed or renovated are in conformity with the plans and specifications and requirements of the National Building Code for Canada.
[15] While AMC uses the 2016/17 data to show a 13.1% higher usage, Dr. Mason cautioned at transcript pg. 2327-2328 that generally the correlation between electric consumption and income was extremely low and further

natural gas as a heating source is almost non-existent given that only two out of 63 First Nations have gas service. AMC further argues that Directive 6 is a targeted bill affordability program, an administratively simple step that enables some alleviation of the burden of energy poverty on some of the most vulnerable people living in Manitoba.[16]

No party, including Manitoba Hydro, questions the motives behind establishing the First-Nation on-reserve rate. However, both GAC and AMC appear to be confusing the motivation to create a customer class versus the criteria to be used to establish a class (i.e. the terms and conditions established in order to identify who is to be included within a customer class). The criteria for inclusion in the PUB's new First Nation Residential class does not take into account income level, quality of housing stock, consumption levels or access to natural gas. Rather, the sole criterion for inclusion in the new Residential Rate class is residency within the geographical bounds of a First Nation.

AMC takes issue with Manitoba Hydro using the words "defining feature" of the classification noting that such term does not appear in the legislation. Manitoba Hydro views this term as being synonymous with "solely"; however to such extent use of this terminology causes concern or confusion, Manitoba Hydro suggests the term "sole criteria" be substituted for "defining feature" where it appears in its submission. While there exist a number of motivations for establishing the First Nation On-Reserve class, the sole classification criteria for inclusion in the class is the region in the province in which the customer resides. This is not a permissible means of classifying customers.

AMC argues that the PUB's jurisdiction to determine rates extends to the definition of customer classes[17] and further argues that since Manitoba Hydro has not defined customer classes in the *Electric Power Terms and Conditions of Supply Regulation*, this means that customer classes is not a term and condition of service.[18] As noted above, AMC cites section 82(1)(c) of *The Public Utilities Board Act* which prohibits unjust or unreasonably classifications in the setting of rates.[19] AMC argues this section allows the PUB to consider the justness or reasonableness of customer classifications. AMC also asserts that it is open to the PUB to set out conditions that Manitoba Hydro must meet to secure approval of rates, which may include modifying the classification of customers because "directly or indirectly, the Board clearly has jurisdiction with respect to the classification of customers."[20]

Consumers Coalition argues the PUB's statutory authority must be read "holistically in a purposive manner consistent with the underlying objective of the statutory scheme."[21] Consumers Coalition further argues that the definition of a rate class is central to the price paid for power and rate

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at transcript pg. 2551 that a representative sample of First Nation communities was required in order to increase insight into whether there would be a correlation on First Nation communities.

[16] AMC Written Submission, p. 8

[17] AMC Written Submission, page 5.

[18] AMC Written Submission, page 6.

[19] AMC Written Submission, pages 6 &7.

[20] AMC Written Submission, page 7.

[21] Letter from the Public Interest Law Centre dated June 18, 2018, page 5.

approval requires the appropriate allocation of costs.[22] According to Consumers Coalition, implicit in the allocation of costs is a determination of what an appropriate class is and any tribunal with the authority to determine just and reasonable rates must consider whether the rate classes are appropriate for achieving that objective.[23]

MIPUG argues the PUB has the ability to determine which customers are sufficiently similarly situated to justify being charged the same rate as this is "the very definition of creating a class for rate purposes."[24] As noted above, in support of its position, MIPUG cites section 77(a) of *The Public Utilities Board Act* as authority that the PUB has discretion to set rates which are not unjustly discretionary and can vary the customer classes proposed by Manitoba Hydro.[25] MIPUG also points to the US Federal Energy Regulatory Commission ("FERC") terminology to demonstrate setting rates which are not "unjustly discriminatory" are well established regulatory principles.[26]

The Manitoba Hydro Act section 28(1)(a) grants Manitoba Hydro the broad power to establish terms and conditions of service by regulation. In response to AMC's submission, the fact that Manitoba Hydro has not previously exercised its power to define customer classes by regulation does not mean the definition of customer classes is not a term and condition of service, nor does it mean Manitoba Hydro ceases to have jurisdiction over customer classifications. It also does not mean that another party obtains jurisdiction simply by the lack of Manitoba Hydro to exercise its power under section 28(1).

Further, any language or interpretation of setting rates by FERC do not apply to Manitoba Hydro and is of limited persuasive value given Manitoba Hydro's unique legislative scheme. As such, Manitoba Hydro submits that *The Public Utilities Board Act* does not expressly or implicitly grant the PUB jurisdiction over the creation or consideration of customer classifications. To find otherwise would expand the PUB's jurisdiction beyond the approval of rates.

AMC and Consumers Coalition both submit that the PUB has "indirect" or "implicit" jurisdiction to determine customer rate classifications. Manitoba Hydro disagrees and adopts its submissions provided in its Review and Vary Application.[27] While it may be open to the PUB to consider the impact rate increases have on different customer classes, it is not expressly or implicitly within the PUB's jurisdiction to re-define customer classes or create conditions that would require Manitoba Hydro to revise its customer classifications in order to receive a rate change. To find such an implicit power would ignore the explicit direction provided for in the legislation and would create ratepayer uncertainty. In addition, the PUB cannot do indirectly what it has not been granted the power to do directly.

[22] Letter from the Public Interest Law Centre dated June 18, 2018, page 5.
[23] Letter from the Public Interest Law Centre dated June 18, 2018, pages 5 & 6.
[24] MIPUG Response to Manitoba Hydro Review and Vary Application, page 4.
[25] MIPUG Response to Manitoba Hydro Review and Vary Application, pages 3 & 4.
[26] MIPUG Response to Manitoba Hydro Review and Vary Application, page 4.
[27] Manitoba Hydro Application to Review and Vary Order 59/18, Appendix A, page 6.

Consumers Coalition also argues that given the PUB's jurisdiction to approve any rate that is just and reasonable and in the public interest "all aspects of the rates are "in issue" when the Board hold a public hearing on rates."[28] Consumers Coalition uses this argument in support of its position that it is incumbent upon the PUB to examine the reasonableness of the classes proposed by Manitoba Hydro.[29] Consumers Coalition cites the case of *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board and Manitoba Public Insurance* 1995 CarswellMan 433 in support of its proposition. It is clear from a review of the *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board and Manitoba Public Insurance* case that the statement regarding "all aspects of the rates are in issue" is referencing the authority of the PUB to set a different rate than that applied for when dealing with the argument by the appellant regarding lack of proper notice. As noted by the Court of Appeal:

> The issue of natural justice and the issue of Board jurisdiction are inextricably linked. If the Board has discretion to set any rate that is fair and reasonable upon the evidence and in the public interest, then all aspects of the rates are "in issue" when the Board holds a public hearing on rates. Notice of a rate hearing, in general terms, is notice that a rate applied for may vary in either direction.
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> Save that the Board approves rates, rather than sets them. I agree with that statement. As the Board had authority to set a different rate than that applied for, the rate hearing notice was sufficient notice of possible increases in rates.[30]

The regulatory framework in Manitoba has been in place for decades. Any person involved in the arduous GRA process can confirm that rate approval in Manitoba is not and has never been "a rubber stamp", nor has Manitoba Hydro suggested that this is or should be the case. It is clear from a review of the PUB's orders over the decades that the PUB has, on numerous occasions, approved rates that were different than what was being applied for by Manitoba Hydro. This does not however, expand upon the jurisdiction of the PUB to other aspects beyond the approval of rates.

Reliance Upon *ATCO Gas and Pipelines v Alberta*

MKO, at paragraph 13 of its submissions, argues "The Supreme Court decided in *ATCO Gas and Pipelines v Alberta*[31] that a regulator such as this Board has the right to limit a utility such as Hydro's managerial discretion over key decisions, including prices and service offerings. This is a complete answer to the question of jurisdiction." AMC relies upon *ATCO Gas and Pipelines v Alberta* for the proposition that a regulator may limit a utility's discretion over service offerings.[32]

The jurisdiction of each administrative body, including public utility regulators, must be reviewed on a case-by-case basis with reference to the specific legislation governing that administrative body.

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[28] Letter from the Public Interest Law Centre dated June 18, 2018, pg. 2
[29] Letter from the Public Interest Law Centre dated June 18, 2018, pg. 3
[30] *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board and Manitoba Public Insurance* 1995 CarswellMan 433, paragraph 24-26
[31] *ATCO Gas and Pipelines v Alberta,* 2006 SCC 4.
[32] AMC Written Submissions, page 4-5.

Broad judicial statements of a regulator's jurisdiction cannot be readily adopted by other regulators without consideration of applicable legislation.

At issue in *ATCO Gas and Pipelines v Alberta* was whether the Alberta Energy and Utilities Board had the jurisdiction to the allocate portions of proceeds of a sale of the utility's assets to customers. This decision did not address the jurisdiction of the regulator to create customer classes. A full reading of the case confirms the Supreme Court's ruling was confined to the regulatory framework under review. The Supreme Court of Canada acknowledged the import of a regulator's jurisdictional limits:

> Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another. More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority.[33]

Two paragraphs later, addressing itself to the Alberta regulatory model, the Court made the statement quoted by AMC:

> However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions.[34]

The prudency of Manitoba Hydro's plant and equipment investment decisions are not subject to approval by the Public Utilities Board.[35] That is a confine of the PUB's jurisdiction in Manitoba. Clearly, the Supreme Court's statement is not a blanket declaration as to the jurisdiction of all public utility regulators in Canada as suggested by AMC and MKO. The starting point of any determination of an administrative body's jurisdiction must be the text of the applicable legislation.[36]

Consideration of Section 43(3) – Commingling of Funds

AMC argues that section 43(3) of *The Manitoba Hydro Act* is a provision on the commingling of Hydro and government funds and does not speak to bill affordability and that there can be no argument that "the funds of {Hydro}" are being used at all.[37] AMC acknowledges that other users will make up the difference related to the First Nations on-reserve rate freeze. Customer funds received by Manitoba Hydro are the "funds of Hydro". Use of customer generated Manitoba Hydro funds for government purposes is exactly the mischief section 43(3) is intended to prevent. As noted previously, section 43(3) places limits on the use of Manitoba Hydro's funds and marks a delineation with respect to the use of funds for intended and legitimate purposes within Manitoba Hydro's legislated mandate, and other social policy purposes which are within the purview and jurisdiction of the legislature.

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[33] *ATCO Gas and Pipelines v Alberta, supra* at paragraph 2 (references removed).
[34] *ATCO Gas and Pipelines v Alberta, supra* at paragraph 4; quoted in part in AMC, Written Submissions, page 5.
[35] *Manitoba (Public Utilities Bd.) v Manitoba (A.G.)*, 1989 CarswellMan 129, 61 Man. R. (2d) 164.
[36] *ATCO Gas and Pipelines v Alberta, supra* at paragraph 41.
[37] AMC Written Submission, pg. 9

Consideration of Section 39(2.2) – Seasonal and Diesel Rates, Zoning

AMC argues that the statutory regime in place does not prohibit multiple sub-classes of residential customers, pointing to the existence of Residential Seasonal rates and Diesel Zone rates.[38] AMC further submits that all customers are generally located within areas of the province zoned for the particular activities that customer engages in. For example, industrial customers are exclusively located within locations zoned for industrial use.[39] AMC argues that the classification of those customers is not a breach of section 39(2.2) of *The Manitoba Hydro Act* despite the customers being found within a particular geographic location, the First Nations On-Reserve class is similarly permitted.

Manitoba Hydro does not disagree that sub-classes within a class are permissible, provided that geography or region is not the sole criteria for inclusion in the class. Residential Seasonal rates are distinguishable from the First Nations On-Reserve customer class in that region of the province or population density of the region in which the customers are located is not the sole or determinative factor in determining whether a customer is eligible for inclusion in the Seasonal class. Residential Seasonal rates are applicable to customers outside of the Winnipeg area using less than 7,500 kWh per season for residential purposes on an individually metered service when usage is casual or intermittent.[40] The primary feature of this customer class is the type and quantity of service provided to the customer, not the customer's location within the province.

AMC erroneously points to Diesel Zone rates as an example of customer class defined by geographic region. Section 39(2.1) of *The Manitoba Hydro Act*, which establishes the requirement for Uniform Rates throughout the province, only applies to grid customers and does not apply to those not connected to Manitoba Hydro's main interconnected system, as defined in section 39(2.2)(a):

> **Equalization of rates**
> 39(2.1) The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province.
>
> **Interpretation**
> 39(2.2) For the purpose of subsection (2.1),
> (a) Grid customers are those who obtain power from the corporation's main interconnected system for transmitting and distributing power in Manitoba;

Customers receiving diesel electric service do not receive service from the grid. Uniform Rates legislation was not intended to apply to this service and thus it cannot be cited as an example of a geographic based customer class. Further, the criterion for inclusion in this customer class is the type of service and product provided to the customer, not the customer's location within the province.

[38] AMC Written Submissions, pages 10-11.
[39] AMC Written Submissions, page 16.
[40] MANITOBA HYDRO-22 Manitoba Hydro – Rate Schedules further to Order 80/17, August 1, 2017 at page 3.

In addition, AMC has failed to recognize that prior to Order 59/18, Seasonal and Diesel Zone customers were charged the same per kWh rate as all other customers in the Residential class.[41] The directive in Order 59/18 now provides a different, lower per kWh rate for Diesel customers than Seasonal and other Residential customers.

There is no evidence whatsoever on the record regarding municipal zoning designations or demonstrating that all General Service – Medium and Large customers are exclusively found within areas zoned for industrial use or that Residential customers are exclusively located in regions which have been zoned for residential use. Further, the existence of municipal zoning classifications which may (or may not) correspond with electric customer classifications does not lead to the conclusion that electric customer classes are defined by the region of the province in which the customer is located. There is no evidence that Manitoba Hydro makes use of zoning classification as part of the criteria for applying electric customer classifications and Manitoba Hydro can confirm that it does not. Customers are classified by the quantity and characteristics of the energy supplied by Manitoba Hydro.[42]

The First Nation On-Reserve customer class is defined solely based upon the region of the province in which the customer is located, specifically whether the customer is residing upon a reserve.

Reliance Upon *Charter* Values and Reconciliation

The Assembly of Manitoba Chiefs ("AMC") submits that the PUB's jurisdiction is affirmed by *Charter* values and *The Path to Reconciliation Act*.[43]

AMC argues *The Path to Reconciliation Act* "sets out principles that the government must have regard for in order to advance reconciliation and it is entirely appropriate for the PUB, as a statutory body making decisions on the basis of compelling public policy considerations, to have recourse to these principles."[44]

AMC relies upon the recent Supreme Court of Canada decision *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 as authority that the PUB's exercise of statutory discretion must comply with *Charter* values.[45]

Manitoba Hydro submits that AMC's reference to *Charter* values and *The Path to Reconciliation Act* is an improper attempt to broaden the scope of the PUB's jurisdiction beyond that which is contemplated by the legislature. Additional aids, such as the *Charter* and *The Path to Reconciliation Act* as suggested by AMC, cannot establish, expand, or defeat the scope of the PUB's jurisdiction as expressly set out in the legislation.

[41] MH Ex. 22 Manitoba Hydro – Rate Schedules further to Order 80/17, August 1, 2017 at pages 10-11
[42] MH Ex. 22 Manitoba Hydro – Rate Schedules further to Order 80/17, August 1, 2017 at pages 10-11
[43] AMC Written Response to Manitoba Hydro Review and Vary Application, page 16.
[44] AMC Written Response to Manitoba Hydro Review and Vary Application, pages 16 & 17.
[45] AMC Written Response to Manitoba Hydro Review and Vary Application, page 17.

AMC points to *The Path to Reconciliation Act* as establishing principles the government must consider. While the PUB may turn its mind to the principles espoused in *The Path to Reconciliation Act* as a "compelling policy consideration", the PUB is not the government and is not obligated or authorized to eliminate the specific inequities which *The Path to Reconciliation Act* attempts to address.

The application of *Charter* values must be consistent with the applicable statutory scheme and objective. Although administrative tribunals may consider *Charter* values, this must be done within the sphere of the tribunal's authority and decision making power.[46] The *Charter* does not create expansive rights where the PUB does not possess the statutory power to grant the particular relief requested.

Prejudice or Damage Resulting from Order 59/18

Finally, MKO argues that the rules provide that Manitoba Hydro must show prejudice or damage that may result from the Order under review and that the damage or prejudice is slight to none. MKO argues that the $1.7 million is minimal and may result in an accounting correction that will not be material to either class if adjustments are necessary, that the order is for one year.[47]

To the contrary, if such adjustment were to be required, it will not simply be an "accounting correction". In order to re-aggregate the Residential class, First Nation customers living on reserve would need to receive rate increases well above the class average, which is clearly not of an immaterial nature as suggested by MKO. As noted by Board Member Ring, "Over time, and in the context of projected annual rate increases, the gap in residential rates will continue to grow." This could lead to rate shock and hardship for a subset of customers already encumbered with a high energy. The impact of such adjustment is not inconsequential and points to the need to have this issue resolved sooner than later, if not by the PUB then by the Court of Appeal by way of stated case.

Excess Energy Purchase Rate

MIPUG and the Coalition were the only Intervenors who made submissions with respect to Manitoba Hydro's Application to Review and Vary Order 59/18 with respect to Directive 7.

Directive 7 of Order 59/18 states:

> ***Manitoba Hydro credit net-metered customers' excess energy put on the grid at the rate of 8.196¢/kWh for 2018/19. Manitoba Hydro must apply to the Board for approval of any future net-metered rate or changes to the 8.196¢/kWh rate.***

[46] For example see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paragraph 46.
[47] Response Submission of Manitoba Keewatinowi Okimakanak Inc. to Manitoba Hydro Review and Vary Application at paragraph 17.

Both the Consumers Coalition and MIPUG acknowledge that the PUB's conclusion in Order 59/18 regarding its jurisdiction to approve rates paid to non-utility generators raises important legal and jurisdictional issues. The Consumers Coalition recommends the establishment of a paper review process to consider more fully whether the PUB has jurisdiction and if so, what the appropriate criteria for setting the rate should be. MIPUG states that the appropriate relief is a stated case, or the convening of a hearing process (including potentially a paper process) to further examine the merits of Manitoba Hydro's submission.

Following receipt of Manitoba Hydro's May 30, 2018 Review and Vary Application, the PUB issued correspondence dated June 1, 2018 indicating that "The Board has determined that a hearing on the R&V Application should be held to determine whether the Directives identified in the R&V Application should be rescinded, changed, altered or varied." The PUB invited Intervenors to provide written submissions and Manitoba Hydro the opportunity to file its Reply. A hearing process has been established. The PUB further indicated that upon receipt of all submissions from parties, it will determine whether to convene an oral hearing on all or part of the R&V Application.

Such process is consistent with the PUB's Rules of Practice and Procedure. Rule 36(4) provides that:

> 36(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 should be rescinded, changed, altered or varied.

Thereafter, Rule 36(5) provides:

> 36(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;
> b) grant the application;
> c) order a Hearing or proceeding be held

In their written submissions, both the Consumers Coalition and MIPUG acknowledge that the issue raised with respect to Directive 7 is fundamentally a jurisdictional question. Neither Intervenor provides any legal analysis supporting the PUB's assertion of jurisdiction. Unlike their submissions with respect to other Directives which Manitoba Hydro seeks to have varied, neither offer any criticism of Manitoba Hydro's analysis nor identify a specific legal issue or concern that merits further review. There exists no justification to incur the additional time and expense associated with holding a further hearing. The issue has been identified and the law has been canvassed. There exists no facts in dispute that will impact the PUB's decision as to jurisdiction.

The Consumers Coalition suggests that it is important to distinguish a customer's motive when installing generation as to whether it is for the purpose of load reduction or in order to sell excess supply. Manitoba Hydro submits that customer motivation has absolutely no bearing on whether the PUB maintains jurisdiction over purchases of power by the Corporation. There is no basis to convene a further hearing to review this topic.

The Consumers Coalition requests a further hearing not simply to further canvass jurisdiction but also to establish appropriate criteria for setting the price for purchased energy. In this regard, the Consumers Coalition is not only putting the cart before the horse, it is asking the PUB to assume the role of the legislator, neither of which are appropriate. A final determination regarding jurisdiction must be made prior to initiating a costly and resource intensive hearing process.

Manitoba Hydro agrees with the concerns raised by MIPUG that the logical conclusion of the PUB's decision to assert jurisdiction over purchased energy from solar generators under 200 kW is that power purchases from all Non-Utility Generators, regardless of source or scale, are subject to the same approval requirements. Manitoba Hydro also agrees that such outcome represents a fundamental change to the historical role and jurisdiction of the PUB. The impacts of such change are not however, merely theoretical. The PUB's Directive 7 has caused confusion and uncertainty and is seriously impacting the industry. Non-Utility Generators with existing contractual arrangements with Manitoba Hydro do not know if these contractual commitments will be honoured. Manitoba Hydro and future Non-Utility Generators cannot enter into arrangements until the issue is resolved as presently, there exists no certainty as to price beyond the current fiscal year. This uncertainty extends to ongoing discussions conducted in good faith with Non-Utility Generators both greater than and less than 200 kW where commercial terms were outlined and to situations where contracts were pending but not yet executed. The PUB's decision needs to be made forthwith in order to resolve the uncertainty created by Directive 7 or, at a minimum move the process forward by means of a stated case.

The PUB has all the information it requires to make a decision. Intervenors have been afforded a hearing process to make submissions. None have been made supporting the PUB's interpretation of its jurisdiction. Manitoba Hydro submits the PUB should, pursuant to Rule 36(5)(b), immediately grant Manitoba Hydro's application, rescind Directive 7 (including the requirement that Manitoba Hydro credit net-metered customers' excess energy put on the grid at the rate of 8.196¢/kWh for 2018/19) and confirm that the PUB does not maintain jurisdiction with respect to purchased power, regardless of source or scale.

In the event the PUB is not prepared to take such action, the matter should be referred to the Manitoba Court of Appeal by way of stated case pursuant to section 58.4(1) of *The Public Utilities Board Act*. As noted by MIPUG, there is a sufficient factual foundation on the record to base a stated case. The issue is not abstract. Proceeding by way of stated case is a more efficient and less costly means of resolving the jurisdictional question.

Retain Consultant to Report on Asset Management Program, Progress of UMS Report and Corporate Value Framework

MIPUG and Consumers Coalition were the only Intervenors who made submissions with respect to Manitoba Hydro's Application for Review and Vary Order 59/18 with respect to Directive 14.

Directive 14 of Order 59/18 states:

> **Manitoba Hydro retain an independent consultant to assess Manitoba Hydro's development of its Asset Management Program and its progress in addressing the recommendations made by UMS, as well as the progress of the development of the Corporate Value Framework. Manitoba Hydro is to file with the Board by June 29, 2018 the terms of reference for the consultant for the Board's review and comment. Manitoba Hydro is directed to report back to the Board on its progress and the result of the consultant's assessment at the next GRA.**

As part of its Application to Review and Vary Directive 14, Manitoba Hydro requested the PUB stay the operation of Directive 14 and in particular the requirement that Manitoba Hydro file by June 29, 2018, the terms of reference for the external consultant with the PUB. By letter dated June 1, 2018, the PUB denied Manitoba Hydro's request to stay the operation of Directive 14, but varied the directive to remove the requirement to file terms of reference for the consultant by June 29, 2018. As such, Directive 14 now reads as follows:

> **Manitoba Hydro retain an independent consultant to assess Manitoba Hydro's development of its Asset Management Program and its progress in addressing the recommendations made by UMS, as well as the progress of the development of the Corporate Value Framework. Manitoba Hydro is to file with the Board the terms of reference for the consultant for the Board's review and comment. Manitoba Hydro is directed to report back to the Board on its progress and the result of the consultant's assessment at the next GRA.**

Manitoba Hydro identified three issues with respect to Directive 14 in its May 30, 2018 Review and Vary Application:

i) The subject matter of the review, capital planning processes, falls outside the PUB's jurisdiction;
ii) Determinations regarding the retention of external consultants and adoption of their recommendations is properly a management function and not that of the regulator;
iii) The jurisdiction to approve rates does not extend to requiring Manitoba Hydro to incur expense for the purpose of preparing reports.

In its submission, the Consumers Coalition argues that the PUB is empowered to approve rates which are just and reasonable and that an important element of the exercise of approving just and

reasonable rates for service is ensuring that actual and projected costs are "necessary and prudent". The Consumers Coalition goes on to reason that the duty to approve just and reasonable rates, requires Manitoba Hydro to demonstrate the reasonableness of its capital expenditures gives the PUB ample reason to issue Directive 14.

Manitoba Hydro agrees with the Consumers Coalition that the PUB has a duty to approve rates which are just and reasonable. Manitoba Hydro takes issue with the Consumers Coalition's statement that the PUB is empowered to ensure that actual and projected costs, including capital costs, are "necessary and prudent". These words do not appear in any of the legislation which governs the PUB's oversight of Manitoba Hydro. This, or similar, argument was rejected by the Manitoba Court of Appeal in *Manitoba (Public Utilities Board)* v. *Manitoba (Attorney-General)*.[48]

> "Mr. Peltz, counsel for the Manitoba Society of Seniors, contends that in fixing or reviewing rates, the Board has jurisdiction to review the decisions of Manitoba Hydro with respect to its major capital projects such as the construction of new generating stations or new transmission lines.
>
> It is agreed by all counsel that the Act in question grants no such specific power to the Board. In other words, the legislation is silent on that issue. However, Mr. Peltz alleges that the practical reality is that capital plans and expenditures cannot be ignored in any workable system of rate review and if legislation is not available, then the Court should, by necessity, imply such power in the Board.
>
> I am unable to imply such intention in the legislation as it stands. To imply, it would be to legislate, which is not the function of this Court.

In the subsequent decision of *Consumers' Association of Canada (Manitoba) Inc.* v. *Manitoba Hydro Electric Board*,[49] the Court of Appeal outlined the role of the PUB and concerns to be addressed when dealing with a rate application:

> The role of the PUB under *The Accountability Act* is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understand its role in this regard.
>
> The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest.

The Court did not reference any specific need or requirement to assess the prudency of utility expenditures but rather the balancing of consumer and utility interests. Considering both of these

[48] *Manitoba (Public Utilities Board)* v. *Manitoba (Attorney-General* Manitoba Judgment [1989] MJ No.491
[49] *Consumers' Association of Canada (Manitoba) Inc.* v. *Manitoba Hydro Electric Board* , 2005 MBCA

Court of Appeal decisions together, it is clear that when the PUB conducts this balancing exercise, it must be confined to the specific powers afforded to it by the legislature.

The PUB's role involves testing Manitoba Hydro's actual and forecast expenditures and evaluating the reliability of these forecasts in setting rates for future test years. In conducting this exercise, deference must be had for the powers assigned by the Legislature to other oversight bodies. Under the Manitoba regulatory framework, the responsibility for capital rests with the Manitoba Hydro-Electric Board and ultimately government. The PUB is entitled to test the reliability of Manitoba Hydro's actual and forecast expenditures through production of information such as the capital expenditure forecast and supporting documentation. The PUB routinely receives such information in GRA filings and through the discovery and evidentiary processes. In Manitoba Hydro's respectful submission, such power does not extend to issuing directives approving or disallowing capital expenditures or regarding the processes adopted by the Corporation for the purpose of assessing its capital requirements. Absent these powers, the PUB simply does not possess the legislative authority to require Manitoba Hydro to retain consultants to prepare reports regarding these topics.

No party addressed Manitoba Hydro's position that the retention of external consultants and the adoption or rejection of recommendations made regarding capital planning processes is strictly a management function and is not the role of the regulator. However, both the Consumers Coalition and MIPUG advance the position that a directive to expend monies in order to retain an external consultant is authorized under Section 39(10)(d) of *The Manitoba Hydro Act*.

> **Material supplied by corporation**
> 39(10) Where an application is made to the Public Utilities Board under this Act, the corporation, under request of the Public Utilities Board, shall provide the Public Utilities Board with
> (a) a statement showing the prices fixed or proposed to be fixed and the prices which were or are in effect prior to the new prices being fixed;
> (b) a statement of the reasons for any changes in the prices fixed or proposed to be fixed including a statement of the facts supporting those reasons;
> (c) a statement of the manner in which and a time at which the changes in the prices were or are proposed to be implemented;
> (d) such further information incidental thereto as the Public Utilities Board may reasonably require.

The information to be supplied by the Corporation pursuant to sections 39(10)(a), (b) and (c) are each in the form of "a statement" (e.g. a statement of the reasons for any changes). Any further information requested by the PUB pursuant to section 39(10)(d) is not without limitation. The request for additional information must be incidental and limited to the statements referenced in subsections (a), (b) and (c). Manitoba Hydro submits that section 39(10), or in particular subsection (d), does not permit or authorize the PUB to require the corporation to expend monies to retain consultants for the purposes of creating reports related to the adoption and implementation of

capital planning processes, especially when considering the fact that capital matters are not even within the PUB's jurisdiction.

MIPUG also argues that Section 32(1) of *The Interpretation Act* provides further authorization for the PUB to order Manitoba Hydro retain consultants to report on the work of other consultants.

> **Exercising powers under an Act or regulation**
> 32(1) The power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers.

Manitoba Hydro submits that firstly the PUB must possess "the power to do a thing or require or enforce the doing of a thing" in order for section 32(1) to have any application to the issue at hand. For this case, the PUB would have to possess jurisdiction to approve or disallow capital in order for it to possess the incidental power to order reports be created by external consultants with respect to the adoption and implementation of asset management processes. To reiterate, the Court of Appeal has made clear that the PUB has no power to review Manitoba Hydro's capital expenditures and refused to imply any such power as incidental to its rate review mandate. Accordingly, if the PUB's rate review mandate does not extend to the approval or disallowance of capital expenditures, it cannot follow that the PUB has the power to direct Manitoba Hydro to retain external consultants to report on capital planning process matters.

Technical Conference on Minimum Equity

Directive 9 of Order 59/18 states:

> ***Manitoba Hydro participate in a technical conference hosted by Board Staff or an external consultant appointed by the Board for the consideration of the establishment of a minimum retained earnings or similar test to provide guidance in the setting of consumer rates for use in rule-based regulation.***

Consumers Coalition, although suggesting the Application is without merit, notes that the questions on which Manitoba Hydro seeks clarification are ones which would begin to be addressed through the workshop[50]. As such, Manitoba Hydro concludes that Consumers Coalition does not object to the technical conference including the issues which Hydro has raised in its Review and Vary Application.

GAC appears to share Manitoba Hydro's concern regarding the focus of a technical conference on minimum equity being overly narrow and detracting from the appropriate targets to establish and maintain a financially stable utility to enhance the long-term fiscal health and value of Manitoba Hydro.[51]

[50] Letter from the Public Interest Law Centre dated June 18, 2018, pg. 10
[51] Letter from Green Action Centre dated June 18, 2018, pgs.3-4

MIPUG suggests that Manitoba Hydro's understanding of the MRET is incorrect and that no further guidance is necessary, aside from its suggestion that the PUB Board clarify that all parties will be offered the opportunity to participate in all phases of the technical conference. MIPUG also suggests that broadening the directive regarding the technical conference from a minimum retained earnings test is unnecessary because, in MIPUG's view, notwithstanding the Board's specificity in the directive, it should be clear to all Parties that all other financial target considerations remain eligible for review and debate at the technical conference. Moreover, MIPUG dismisses Manitoba Hydro's concerns regarding implementation of a minimum retained earnings test for rate-setting as, in MIPUG's view, such a step would only be one possible outcome of many for the PUB Board having itself initiated the technical conference through Directive 9.[52]

The GRA proceeding began with a Procedural Order (70/17) which specifically included appropriate capital structure, financial targets, and pacing to achieve financial targets in the scope of the hearing. Having concluded a year-long hearing, Manitoba Hydro, like GAC, is not able to discern the PUB's direction on these topics. MIPUG appears to concur where it paradoxically notes that the Review and Vary is not supportable because "the very purposes (sic) of the technical conference is to clarify the PUB's intention with respect to future targets".[53] Order 59/18 directs a technical conference to consider establishing guidance for the setting of consumer rates. Directive 9 is the only Directive in Order 59/18 that addresses financial targets. Notwithstanding apparently conflicting statements in the body of Order 59/18, absent clarification from the PUB, rate-setting based on maintenance of a minimum retained earnings threshold stands as the only reasonable interpretation of the PUB's go forward intentions regarding financial targets.

Given that financial targets and pacing were a focus of the GRA from the outset, some clear definition of what the parameters of the technical conference are, and specifically that they are not limited to establishing a MRET to replace existing debt/equity, interest coverage and capital coverage targets will avoid future debate regarding the PUB's intentions. It is not an answer to this request for clarification for MIPUG to suggest that "the very purpose of the technical conference is to add clarity".[54] With respect, having just completed a hearing which had as a fundamental issue financial targets, MIPUG's submission that parties should now participate in a debate as to the parameters of a conference, and thereafter hold another hearing to determine whether the targets discussed during the technical conference ought to be adopted is highly inefficient, unconstructive and defeats all of the effort and expense of Manitoba Hydro's just completed General Rate Application. MIPUG's suggested approach offers no reasonable path forward for Manitoba Hydro to begin to develop its next rate application. Manitoba Hydro also takes issue with MIPUG's assertion that "the entire GRA hearing was based on Hydro itself attempting to abandon targets that were long in place..."[55] On the contrary, a central issue in this hearing, from Manitoba Hydro's perspective, was the appropriate timeframe for the Corporation to return to a 75:25 debt to equity target which has been, without

[52] MIPUG's Response to Manitoba Hydro's Review and Vary Request, pgs. 8-10
[53] MIPUG's Response to Manitoba Hydro's Review and Vary Request, pg. 8
[54] MIPUG's Response to Manitoba Hydro's Review and Vary Request, pg. 7
[55] MIPUG's Response to Manitoba Hydro's Review and Vary Request, pg. 8

question, the central and primary financial target focused on by both Manitoba Hydro and the PUB for over two decades.

Manitoba Hydro also takes issue with MIPUG's attempt to characterize Manitoba Hydro's Schedule A as "excessively over-interpreted" or "sensational". In fact, comparing the equity levels projected in Schedule A with those in Exhibit 93 and those highlighted by MIPUG in PUB/MIPUG 14, the results are very similar in the first 12 years of the forecast, all resulting in approximately $3 billion of equity and no abatement of debt growth. MIPUG describes the MRET concept brought in by Osler and Forrest in PUB/MIPUG 14 to be "not anything like the concept portrayed by Hydro in Schedule A" failing to appreciate that the baseline scenario upon which MIPUG's analysis in PUB/MIPUG 14 is derived is virtually identical in outcomes to Schedule A. Further, MIPUG in its submission quotes PUB/MIPUG 14 that "the forecast minimum level of retained earnings over the next decade exceeds any reasonable MRET", all of which suggests that Manitoba Hydro's submission is not overstated or hysterical and that further guidance from the PUB is required prior to commencement of a technical conference.

Contrary to MIPUG's submission that Manitoba Hydro "attempt[s] to prevent a technical conference focused on matters that Board saw as important and relevant"[56], Manitoba Hydro seeks clarity on the PUB's expectations at the outset by seeking direction on the four questions outlined in its Review and Vary Application (Appendix D, p. 10). It is clear from all parties submissions and in particular MIPUG's that there is uncertainty as to the interpretation or application of the PUB's findings in Order 59/18 on the subject of MRET, and all parties will benefit from the PUB enunciating its views on the questions posed in Manitoba Hydro's Review and Vary Application prior to engaging in the development of terms of reference for the technical conference. The alternative is a technical conference that will fail to meet the PUB's objectives, a restricted ability for Manitoba Hydro to develop a financial plan that aligns with the PUB's views and the need to re-litigate all of the issues that consumed this past hearing process in future rate applications.

Determination of Timing of Future Rate Increase and Time of Use Rate Proposal

Order 59/18 states:

> **Therefore in the absence of unforeseen or emergency circumstances, the Board will not consider future interim rate increases.**
>
> **Filing of a GRA after September 1, 2018 but before December 1, 2018 is required for consideration of a request for a revised rate in fiscal year 2019/20. For the next GRA the Board will not consider rate increases for more than two test years.** (p. 171)

The Consumers Coalition states that pursuant to section 26(1) of *The Crown Corporations Governance and Accountability Act*, "Manitoba Hydro has a right to apply for rates for service for a

[56] MIPUG's Response to Manitoba Hydro's Review and Vary Request, pg. 10

period of not more than three years" (emphasis added).[57] Manitoba Hydro agrees with this statement. The Consumers Coalition goes on to state that it would be open to the PUB to reject a three year proposal. Manitoba Hydro also agrees with this statement. Manitoba Hydro's concern, which is not addressed in the Consumers Coalition's submission, is that the PUB is, by virtue of its statement at p. 171 of Order 59/18, making its determination prior to a proposal having been filed and prior to hearing the complete evidence with respect to such proposal. The legislation affords Manitoba Hydro the right to file a three year rate proposal as well as to seek interim rates. The PUB is not required to approve Manitoba Hydro's request, however the rules of natural justice, in particular the right to a fair hearing, dictate that a fair hearing must take place (which would include the filing of a rate application and the hearing of evidence), prior to the PUB making its determination.

The Consumers Coalition states that it would "strongly support rate applications of no more than two test years until Manitoba Hydro demonstrates that its house is in order" and in a footnote indicates "a reasonable argument can be made for annual rate reviews." Manitoba Hydro submits that the appropriate time for such submission is at the conclusion of an evidentiary process where a rate application seeking rates for more than two tests years is being sought. Only then does the PUB have the facts and context to make its decision. To make a determination regarding multi-year rate increases any earlier is procedurally unfair and inefficient.

By way of example, Manitoba Hydro filed a GRA on November 30, 2009 seeking rates effective April 1, 2010 and April 1, 2011. The scope of this GRA expanded (and became known as the "Risk Review"). The PUB's final Order was not issued until January 17, 2012, more than two years after the filing and nine months after the proposed implementation date for the second year rate increase. Manitoba Hydro is confident that at the outset of this process, no party, including the PUB, anticipated the process would take over two years to complete. The Corporation would have been severely prejudiced had the PUB placed restrictions on multi-year rate increases or the use of interim rate increases prior to making this filing. Arguably (and with the benefit of hindsight), a three year rate increase would have avoided the need for interim rate increases in subsequent years.

Unless and until wholesale changes are made to the regulatory process, any suggestion promoting annual reviews must be viewed as unrealistic, unreasonable and an imprudent use of the Corporation's resources. The 2017/18 GRA was filed May 5, 2017 with the PUB's final Order issuing 361 days later, on May 1, 2018. Based on this process, Manitoba Hydro would have to begin preparing its next GRA before completing the evidentiary process on the current GRA. While some Intervenors may view it as beneficial to run continual hearings, Manitoba Hydro must be afforded time to digest, prepare and implement Directives issued by the PUB and also run its business.

The Consumers Coalition appears to infer that Manitoba Hydro's advice that a GRA will not be filed in the 2018 calendar year means Manitoba Hydro intends to file for an interim rate interim increase. Manitoba Hydro can advise that no such determination has been made. Knowledge of the scope and outcome of the PUB's technical conference is expected to play a significant role in Manitoba Hydro's

[57] Letter from the Public Interest Law Centre dated June 18, 2018, pg. 11

determination in this regard and also with respect to whether a two or three year rate approval will be sought.

Manitoba Hydro is open to discussions regarding improvements to the regulatory process and the ability resolving issues on a consensus basis as suggested by GAC. These suggestions however do not deal with the issue at hand, which is limiting the mechanisms provided by the Legislature for the effective and efficient hearing of rate applications.

Manitoba Hydro does not support having a hearing for the purposes of sequencing and scheduling future hearings and the completion of PUB Board ordered directives as suggested by MIPUG. Intervenors have made their submissions and the PUB its determinations regarding what it requires from the utility. The PUB must now determine the pacing of its requirements taking into account its other regulatory commitments and priorities, together with Manitoba Hydro's capacity to implement directives and make other filings. Manitoba Hydro is confident that the PUB can make the necessary determinations without the necessity of a hearing.

If a hearing for this purpose were to be scheduled, it would involve not only parties to Manitoba Hydro rate applications, but also those of Centra Gas, Manitoba Public Insurance and other industries which the PUB regulates. Such hearing would be inefficient, difficult to manage and an unnecessary expense. The PUB is aware of its schedule and its priorities. What is needed is for the PUB to understand Manitoba Hydro's capacity and competing priorities in order to achieve a workable schedule. Communication, not a hearing, is the best means of addressing this issue.

Manitoba Hydro appreciates the opportunity to comment on the submission of Intervenors. If you have any questions or comments with respect to this submission, please contact the writer at 204-360-3946 or Odette Fernandes at 204-360-3633.

Yours truly,

MANITOBA HYDRO LEGAL SERVICES DIVISION
Per:

PATRICIA J. RAMAGE
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Bob Peters, Board Counsel
Registered Intervenors