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April 25, 2022

THE PUBLIC UTILITIES BOARD OF MANITOBA
400-330 Portage Avenue
Winnipeg, Manitoba
R3C 0C4

ATTENTION: Dr. D. Christle, Board Secretary and Executive Director

Dear Dr. Christle:

RE: Reply to Intervener Comments on Manitoba Hydro's Application to Review & Vary Order 9/22

In accordance with the timetable established by the Public Utilities Board's ("PUB" or "Board") procedural letter dated March 31, 2022, on April 14, 2022, the Consumers Coalition ("Coalition") and the Manitoba Power Industrial Users Group ("MIPUG") provided submissions to the PUB regarding Manitoba Hydro's Application to Review & Vary Order 9/22 filed on February 25, 2022 ("R&V Application"). Manitoba Hydro's reply was directed to be filed no later than noon on April 25, 2022. This letter is the reply of Manitoba Hydro.

Manitoba Hydro replies to certain comments made by Coalition and MIPUG. The fact that Manitoba Hydro does not address or respond to any particular comment or argument should not be taken as acceptance of any position advanced by Coalition or MIPUG.

MIPUG makes several submissions with respect to the duty of procedural fairness.¹ However, Manitoba Hydro has not alleged a breach of procedural fairness in the R&V Application, as the PUB has clearly provided reasons. Manitoba Hydro's challenges are with respect to the lack of reasons in Order 9/22 and are made within the reasonableness analysis.² As such, MIPUG's submissions on procedural fairness are not relevant to the PUB's determination of the R&V Application and should be disregarded.

Coalition, MIPUG and Manitoba Hydro generally agree as to the scope of the PUB's jurisdiction; largely differing upon the interpretation of the language contained in Order 9/22. Accordingly, to the extent that Coalition, MIPUG and Manitoba Hydro each have varying interpretations, and for the reasons that

¹ MIPUG Submission Appendix A at paras 7-14.

² *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22 "Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis."(emphasis in original).

follow, Manitoba Hydro submits that it is necessary and beneficial for all parties to the proceeding in having the PUB provide the additional clarity and detailed reasons sought by Manitoba Hydro in its R&V Application.

Findings related to Precipitation Forecasting

Despite firstly submitting that this aspect of the R&V Application should be dismissed, both Coalition and MIPUG then agree that the Board could provide the additional clarity sought by Manitoba Hydro on this finding. Given the consensus that the findings relating to long-term precipitation forecasting are ambiguous, Manitoba Hydro submits the PUB should grant the relief it has sought.

Appropriateness of an R&V Application

MIPUG criticizes Manitoba Hydro's filing of the R&V Application as inappropriate and suggests Manitoba Hydro should seek relief by filing "additional information and updates as part of an application to finalize rates at a further General Rate Application."³ This suggestion is unfounded and would amount to a denial of Manitoba Hydro's procedural rights pursuant to *The Public Utilities Board Act* (the "PUB Act") and the PUB Rules of Practice and Procedure ("PUB Rules"). Furthermore, characterizing the exercise of these rights and the R&V Application as self-serving, ill-advised and litigious⁴ is unwarranted and detrimental to the mutual working relationship between Manitoba Hydro and MIPUG in regulatory proceedings before the PUB.

Moreover, Manitoba Hydro's R&V Application relates specifically to findings and directives which contemplate the performance of certain actions before, or the production of material in, the next general rate application. The suggestion that Manitoba Hydro should address these issues by filing "a complete record of evidence"⁵ next time around is contrary to the routine reminder of the PUB at the conclusion of its Orders setting out the opportunity for parties to review and vary any PUB Order. Seeking clarification and review of these important items now and in strict accordance with the *PUB Act* and *Rules* in advance of the November 15th filing deadline is appropriate and necessary to ensure that Manitoba Hydro's filing meets the PUB's requirements and expectations.

Directive 6 & Directive 7 – Business Operations Capital and Operating & Administrative ("O&A") Expenses

All parties accept Manitoba Hydro's position that the PUB does not have jurisdiction to direct Manitoba Hydro to make or reduce expenditures.⁶ Despite this agreement, both Coalition and MIPUG then attempt to characterize Directives 6 and 7 exclusively as "information seeking only" directives with respect to Business Operations Capital and O&A expenses respectively. The characterization provided

³ MIPUG Submission dated April 14, 2022 at page 1; also see page 6-7.

⁴ MIPUG Submission dated April 14, 2022 at page 2 and 5.

⁵ MIPUG Submission dated April 14, 2022 at page 6-7.

⁶ MIPUG Submission dated April 14, 2022 at page 9; Coalition Submission dated April 14, 2022 at page 12, 13 and 16.

by both Coalition and MIPUG conflicts with the language of Directives 6 and 7 which direct Manitoba Hydro to demonstrate those savings by providing updated information to the PUB at the 2022/23 General Rate Application. Manitoba Hydro submits its interpretation of these Directives is consistent with the plain and ordinary meaning of the language.

Directive 6 provides:

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.

Directive 7 provides:

At the 2022/23 General Rate Application, Manitoba Hydro demonstrate the savings 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.

If the intention of Directives 6 and 7 were restricted to information seeking as suggested by Coalition and MIPUG, purposeful language such as “Manitoba Hydro demonstrate any savings” would have been used.

The specific language used by the PUB to “demonstrate the savings … that are found” and that “Manitoba Hydro must reduce expenditures”⁷, read together with the entire context of Order 9/22 as detailed in the R&V Application, go beyond information seeking by the PUB. Manitoba Hydro submits that the only reasonable interpretation of the language used by the PUB is a specific direction to Hydro to reduce its expenditures, which all parties agree is outside of the PUB’s jurisdiction and constitutes an error in law.

The Coalition’s suggestion that the Directives are information seeking only, while then rejecting Manitoba Hydro’s alternative remedies within the R&V Application for Directives 6 and 7 as they would fundamentally change the Directives from “targeting ongoing concerns over higher than necessary levels of expenditures” to “simple administrative details of filing information”⁸, is internally inconsistent. If the intention of Directives 6 and 7 were truly information seeking only, providing information relating to the expenditures and a comparison of the forecasted and actual expenditures as suggested by Manitoba Hydro as an alternative remedy would accomplish such an information seeking purpose. Simply put, if that was the true intention of the PUB, the R&V Application provides it with the opportunity to provide that clarification.

⁷ PUB Order 9/22 at pages 31, 34, 41 and 63.

⁸ Coalition Submission dated April 14, 2022 at page 15 and 17.

Directives 6 and 7 can clearly be distinguished from Directive 14 of Order 59/18, which was commented upon by the Manitoba Court of Appeal. Directive 14 contemplated retaining a consultant to assess and report upon Manitoba Hydro's asset management program, which the PUB said was necessary to provide required information.⁹ Directives 6 and 7, together with other comments in Order 9/22, are an explicit order to Manitoba Hydro to reduce expenditures, in direct conflict with the evidence from Manitoba Hydro at the proceeding that such reductions or cuts were not possible as cited at pages 10-13 and 15-17 of the R&V Application, and then show the savings achieved by comparing the forecasted expenditures from the Interim Rate proceeding to the actual reduced expenditures as to be achieved by Manitoba Hydro at the 2022/23 GRA.

The Interveners rely heavily upon previous PUB orders which they submit provide context and rationale to support the PUB's findings in Order 9/22. Institutional history does not permit the PUB to exceed its jurisdiction by ordering that savings must be found in Business Operating Capital and O&A expenditures; or to disregard the evidence filed in the Interim Rate proceeding which established that the forecasted expenditures were necessary for the safe operation of Manitoba Hydro; or to make conflicting findings of fact without citing any evidentiary basis for doing so. Moreover, attempting now to rely upon previous PUB orders is completely inconsistent with the language in Order 9/22 that the PUB's findings were based upon the record of this proceeding.¹⁰ No party, including the PUB, has identified what specific elements from the evidentiary record of the interim proceeding, or previous Board Orders, that it relied upon to support and make these critical determinations.

Rationale for 3.6% Interim Rate Award

Both Coalition and MIPUG submit that the PUB's decision provides adequate rationale and support for the 3.6% rate award, relying in large part on the page length of Order 9/22.¹¹ The essence of Coalition and MIPUG's argument appears to be that because Order 9/22 is 96 pages in length, even though the recital of facts and the positions of parties account for a significant amount of those 96 pages of Order 9/22, adequate reasons can be found or inferred from the decision itself. Manitoba Hydro disagrees. Manitoba Hydro submits that the length of any decision on its own is not an appropriate factor or in any way indicative of assessing the reasonableness of any decision, or, alternatively as suggested by Coalition, representative of "an internally coherent and rational chain of analysis".¹² It is trite law that

⁹ *Manitoba Hydro-Electric Board v Public Utilities Board (Man) et al*, 2019 MBCA 54 at para 36.

¹⁰ Order 9/22 at page 63 "the Board finds Manitoba Hydro's plans to increase its O&A expenses in 2022/23 to be unsupportable based on the evidence in this Interim Application."; also see page 63 "Based on the record of this hearing, the Board finds that Manitoba Hydro can slow, pause, or suspend planned O&A increases."

¹¹ MIPUG Submission dated April 14, 2022 at page 5; MIPUG Submission Appendix A, at para 2; Coalition Submission dated April 14, 2022 at pages 1, 3, 5, 7, 8 and 18,

¹² *Gonzalez v. Canada (Citizenship and Immigration)*, 2014 FC 750 "The Board spends a lot of time reciting in a perfunctory way the legal principles that govern the state protection issue, but it avoids dealing with the specifics of the evidence on the key issue. Phrases such as "the preponderance of the evidence" cannot be used to evade the Board's duty to examine and cite evidence that actually supports its conclusions and deal

an administrative decision maker commits an error in law when the reasons when read in conjunction with the record do not make it possible to understand the rationale on a critical point.¹³

Coalition and MIPUG each rely upon the Supreme Court of Canada's guidance in *Vavilov* for the proposition that the PUB was not required to address all arguments and pieces of evidence in its reasons.¹⁴ Manitoba Hydro submits that these Intervenors have selectively quoted from the Supreme Court's guidance, and it is evident that administrative decision makers are required to address key issues:

Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (Newfoundland Nurses, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.¹⁵

While a decision maker is not required to refer to every argument or piece of evidence, there must be consideration of central arguments and key pieces of evidence. Manitoba Hydro submits that Order 9/22 does not reveal whether or not the PUB grappled with central arguments raised by Manitoba Hydro as stipulated by the Supreme Court of Canada in *Vavilov*, including arguments related to achieving cost reductions, the interest of ratepayers and the financial health of the utility. Manitoba Hydro is not suggesting that the PUB did not consider key issues during its deliberations; rather, that reasons for the determination on these key issues are not identified or articulated within Order 9/22 and, as such, that Manitoba Hydro is not in a position to assess those reasons.

In support of its position each of the Intervenors refer to the findings of fact relating to reduction of expenditures as justification for the 3.6% interim rate award. Manitoba Hydro submits that those findings are inconsistent with the evidence filed in the proceeding as further explained above in its submissions on Directives 6 and 7. Manitoba Hydro submits that its request for relief related to the rationale for the 3.6% interim rate increase needs to be considered holistically and in light of its R&V Application relating to Directives 6 and 7. The failure to provide fulsome justification for those key findings, or how the PUB meaningfully grappled with Manitoba Hydro's evidence that achieving

with evidence that directly contradicts those conclusions." Cited with approval in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 102.

¹³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 103.

¹⁴ Coalition Submission dated April 14, 2022 at page 7; MIPUG Submission, Appendix A at para 15.

¹⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 128 ("emphasis added").

significant cost reductions would be challenging and then erring in law by ordering that such reductions must occur, contributes to Manitoba Hydro's view that Order 9/22 lacks rationale for the interim rate awarded.

Both Coalition and MIPUG appear to confuse the onus on an applicant in an interim application, which is less onerous than in a final rate application, with a reduced onus on an administrative tribunal to issue a reasonable decision with articulated and comprehensible reasons. While Order 9/22 must be read in the context of the interim rate proceeding and hearing which was established by the PUB itself in Order 128/21 to fairly determine the Application, the Order must still provide sufficient justification to permit the parties to understand how the PUB determined central issues, including how the PUB determined what the interests of ratepayers were and how an interim increase of 3.6% would meet the financial needs of the Corporation. MIPUG has provided no authority to support its claim that the administrative law principles established by the Supreme Court of Canada in its *Vavilov* decision are limited in application to final decisions.¹⁶

Without having such important clarification and fulsome understanding of the reasons for the interim findings and directives in Order 9/22, Manitoba Hydro is severely disadvantaged and prejudiced in that the issues raised within Manitoba Hydro's R&V Application relate specifically to findings and directives which contemplate the performance of certain actions and the production of material before the next general rate application, which is to be filed on November 15, 2022 and will include a review to finalize or vary the interim rate increase of 3.6% awarded in Order 9/22.

Directive 4 – Long-term Financial Forecast

Both Intervenors submit that Directive 4 is solely for information and rate setting purposes and, as such, does not exceed the PUB's jurisdiction.¹⁷ Neither Intervener challenges the central issue raised by Manitoba Hydro in the R&V Application on this point; namely, that the PUB does not have jurisdiction to compel Hydro to prepare a long-term forecast for its internal management use.

Manitoba Hydro submits that it reasonably interpreted the phrase "its long-term financial forecast" to be a direction to create a long-term financial forecast for use by internal management.

As further outlined in Manitoba Hydro's R&V Application, a long-term financial forecast scenario is under development. Manitoba Hydro has not "rejected" the idea that a long-term forecast is useful as alleged by MIPUG. In that respect, Manitoba Hydro directs the parties' attention to the evidence of Ms. Grewal.¹⁸

¹⁶ MIPUG Submission Appendix A at para 11.

¹⁷ MIPUG Submission dated April 14, 2022 at page 7; Coalition Submission dated April 14, 2022 at page 10.

¹⁸ December 10, 2021, Transcript at pages 147-163.

Despite submitting that this aspect of the R&V Application should be dismissed, both Interveners submit that additional clarity and direction could be provided. With respect to Coalition's recommendation regarding the internal component forecasts, Manitoba Hydro advises that it will provide information on the component forecasts and assumptions used to derive the 20-year scenario. However, the component forecast information may not be in the same form or detail as filed in previous general rate applications. As in the past, the timeliness of the component information will also be dependent upon internal planning and capacity constraints.

Both Interveners recommend that the PUB amend Directive 4 to require Manitoba Hydro to file several alternative financial forecast scenarios at the next general rate application. With respect to MIPUG's suggestion to develop potential future alternative scenarios,¹⁹ Manitoba Hydro is unclear as to what "alternative scenarios of potential futures" MIPUG is referring to. Developing and modelling different scenarios of potential energy futures is an essential component of the Integrated Resource Planning process. The first IRP is expected to be completed in summer 2023, and, as such, it would be premature to begin to explore alternative scenarios for the upcoming GRA prior to Manitoba Hydro completing this important foundational work. Manitoba Hydro is prepared to provide risk sensitivities associated with key assumptions in the forecast; however, MIPUG's recommendation to develop potential future alternative scenarios should be denied.

Manitoba Hydro thanks the PUB for the opportunity to provide this reply submission, which is respectfully submitted. Should you have any questions with respect to this submission, please contact the writer at 204-360-3257.

Yours truly,

MANITOBA HYDRO LEGAL SERVICES DIVISION

Per:



BRENT A. CZARNECKI

Barrister & Solicitor

¹⁹ MIPUG Submission dated April 14, 2022 at page 8.