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The Public Utilities Board of Manitoba
400 – 330 Portage Avenue
Winnipeg, MB R3C 0C4

Attention: Dr. Darren Christle, Executive Director and Board Secretary

Sent via email

Dear Dr. Christle:

**Re: Manitoba Hydro 2021/22 Interim Rate Application – Consumers Coalition
Comments on Manitoba Hydro's Application to Review and Vary PUB Order 9/22**

Overview

In the process leading to Order 9/22, the Manitoba Public Utilities Board (PUB) sought to expedite consideration of the request by Manitoba Hydro for a time sensitive, Interim Rate Application seeking a 5% rate increase.

Within 5 weeks of the filing of Hydro's application, the PUB undertook a written and oral evidentiary process and issued Order 137/21, a 16-page order granting Manitoba Hydro a 3.6% rate increase. Despite the interim nature of this proceeding, the PUB also issued an additional 96 pages of reasons in Order 9/22 with helpful directives for the purposes of the 2022/23 General Rate Application (GRA).

Specifically mindful of the guidance of the Supreme Court of Canada on the nature of interim rate decisions, Orders 137/21 and 9/22 set out "an internally coherent and rational chain of analysis" that is intimately connected to the legislative framework, the evidence before the PUB and the insight of regulatory decisions dating back over 18 years.

On February 25, 2022, Manitoba Hydro filed a review and vary application preternaturally focused on the need to replace the word “its” with the word “a” and apparently indifferent to the realities of an Interim Rate Application and the guidance of the Supreme Court of Canada.

Manitoba Hydro’s application to review and vary Order 9/22 fails to demonstrate:

- a) an error of law, jurisdiction or fact that raises substantial doubt as to the correctness of the decision; or,
- b) new facts or a change in circumstances that raise a reasonable possibility that the Board's decision might be materially changed.¹

The application to review and vary Order 9/22 should be dismissed.

Background

For much of 2021 and despite the existence of a drought, Manitoba Hydro resisted the requests of residential and industrial consumers, as well as First Nation political organizations for a status update hearing to determine whether its current rates were just and reasonable.

On September 29, 2021, Manitoba Hydro changed course. It advised the PUB of its intention to file an Interim Rate Application for the 2021/22 year to assist in addressing the financial impacts of the ongoing drought.

On November 15, 2021, Hydro filed its Interim Rate Application and sought a 5% rate increase. The information supplied by Manitoba Hydro in support of the Interim Rate Application was modest as compared to the type of an information typically filed in support of a GRA.² It lacked the long-term financial information historically relied upon by Manitoba Hydro in a rate application and by the PUB in recommending and approving rates.

Given the interim nature of the application and Manitoba Hydro’s request for an order effective January 1, 2022, the PUB undertook an expedited hearing process involving significantly less written discovery, a much shorter oral hearing process and no opportunity for intervenors to file their own independent evidence.

¹ See also PUB Order 90/18, p 6-7 where the Board discusses its authority regarding review and vary applications.

² Hydro’s Application and Minimum Filing Requirements constituted approximately 700 pages.

PUB Order 137/21

Within 5 weeks of Manitoba Hydro filing its Interim Application, the PUB issued Order 137/21, a 16-page decision which granted the crown monopoly a 3.6% rate increase. It indicated that further reasons would follow.

In its decision, the PUB recognized “the time constraints under which this expedited interim process was conducted”³ and highlighted the critical distinction between interim and final rate decisions. Citing Supreme Court authority, the PUB observed that “interim rates are set without the benefit of a full evidentiary record, involve an abbreviated process, and are adjudicated against a less onerous legal standard than are final rates.”⁴

The PUB also noted that a limitation in the Interim Rate Application “acknowledged by Manitoba Hydro and all Interveners, was that there currently is no long-term financial forecast being used in the management of Manitoba Hydro.” It found “without such a current planning document, the Board and all Parties are at a disadvantage when considering the important concepts of rate smoothing and reasonable rate trajectories when balancing the interests of ratepayers with the financial health of Manitoba Hydro.”⁵

The 3.6% rate increase granted was intended to recognize both “the financial consequences of the drought and the Board’s objective to avoid rate shock by smoothing the rate increases required to address the costs of major capital projects entering service.”⁶

PUB Order 9/22

One month after Order 137/21, the PUB issued Order 9/22.

Notwithstanding the abbreviated nature of the interim proceeding requested by Manitoba Hydro, the PUB provided an additional 96 pages of reasons. Central to its decision to grant a 3.6% rate increase, rather than the 5% sought by Manitoba Hydro, were:

- its findings that Retained Earnings and efficiency savings related to Operating and Administrative expenses as well as Business Operations Capital could be used to mitigate the adverse financial impacts of the drought;⁷

³ PUB Order 137/21, p 11.

⁴ PUB Order 137/21, p 11 referencing *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at 1754.

⁵ PUB Order 137/21, p 12.

⁶ PUB Order 137/21, p 12.

⁷ PUB Order 9/22, p 47-48.

- its determination that “because Manitoba Hydro’s Interim Application is filed three-quarters of the way through the fiscal year,” there was “no reasonable opportunity through regulatory action to avoid the reduction in Retained Earnings for 2021/22.”⁸
- its conclusion that Hydro’s forecast of a “a return to positive Net Income in 2022/23” would allow for a partial replenishment of Retained Earnings.”⁹

The PUB approach in Order 9/22 is consistent with prior PUB decisions dating back over 18 years holding that adverse circumstances such as a drought should be met with a combination of responses including rate increases, the drawing down of retained earnings and the exploration of opportunities for operational efficiencies. It is consistent with the PUB concern in recent decisions regarding Manitoba Hydro’s challenges in prudently and reasonably managing Operating and Administrative expenses as well as Business Operations Capital.

The order also tracks the general range of recent rate increases undertaken in the same context of responding to the cost pressures of major capital projects entering service while trying to mitigate rate shock.¹⁰

Recognizing the interim nature of the decision as well as Manitoba Hydro’s challenges in filing timely general rate applications, the PUB found that the interim rates would only “remain in effect only until November 30, 2022” unless a General Rate Application was filed “by November 15, 2022, to confirm the 2021/22 interim rate increases, to seek rates for 2022/23, and for 2023/24 should it so decide.”¹¹

In the specific context of the information required to assess a potential Manitoba Hydro rate application for the 2022/23 year, the PUB also issued directives that:

4. Manitoba Hydro include in its 2022/23 General Rate Application its long-term financial forecast of at least 20 years together with its underlying assumptions.
6. At the 2022/23 General Rate Application, Manitoba Hydro demonstrate the savings in Business Operations Capital that are found by showing the updated Business Operations Capital spending compared to the spending proposed at this interim proceeding.
7. At the 2022/23 General Rate Application, Manitoba Hydro demonstrate the savings

⁸ PUB Order 9/22, p 48.

⁹ PUB Order 9/22, p 48.

¹⁰ See for example: two interim rate increases of 3.36% effective August 1, 2016 and August 1, 2017 and a rate increase of 3.6% effective June 1, 2018 approved in Order 59/18, p 17; a rate increase of 2.5% effective June 1, 2019 approved in Order 69/19.

¹¹ PUB Order 9/22, p 93.

in O&A expenses that are found by showing the updated O&A expenses compared to the O&A expenses proposed in this interim proceeding.

The Review and Vary Application

On February 25, 2022, Manitoba Hydro filed an application to review and vary Order 9-22. It was comprised of 5 distinct arguments:

- Part 3 of Hydro’s submissions challenges the adequacy of the PUB reasons, notwithstanding the 112 pages of reasons provided by the PUB in support of an interim rate decision yet to be finalized. It does not incorporate or address the relevant Supreme Court of Canada jurisprudence relating to interim rate applications or the justification, transparency and intelligibility of reasons;
- Part 4 of Hydro’s application devotes almost 4 pages of analysis to replacing the word “its” in Directive 4 with the word “a”. It concedes the “PUB may direct the utility to prepare documents to assist in discharging its rate-setting mandate” including long-term financial forecasts;
- Part 5 of Hydro’s application acknowledges “the PUB may consider capital expenditures in setting just and reasonable rates in future proceedings”. Curiously, it then goes on to challenge a request by the PUB made in the specific context of the 2022-23 rate application that Hydro demonstrate prudence and efficiency in capital management (Directive 6);
- Part 6 of Hydro’s application similarly acknowledges that the “PUB may consider O&A expenses in setting just and reasonable rates in future proceedings”. It then challenges a request by the PUB made in the specific context of the 2022-23 rate application that Hydro demonstrate prudence and efficiency in Operating and Administrative expenditures (Directive 7).
- Part 7 of Hydro’s application asks the PUB to withdraw a finding that additional expert evidence is required to mitigate drought risk. In the alternative, it asks the PUB for clarification on whether the finding was intended to be a directive, and if so, the specifics of the directive.

The legal test for a review and vary application

Under s. 44(3) of the *Public Utilities Board Act*, the PUB may review, rescind or vary its orders.¹²

Rule 36 (4) of the PUB Rules of Practice and Procedure indicate that:

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

¹² *Public Utilities Board Act*, CCSM c P280, s 44(3).

and whether there is reason to believe the order or decision should be rescinded, changed, altered or varied.

Rule 36 (5) a) of the Rules of Practice and Procedure authorizes the Board to, after its determination of the preliminary question above:

- a) dismiss the application for review if,
 - i) in the case where the applicant has alleged an error of law or jurisdiction or an error in fact, the Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness of the Board's order or decision; or
 - ii) in the case where the applicant has alleged new facts not available at the time of the Board's Hearing that resulted in the order or decision sought to be reviewed or a change of circumstances, the Board is of the opinion that the applicant has not raised a reasonable possibility that the new facts or the change in circumstances as the case may be, could lead the Board to materially vary or rescind the Board's order or decision; or
- b) grant the application; or
- c) order a hearing or proceeding be held.

In essence and recognizing the onus lies with the Applicant, the issue is not whether reasonable persons might come to a different conclusion based on the same evidence but whether:

- a) there is an error of law, jurisdiction or fact raising substantial doubt as to the correctness of the decision; or,
- b) new facts or a change in circumstances have arisen or been learned raising a reasonable possibility that the Board's decision might be materially changed.¹³

Rationale supporting the 3.6% interim rate increase (Part 3 of Hydro's application)

While the Consumers Coalition recommended a rate increase lower than 3.6% in the interim rate application process, Manitoba Hydro has not established an error of law, jurisdiction or fact and has not raised new facts or a change in circumstance which casts doubt on the correctness of Order 9/22 in justifying the 3.6% interim rate increase ordered by the Board. Manitoba Hydro's application to review and vary on this point should be dismissed.

¹³ See also PUB Order 90/18, p 6-7 where the Board discusses its authority regarding review and vary applications.

Orders 137/21 and 9/22 reflect the nature of the evidentiary record in the context of an application for an interim rate increase. Despite a limited, high-level evidentiary record and the absence of a long-term financial outlook, the PUB provided extensive justification for the 3.6% rate increase in its initial 16-page interim rate decision and its subsequent 96-page reasons.

Reasons for a decision must reflect the history and context of the proceeding

It is entirely appropriate for the necessary detail in an interim decision to correspond to the detail available in the evidentiary record, which is reduced substantially compared to full or final rate review processes. The PUB recognized this reality in Order 137/21, which initially approved the 3.6% rate increase, with reference to a Supreme Court of Canada decision relating specifically to interim applications:

As previously found by the Board, interim rates are set without the benefit of a full evidentiary record, involve an abbreviated process, and are adjudicated against a less onerous legal standard than are final rates. This finding by the Board is consistent with Manitoba Hydro’s acknowledgement of the Supreme Court of Canada’s fundamental principle that interim applications are “made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision.”¹⁴

A review of reasons given by an administrative decision-maker “properly considers both the outcome of the decision and the reasoning process that led to that outcome.”¹⁵ The Supreme Court has made it clear that reasons provided by administrative decision-makers must demonstrate “an internally coherent and rational chain of analysis” “that is justified in relation to the facts and law that constrain the decision maker.”¹⁶

However, these requirements are qualified by the well-established principle that administrative decision makers, are not required to address and respond to each and every argument and piece of evidence before them in their reasons.¹⁷

To this end, the Supreme Court has previously confirmed that:

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. **That the reasons given for a decision do “not include all the arguments, statutory**

¹⁴ PUB Order 137/21, p 11, referencing *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at 1754.

¹⁵ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 86.

¹⁶ *Ibid* at para 85.

¹⁷ *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2012] 3 SCR 405 at para 3.

provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16.¹⁸

The Court then also explained that “the review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.”¹⁹ This means that should an administrative board’s decision be subject to review, its reasons are to be read in a manner that recognizes its particular specialized expertise²⁰ and are to be complemented by the entirety of the record before it and the procedural history of the matter at issue:

[94] **The reviewing court must also read the decision maker’s reasons in light of the history and context of the proceedings in which they were rendered.** For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker’s work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker’s reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member. (emphasis added)²¹

In short, in order for Manitoba Hydro’s application to succeed, it must demonstrate that the 96 pages of reasons provided in PUB Order 9/22, combined with the 16 page decision in Order 137/21, fail to demonstrate that the Board’s reasoning process adequately justifies the 3.6% rate increase, which would constitute an error of law. For the reasons set out in the following section, there is no demonstrable error of law because Orders 9/22 and 137/21 meet and exceed the requirement that the reasoning applied by the decision-maker justify its decision.

¹⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 91, citing *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 (emphasis added). See also the Concurring Minority reasons of Abella and Karakatsanis JJ at para 301.

¹⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 91.

²⁰ *Ibid* at para 92.

²¹ *Ibid* at para 86. See also the Concurring Minority reasons of Abella and Karakatsanis JJ at para 301.

The PUB's reasons are grounded in history, the evidentiary record and the context of an interim rate proceeding

In accordance with administrative law principles, the PUB set just and reasonable rates that reflect the context of the limited evidentiary record for an interim rate application, the history of past proceedings and the absence of any indication of a long-term trajectory.

Orders 137/21 and 9/22 set out “an internally coherent and rational chain of analysis” that explains why the Board did not approve the 5% requested and instead approved a 3.6% interim rate increase. In particular, the Orders consider:

- the importance of “balancing the interests of ratepayers with the financial health of Manitoba Hydro”;²²
- concepts of “rate smoothing and reasonable rate trajectories”;²³
- the need to recognize “the financial consequences of the drought and the Board’s objective to avoid rate shock by smoothing the rate increases required to address the costs of major capital projects entering service”;²⁴
- opportunities to use Retained Earnings and efficiency savings related to Operating and Administrative expenses as well as Business Operations Capital rather than higher rate increases to mitigate the adverse financial impacts of the drought;²⁵
- the reality that there was “no reasonable opportunity through regulatory action to avoid the reduction in Retained Earnings for 2021/22;”²⁶ and
- the fact that a forecast “return to positive Net Income in 2022/23” would allow for a partial replenishment of Retained Earnings.”²⁷

In essence, the PUB followed a similar approach in Orders 137/21 and 9/22 as it did in Order 69/19.²⁸ Given the lack of meaningful impact that any rate increase would have on the 2021/22 fiscal year and a projected positive net income in the next 2022/23 fiscal year, the PUB approved a rate increase to aid in rate stability until a full GRA where a long-term financial forecast can be used to determine a new rate trajectory for rate-smoothing purposes.

²² PUB Order 137/21, p 12.

²³ PUB Order 137/21, p 12.

²⁴ PUB Order 137/21, p 12.

²⁵ PUB Order 9/22, p 47-48.

²⁶ PUB Order 9/22, p 48.

²⁷ PUB Order 9/22, p 48.

²⁸ See PUB Order 69/19, p 14-19 for the justification on the rate approved in that process in the absence of a long-term financial forecast. See specifically p 14 where the PUB found that: “The Board further finds that Manitoba Hydro has not established that it requires any additional revenues from a rate increase in 2019/20 to flow into the Utility’s general revenues.” And see also p 17: “The rate increase approved by the Board is based on the need to enhance rate stability and predictability due to the upcoming in-service dates for major new capital projects.”

The PUB approach is consistent with prior PUB decisions dating back over 18 years that adverse circumstances such as a drought should be met with a combination of responses including rate increases, reliance on retained earnings as well as opportunities for operational efficiencies. It is consistent with the PUB concern in recent decisions with Manitoba Hydro's challenges in prudently and reasonably managing Operating and Administrative expenses as well as Business Operations Capital.

The Orders were acutely alive to the reality that the interim rate increase is not a final decision and will be confirmed or varied in the next GRA where all parties will have an opportunity to fully test the evidence.²⁹

Hydro has not met the threshold for a review and vary application. It is not raising new facts that would lead to the decision being materially varied and there is no error of law that raises doubt as to the correctness of the decision.

In particular, there is no error of law because the PUB made the necessary findings in the context of an interim rate application to support its decision. In other words, and as required by administrative law principles, the PUB's reasoning justifies its decision.

Ultimately, Manitoba Hydro cannot "have its cake and eat it too". The corporation cannot both file evidence limited to supporting an emergency interim rate application and expect the PUB to provide more extensive reasons than was possible based upon the limited evidentiary record.

The Consumers Coalition recommends that the PUB dismiss Manitoba Hydro's application to review and vary Order 9/22 as it relates to the rationale for the 3.6% interim rate increase.

Directive 4 – Long Term Financial Forecast (Part 4 of Hydro's application)

Regulatory common sense, a review of prior PUB decisions and language specifically indicating that Directive 4 is for the purposes of the 2022/23 General Rate Application, makes it clear that the directive is aimed only at the rate setting review process.

Manitoba Hydro has not established an error of law, jurisdiction or fact and has not raised new facts or a change in circumstances. Its application to review and vary on this point should be dismissed. However, should the PUB choose on its own initiative to provide clarification, the Consumers Coalition offers recommendations to ensure the forecast components to be filed by the corporation will be of value to the Board.

²⁹PUB Order 9/22, p 13 where the PUB states that the 2021/22 interim rate increase will be confirmed in the next General Rate Application filed by Manitoba Hydro.

Long-term financial forecasts are essential to the PUB's rate-setting function

It is open to Manitoba Hydro to decide, in the management of its business, that it does not want to prepare long-term forecasts for its own planning purposes. However, the PUB has signaled both in this decision and in prior decisions that it requires long-term forecasts in order to exercise its responsibility to set just and reasonable rates.

Manitoba Hydro's Integrated Financial Forecast (IFF) has traditionally been one of the primary tools used by the PUB in exercising its rate setting function.³⁰

In a recent proceeding where an IFF was not available, the PUB explicitly found that the "the limitations in this proceeding that arose from the Utility not filing an IFF demonstrate the importance of such long-term financial forecast being available as a tool in rate setting."³¹ The Board further found that "it is not reasonable to consider another GRA absent a full IFF or other long-term financial forecast" and directed Hydro "file with its next GRA filing an IFF or other long-term financial forecast in a form consistent with an IFF."³²

Long-term forecasts are necessarily just that – forecasts. They are expected to change as circumstances change. However, the PUB cannot set final rates in a void without any indication of what the longer term might bring. Doing so would be irresponsible rate setting and not in line with established practice and prior Board findings.

Possible clarification to the long-term financial forecast directive

While Manitoba Hydro has not alleged any errors of fact or law in the PUB's directive relating to the long-term forecasts, the Board could, on its own initiative under Rule 36(1), decide to modify Directive 4 to specify that the long-term forecast does not have to be "its" IFF, in the sense that it does not have to be an IFF approved by the Manitoba Hydro-Electric Board and that Hydro uses internally.

On its own initiative, the PUB could clarify that Manitoba Hydro must provide a "long-term financial forecast in a form consistent with an IFF", which would align the language in Order 9/22 with the language used in Order 69/19.³³

To ensure the long-term forecast filed can be relied on by the PUB for rate setting purposes, the Consumers Coalition would recommend clarifying the type of information the PUB will require. The PUB could include a preliminary indication of elements to be incorporated in a long-term financial forecast, such as:

³⁰ See for example PUB Order 69/19, p 19.

³¹ PUB Order 69/19, p 19.

³² PUB Order 69/19, p 19.

³³ PUB Order 69/19, p 19.

- The IFF scenario must be rigorous and complete in terms of all the various component forecasts that are compiled to form an “integrated” IFF (see for example the list on page 7 of IFF 16 from the 2017/18 & 2018/19 GRA – Appendix 3.1). On a preliminary basis, the Consumers Coalition would recommend that Debt Management Strategy should also be added to that list, especially in the context of Manitoba Hydro’s current ongoing capital projects.
- It may be beneficial for the PUB to specify the IFF scenario must be the management’s best estimate based on information it has and reasonable assumptions.
- These assumptions should be put together into an IFF format and should not be limited to a run of the financial statement schedules.
- The component forecasts should be timely and not outdated scenarios used for prior purposes.
- Finally, normally an official IFF would contain indicative rate increases based on the attainment of established financial metrics and associated targets. Given that these items appear to still be in state of flux and not approved by the PUB and may not be approved by the Manitoba Hydro Electric Board for an IFF scenario, there should be willingness on the part of the corporation to run additional scenarios during the next GRA. This would allow the PUB and Intervenor to be able to recommend a reasonable rate trajectory to the PUB.

The Consumers Coalition also would recommend that further details regarding what should be included in the long-term financial forecast to be filed by Manitoba Hydro in its next GRA should be confirmed in approved Minimum Filing Requirements, following an opportunity for Manitoba Hydro and Intervenor to provide comments.

Directive 6 – Business Operations Capital Reductions (Part 5 of Hydro’s Application)

Hydro’s submissions on Business Operations Capital echo the same tired submissions rejected by the Manitoba Court of Appeal at the leave to appeal stage in 2019.³⁴

While the PUB cannot approve or reject specific capital expenses, it has jurisdiction to review whether Business Operations Capital expenses are necessary and prudent for rate-setting purposes and to issue information-seeking directives necessary for the fulfillment of its duties.

Manitoba Hydro has not established an error of law, jurisdiction or fact and has not raised new facts or a change in circumstances. As a result, its application to review and vary on this point should be dismissed.

³⁴ *Manitoba Hydro-Electric Board v Public Utilities Board (Man) et al*, 2019 MBCA 54 at paras 35-39.

Jurisdiction

It is recognized by Manitoba Hydro, the PUB and Intervenors that the Board cannot order Hydro to spend or not spend on specific projects, and the PUB does not have jurisdiction to approve, reject or vary capital projects. However, the PUB's jurisdiction to review whether Hydro's expenses are necessary and prudent is clear and settled law, as these expenses have a direct impact on rates.³⁵

The PUB has jurisdiction to issue information-seeking directives to assist it in fulfilling its responsibility, as recently confirmed by the Manitoba Court of Appeal in 2019 at the leave to appeal stage:

[35] In reply, the PUB argues that Directive 14 does not mean and is not meant for it to infringe on the management functions of Hydro. It takes the position that, in order for it to fix just and reasonable rates, which is clearly part of its mandate, it has to be in a position to understand Hydro's capital expenditures. The PUB acknowledges that it does not have the authority to approve or disapprove of Hydro's capital projects, but maintains that, as capital project expenditures form part of Hydro's revenue requirements, which it seeks to recover from ratepayers, the revenue requirements have to become a focus of its inquiry.

[36] In addition, the PUB points to the fact that, despite orders dating back to 2008, Hydro has not yet fully complied in providing asset condition information. The PUB argues that, if it is unable to direct an independent study, and if Hydro does not file a comprehensive study, then it is unable to adequately assess the extent to which rates should recover business operations capital expenditures.

[37] Consumers' takes the position that there is no arguable basis on which Hydro can challenge this directive. It argues that, although Hydro advances its challenge on the basis of its authority to make capital expenditure decisions, the effect of that challenge is to question the PUB's ability in the context of its ratemaking role to investigate whether proposed capital asset management expenditures are prudent and reasonable and that is clearly within the PUB's mandate.

[...]

[39] I accept the arguments put forth by the PUB and Consumers'. **This directive is not an intrusion into the manner in which Hydro conducts its**

³⁵ See PUB Order 5/12, p 27.

affairs. It is an information-seeking directive to help the PUB discharge its mandate and, in my view, the PUB is well within its legislative mandate to do so. Considering that the PUB is interpreting its home statute and considered on a standard of reasonableness, I have not been convinced that Hydro has an arguable case with a reasonable prospect of success. (emphasis added)³⁶

In PUB Order 9/22, Directive 6 is clearly an information-seeking directive intended to help it discharge its mandate in the next General Rate Application, given consistent findings for years that Manitoba Hydro’s expenses relating to Business Operations Capital are not necessary and prudent for rate-setting purposes.

Since at least 2015, and consistently since that time, the PUB has signalled to Manitoba Hydro that it has not adequately evaluated the long-term pacing and prioritization requirements for Business Operations Capital spending.³⁷

In 2018, following a comprehensive review of Manitoba Hydro’s Capital Expenditure Forecast and asset management practices, the PUB found that there should be deferrals/reductions to Business Operations Capital for rate-setting purposes.³⁸ It issued recommendations to signal that Business Operations Capital could be reduced³⁹ and issued a directive to retain a consultant on asset management to further the prioritization of Business Operations Capital at the next GRA.⁴⁰

In the 2021/22 interim rate application filed by Manitoba Hydro, the levels of Business Operations Capital are the same or higher than in the 2017/18 & 2018/19 GRA. As a result, and given prior PUB findings on this issue, there is clear consistency in the regulatory signaling of the PUB findings between Orders 59/18 and 9/22.

Directive 6 of Order 9/22 expressly references information required “at the 2022/23 General Rate Application.” The PUB is not directing Hydro to spend or not to spend on particular projects, which would not be within its jurisdiction.

Rather, the PUB is seeking information regarding the prudence and reasonableness of Business Operations Capital expenditures for the purposes of better assessing the expenses to be included in the revenue requirement for the purposes of rate setting. As the PUB has signaled, the level and prioritization of the expenditures are especially important in the context of major capital expansion and a drought due to the rate pressures faced by consumers.

³⁶ *Manitoba Hydro-Electric Board v Public Utilities Board (Man) et al*, 2019 MBCA 54 at paras 35-39.

³⁷ PUB Order 59/18, p 110.

³⁸ PUB Order 59/18, pages 110-113, Section 6.3.

³⁹ PUB Order 59/18, p 264, Recommendations #1 and #2 in Section 24.0.

⁴⁰ PUB Order 59/18, p 268, Directive #14 in Section 25.0.

Reasons

Manitoba Hydro failed to recognize and act on PUB regulatory guidance from Orders 59/18 and 69/19. It attempts to treat Order 9/22 in isolation from the prior decisions.

Regulatory decisions are cumulative. The next proceeding builds on the last one. The kinds of questions and clarifications that Manitoba Hydro seeks in its application to review and vary are in large part found in these two prior decisions, Order 59/18 being based on a comprehensive GRA and Order 69/19 being based on more information and process than Order 9/22. Order 9/22 must be read in the context of Orders 59/18 and 69/19 and represents consistent regulatory signalling from Hydro's independent regulator that the corporation's Business Operations Capital are not necessary or prudent.

Recommendation

If Hydro is unable to demonstrate during the 2022-23 GRA that its Business Operations Capital expenditures are prudent, reasonable and appropriately prioritized, it remains open to the PUB to reduce the revenue requirement for Hydro based on the evidence before it at that time.

Manitoba Hydro's proposal that it be directed to "provide a narrative explanation of its processes for assessing and optimizing business operations capital expenditures" and a "comparison between the Business Operations Capital expenditures (actual and forecasted) to the Business Operations Capital expenditures included in the 2021/22 Interim Rate Application" should not be accepted as it would change the fundamental nature of the PUB directive.

The PUB has already found since at least 2015 that these expenses could better be prioritized. Given consistent evidence and findings on this issue, it would not be appropriate to change the directive from targeting ongoing concerns over higher than necessary levels of expenditures for rate-setting purposes to simple administrative details of filing of information.

Manitoba Hydro has not raised new facts or established an error in law. The Consumers Coalition recommends that Manitoba Hydro's application to review and vary Directive 6 be dismissed.

Directive 7 – Operating and Administrative Expense (“O&A”) Reductions (Part 6 of Hydro’s application)

While the PUB cannot approve or reject specific expenses, it has jurisdiction to review whether O&A expenses are necessary and prudent for rate-setting purposes and to issue

information-seeking directives to fulfill its responsibilities. The Consumers Coalition's position regarding O&A expenses is similar to its position on Business Operations Capital.

Jurisdiction

While the PUB does not have jurisdiction to approve or reject specific expenses, it has jurisdiction to assess whether O&A expenses are necessary and prudent for rate-setting purposes and to issue information-seeking directives to that effect. The 2019 Manitoba Court of Appeal findings with respect to Business Operations Capital also apply to an information-seeking directive relating to O&A expenditures.

Reasons

The PUB has made numerous findings in the past relating to O&A. Order 9/22 is a continuation of those findings and cannot be read in isolation as there is consistency in the PUB's regulatory signalling.

Specifically, in 2018 the PUB found that Manitoba Hydro can further reduce O&A for rate-setting purposes.⁴¹ It issued a recommendation that O&A can be further reduced after the Voluntary Departure Program,⁴² as well as directives to file detailed O&A information at the next GRA.⁴³

In 2019, the PUB once again found that Hydro's O&A was not acceptable for rate-setting purposes.⁴⁴ It issued a directive to file O&A details at the next GRA.⁴⁵

Manitoba Hydro appears to have ignored this regulatory signaling from its independent regulator. Its O&A has seen a significant increase since those two decisions – over 16.2% or \$83 million in the last 3 years alone. Once again, there is clear consistency in the regulatory signaling of the PUB on O&A in Orders 59/18, 69/19 and 9/22, which must be read together.

Recommendation

Similar to Business Operations Capital, if Hydro chooses not to demonstrate savings in O&A, it would still be open to the PUB to reduce the revenue requirement for Hydro to reflect its assessment of necessary and prudent O&A expenses based on the evidence before it and given consistent prior findings that O&A could be further reduced.

⁴¹ PUB Order 59/18, pages 141 to 142, Section 10.3.

⁴² PUB Order 59/18, page 264, Recommendation #4 on O&A in section 24.0.

⁴³ PUB Order 29/18, pages 267-268, Directives 12 and 13 in section 25.0.

⁴⁴ PUB Order 69/19, pages 23-24, Section 4.0.

⁴⁵ PUB Order 69/129, page 47, Directive #8.

Manitoba Hydro’s proposed alternative that it be directed to file “a narrative explanation of its processes for assessing and optimizing operating and administrative expenditures” and “a comparison between the O&A expenditures (actual 9 and forecasted) to the O&A expenditures included in the 2021/22 Interim Rate Application” would not be appropriate because it would change the fundamental nature of the PUB’s directive on this issue.

Given the years of consistent findings by the PUB, it would not be appropriate to change the directive from targeting ongoing concerns over higher than necessary levels of expenditures for rate-setting purposes to simple administrative details of filing of information.

As Manitoba Hydro has not raised new facts or established an error in law, the Consumers Coalition recommends that Manitoba Hydro’s application to review and vary Directive 7 be dismissed.

Findings related to Long Term Precipitation Forecasting Capability (Part 7 of Hydro’s application)

The findings of the PUB on page 87 of Order 9/22 are grounded in the evidence available in this and prior proceedings. Manitoba Hydro has not raised new facts or established errors in law. Its application to review and vary the findings on Long Term Precipitation Forecasting Capability should therefore be dismissed.

While there do not appear to be any errors of fact or law in the PUB’s findings relating to Long Term Precipitation Forecasting Capability, the Board could, on its own initiative under Rule 36(1), decide to provide clarification regarding the intended outcome of its findings on page 87 of Order 9/22.

Specifically, the PUB could clarify whether the finding that “additional expert evidence at the 2022/23 General Rate Application that examines the 2021/22 interim rates is required to determine what, if any, additional drought forecasting options may exist to mitigate Manitoba Hydro’s drought risk” was intended to be a directive.

If it was intended to be a directive, the PUB could choose to provide clarification regarding the specific objectives and deliverables for such a consultant engagement. The PUB could clarify whether it intends to retain its own consultant in accordance with sections 19 or 21 of *The PUB Act* or whether the PUB expects Manitoba Hydro to retain a consultant to provide evidence on the objectives and deliverables at the next General Rate Application.⁴⁶

⁴⁶ Such clarification would also be consistent with Manitoba Hydro’s alternative proposed remedy.

Conclusion

Order 9/22 sets out a careful chain of reasoning grounded in the evidence before the PUB, the legislative scheme and prior PUB decisions. Its 96 pages of analysis go above and beyond the requirements for an interim rate decision subject to finalization at a General Rate Application.

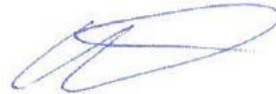
The Consumers Coalition appreciates the opportunity to provide comments on Manitoba Hydro's application to review and vary the PUB Order 9/22. It looks forward to moving beyond the interim rate application to a General Rate Application process that will provide regulatory clarity and begin to restore confidence in the PUB rate-setting process for all interested parties.

Please contact us if you have any questions.

Yours truly,



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