RESPONSE SUBMISSION OF MANITOBA KEEWATINOWI OKIMAKANAK INC. to

MANITOBA HYDRO REVIEW AND VARY APPLICATION

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Response to Application

1. MANITOBA KEEWATINOWI OKIMAKANAK INC. (MKO) will only respond to Manitoba Hydro's Review and Vary Application "the Application" with respect to Directive 6. MKO does not take a position on any other aspect of the Application.

2. Manitoba Hydro's Review and Vary Application is subject to Rule 36 of the Public Utilities Board Rules of Practice and Procedure. Rule 36 (5) a) I) provides that in the case of an application based upon error of law or jurisdiction or an error in fact the Board may dismiss the application if the Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness of the Board's order.

> *(5) After determining the preliminary question under subsection (4), the Board may:*
>
> *a) dismiss the application for review if,*
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> *i) in the case where the applicant has alleged an error of law or jurisdiction or an error in fact, the Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness of the Board's order or decision; or*

3. The entirety of the grounds set out by Manitoba Hydro (Hydro) with respect to Board jurisdiction and the law regarding its jurisdiction to set rates have been canvassed, argued and presented to the Board on numerous occasions. The grounds have been debated between Hydro and nearly all of the intervenors for years. The Board has never accepted Hydro's interpretation of its role in rate making or setting rates. In the Application Hydro uses the same argument and uses the same law and evidence that it has used in the past and is almost identical to the argument made at the conclusion of the just concluded GRA hearing. If the Board was not convinced in the preceeding years of the merit of Hydro's argument how can the Board now say that based upon this same old argument it is now

substantially in doubt as to the correctness of its current and past interpretation of jurisdiction and law.

4. Rule 36 only allows the Board to make 3 decisions:
   a. It can dismiss the Application;
   b. It can grant the Application;
   c. It can order a hearing.

5. With all due respect to Hydro how can the Board grant the Application if it has rejected it formally on all previous occasions and do so without reversing all Orders made previously that accepted the Board's jurisdiction.

6. Similarly, how can the Board order a hearing on this matter when all of the arguments will presumably be the same as in all past hearings. There is no new evidence, facts or law that have interevened since the last several hearings.

7. This leaves only option a) which is to dismiss the Application.

8. Hydro's argument that it has not agreed in the past nor does it now agree with the Board's orders regarding jurisdiction and law is not a legal argument that supports a Review Application.

9. With all due respect to Hydro, this is not a request for a Review, it is in fact an appeal. It is not up to this Board to hear an appeal to over-rule its previous Orders. 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. All Orders made by the Board have legal force and unless appealed stay in force and are subject to be followed. Neither Hydro nor any other party to a hearing has the right to say we are not bound by a decision of the Board or that we can ignore it if we want or just pretend that it has no force.

10. This is a matter that should be dealt with under *The Public Utilities Board Act* under the provisions that have been statutorily set out in section 58 for appealing Board Orders:

> **Grounds of appeal**
> 58(1) An appeal lies from any final order or decision of the board to The Court of Appeal upon
> (a) any question involving the jurisdiction of the board; or
> (b) any point of law; or
> (c) any facts expressly found by the board relating to a matter before the board.
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> **Leave to appeal**
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> 58(2) The appeal shall be taken only
> (a) by leave to appeal obtained from a judge of The Court of Appeal;
> (b) within one month after the making of the order or decision sought to be appealed from, or within such further time as the judge under special circumstances shall allow; and
> (c) after notice to the other parties stating the grounds of appeal.

11. This is not a situation where section 58.4 of the Public Utilities Board Act regarding a Reference to the Court of Appeal should apply. The Board has not wavered in its opinion that it has jurisdiction to act in the manner it has in this case. It is not a situation where the Board has doubt or has insufficient evidence or law to support its position. In this case it does not have any reason to ask the Court of Appeal to give it guidance.

Is the decision of the Board Correct?

12. The argument made by Hydro is in fact no different than the argument in its final Submission at the 2017-18 &2018-19 GRA. This argument was fully canvassed by the

Intervenors MKO, AMC and GAC in their final submissions. The interpretation of statutes, law and jurisdiction were before the Board prior to it making its decision. It is of no purpose for all of those arguments to be again argued on this Review Application.

13. The Supreme Court of Canada decided in *ATCO Gas and Pipelines v Alberta*, 2006 SCC 4 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.

14. In *Advocacy Centre for Tenants Ontario and Ontario Energy Board* 2008 293DLR (4) 684 the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility.

> Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate". In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

15. The above case was approved and followed in *Toronto Hydro-Electric System Limited v Ontario Energy Board* 2010 99 O.R (3) 481 a decision of the Ontario Court of Appeal (Head note attached). The Court held that a Board may impose any reasonable condition upon a rate decision and that this ability was within the jurisdiction of the Board.

16. This Board in its majority decision accepted the arguments by MKO and AMC that the establishment of a class of First Nations on Reserve was not solely governed by geographical considerations. This is a finding that the Board has jurisdiction to make and is not an error in law as the legislation specifically allows for the creation of a class and rates for that class as long as the sole reason is not geographical. The Board received

ample evidence during the hearing as to the unique circumstances that justify such a finding. So there is no error of fact nor is there an error in law. The Board was correct in its decision and the case law supports that the Board should not have a concern about the correctness of that decision.

17. The Rules provide that the Applicant must also show prejudice or damage that may result from the Order under review. On a balance of the weight of prejudice or damage that may result it is respectfully submitted that the damage or prejudice to Hydro is slight to none. Hydro expects total revenue of 1.5 billion dollars next year. The cost of not having an increase on First Nations on Reserve results in approximately 1.7 million dollars less from that class with a corresponding increase on other classes. The amount is minimal and may result in an accounting correction that will not be material to either class if adjustments are necessary. The order is for one year. If it is continued or becomes entrenched it will only be because Hydro itself has not done enough to implement a general low income program.

Respectfully submitted on behalf of MANITOBA KEEWATINOWI OKIMAKANAK INC.
this 18th day of June 2018

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Toronto Hydro-Electric System Limited v. Ontario Energy Board

[Indexed as: Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)]

99 O.R. (3d) 481

Court of Appeal for Ontario,
Feldman, Lang and MacFarland JJ.A.
April 20, 2010

Public utilities -- Ontario Energy Board -- Ontario Energy Board concerned about large dividends paid by electricity distributor to affiliate at time when capital was needed for reinvestment in aging infrastructure -- Board imposing, as condition of rate decision, requirement that distributor obtain approval of majority of its independent directors before declaring any future dividends payable to its affiliates -- Board not exceeding its jurisdiction by imposing that condition -- Decision reviewable on standard of reasonableness -- Decision reasonable.

THESL is an electricity distributor licensed and regulated by the Ontario Energy Board. It is a wholly owned subsidiary of THC. All of the shares of THC are owned by the City of Toronto. When THESL applied to the Board for approval of its distribution rates to be effective May 2006, the Board expressed a concern about large dividends paid by THESL to its affiliates at a time when capital was required for reinvestment in aging infrastructure. The Board imposed a duty on THESL to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. The Divisional Court allowed THESL's appeal, holding that the Board had no jurisdiction to impose the

condition and that the imposition of such a condition represented an unwarranted and unlawful restriction on the authority of the board of directors to declare a dividend. The Board appealed.

Held, the appeal should be allowed.

Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid legislative purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. The Ontario Energy Board's power in respect of setting rates is to be interpreted broadly. The Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B specifies that in carrying out its responsibilities, the Board shall be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity services. The Act also permits the Board in making an order, to impose such conditions as it co nsiders proper, and states that those conditions may be general or particular in application. It was apparent that as part of its rate-setting function, the Board was entitled to consider the history of THESL's dividend payments. That was part of the inquiry into whether and how to control outgoing cash-flows from THESL in order to ensure adequate capital. That line of inquiry went to the heart of the Board achieving its statutory objectives. The inquiry and the condition imposed were within the Board's jurisdiction.

The Board's decision to impose the impugned condition was reviewable on a standard of reasonableness. The Board's reasons provided an intelligible explanation for the condition. The reasons disclosed a concern relating to prices and the adequacy, reliability and quality of service and explained how the chosen [page482] remedy would help alleviate that concern. The Board was concerned because THESL was paying THC very large dividends even though increased capital spending was going to

be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately have adverse effects on ratepayers. The Board also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts was to require that any dividend paid by THESL be approved by a majority of its independent directors. The decision was reasonable.

Cases referred to

Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC 14,209 at 111, [1979] 2 A.C.W.S. 108; Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, 2007 SCC 15, 279 D.L.R. (4th) 1, 360 N.R. 1, J.E. 2007-670, 59 Admin. L.R. (4th) 1, 155 A.C.W.S. (3d) 7, EYB 2006-116801, 59 C.H.R.R. D/276, apld

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, 2006 SCC 4, 263 D.L.R. (4th) 193, 344 N.R. 293, [2006] 5 W.W.R. 1, J.E. 2006-358, 54 Alta. L.R. (4th) 1, 380 A.R. 1, 39 Admin. L.R. (4th) 159, 145 A.C.W.S. (3d) 725, distd

Other cases referred to

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684, 166 A.C.W.S. (3d) 384, 238 O.A.C. 343 (Div. Ct.); Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339, [2009] S.C.J. No. 12, 2009 SCC 12, 304 D.L.R. (4th) 1, 385 N.R. 206, 77 Imm. L.R. (3d) 1, 82 Admin. L.R. (4th) 1, EYB 2009-155418, J.E. 2009-481; Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC 220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33, 193 O.A.C. 180, 136 A.C.W.S.