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February 25, 2022

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

Dear Dr. Christle:

RE: MANITOBA HYDRO APPLICATION TO REVIEW AND VARY ORDER 9/22

Please find enclosed a copy of Manitoba Hydro's Application to Review and Vary Public Utilities Board Order 9/22. Should you have any questions with respect to this Application, please contact the writer at 204-360-3257.

Yours truly,

MANITOBA HYDRO LEGAL SERVICES DIVISION

Per:

A handwritten signature in blue ink, appearing to read 'Brent A. Czarnecki'.

BRENT A. CZARNECKI
Barrister & Solicitor

Att.

PUBLIC UTILITIES BOARD

MANITOBA HYDRO

APPLICATION TO REVIEW AND VARY ORDER 9/22

**MANITOBA HYDRO
APPLICATION TO REVIEW AND VARY ORDER 9/22**

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1 1. Introduction

2 On November 15, 2021, Manitoba Hydro filed an interim rate application seeking to alter electric rates
3 sufficient to increase general consumer revenue by 5.0% effective January 1, 2022 (“Application”). By
4 Order 137/21 issued December 24, 2021, the Public Utilities Board (“PUB” or “Board”) varied Manitoba
5 Hydro’s requested relief and ordered an electric rate increase effective January 1, 2022 sufficient to
6 increase general consumer revenue by 3.6%. The PUB approved the specific rates by Order 140/21 issued
7 December 31, 2021. Lastly, the PUB issued Order 9/22 on January 26, 2022 which provided both reasons
8 for the Board’s Orders 137/21 and 140/21, and additional directives to Manitoba Hydro.

9 Pursuant to section 44(3) of *The Public Utilities Board Act* (“PUB Act”) and section 36 of the *PUB Rules of*
10 *Practice and Procedure* (“PUB Rules”), Manitoba Hydro applies to review and vary Order 9/22, specifically
11 the following:

- 12 a. Findings in support of the determination that the interim rate increase awarded was in the
13 public interest;
- 14 b. Directive 4;
- 15 c. Directive 6 and the related findings contained at pages 30-31, 41, and 47; and,
- 16 d. Directive 7 and the related findings contained at pages 34, 41, 47 and 63.

17 **1.1. Procedural History**

18 Manitoba Hydro filed its Application on November 15, 2021, which included responses to Minimum Filing
19 Requirements (“MFRs”) approved by the PUB for the Status Update proceeding and all approved MFRs
20 submitted by the intervenors. By Order 128/21 issued on November 22, 2021, the PUB accepted Manitoba
21 Hydro’s Application as complete but found it would benefit further from an expanded evidentiary record.¹

22 Accordingly, Manitoba Hydro filed responses to Information Requests approved by the Board on
23 December 3, 2021. *Viva voce* evidence from Manitoba Hydro’s Chief Executive Officer, Chief Financial
24 Officer and other senior members of management was heard on December 10 and 13, 2021. The
25 proceeding was also supplemented by commentary from ratepayers, both in writing and through oral
26 presentations.² All parties had the opportunity to submit both written and oral submissions.

27 **2. Review and Vary Legal Framework**

28 Under section 44(3) of the *PUB Act*, the Board may review, rescind or vary its orders.

29 Rule 36(4) of the *PUB Rules* establishes a process for the exercise of the authority to review, rescind,
30 change, alter or vary decisions. Upon a written application to review and vary a decision, the PUB must

¹ Order 128/21 at page 14.

² Order 9/22 at page 11.

1 determine as a preliminary question whether the matter should be reviewed, and whether there is reason
2 to believe the decision would be rescinded, altered or varied.³

3 After determining this preliminary question, the PUB may then:

4 a) dismiss the application for review if,

5 i) in the case where the applicant has alleged an error of law or jurisdiction or an error in fact, the
6 Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness
7 of the Board's order or decision; or

8 ii) in the case where the applicant has alleged new facts not available at the time of the Board's
9 Hearing that resulted in the order or decision sought to be reviewed or a change of circumstances,
10 the Board is of the opinion that the applicant has not raised a reasonable possibility that the new
11 facts or the change in circumstances as the case may be, could lead the Board to materially vary
12 or rescind the Board's order or decision; or

13 b) grant the application; or

14 c) order a hearing or proceeding be held.

15 For the reasons set out below, Manitoba Hydro respectfully requests that Order 9/22 be varied with the
16 PUB ordering the specific remedies sought herein without the need for a further proceeding.

17 **3. Rationale Supporting the PUB's Determination that the Interim Rates Awarded were in the Public**
18 **Interest**

19 **3.1. Grounds for Review**

20 Reasons for an order or decisions play a fundamental role in the PUB's decision-making. The process of
21 drafting specific and fulsome reasons necessarily encourages decision makers to carefully examine their
22 thinking and articulate their analysis.⁴ At the most simplistic level, reasons explain how and why a decision
23 is made; they help demonstrate to affected parties that the decision was made in a fair and lawful manner
24 in light of the evidence and argument.⁵ Where a decision maker's rationale for an essential element of
25 the decision is not addressed in the reasons and cannot be inferred from the record of the proceeding or
26 the institutional history, the decision may be inadequate.⁶

³ Order 90/18 at page 6.

⁴ *Baker, supra* at para 39; cited with approval in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 v at para 80.

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 79.

⁶ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 98.

1 Manitoba Hydro submits Order 137/21 and Order 9/22, when read in light of the entire evidentiary record
2 of the proceeding, fails to establish the rationale for how the PUB ultimately determined the essential
3 element of the decision - that 3.6% was the appropriate interim rate increase to balance customer
4 interests and the financial health of the utility.

5 Manitoba Hydro made specific submissions as to what ought to be considered as the interests of its
6 customers.⁷ Manitoba Hydro argued that customers' interests necessarily include the provision of safe
7 and reliable power, the desire for timely and superior customer service to existing and new customers,
8 and rate stability, in addition to maintaining comparatively low rates. Those submissions were not
9 recounted or addressed in Orders 137/21 and 9/22. Order 9/22 includes no specific Board findings related
10 to the interest of ratepayers, a key component of the determination of the public interest.

11 The ability of the PUB to review, approve and fix rates is constrained by the provisions of *The Manitoba*
12 *Hydro Act*, including section 39(1) which provides that the prices payable for power shall be such to return
13 in full the cost of supplying that power. With respect to the financial health of the utility, the PUB accepted
14 Manitoba Hydro's evidence that it expected to experience a \$398 million reduction in Net Extraprovincial
15 Revenue and that the revenue requirement impact associated with the major capital projects will reach
16 \$708 million in 2021/22.⁸ However, while referring to these facts, the PUB did not explain how its awarded
17 increase of 3.6% would address the Corporation's immediate and pressing financial needs.

18 Historically, the PUB has held that Manitoba Hydro rates are to be regulated on a cost of service model in
19 which rates are set to recover the costs of providing power to Manitobans.⁹ This is consistent with section
20 39(1) of *The Manitoba Hydro Act*. In light of Manitoba Hydro's evidence in this proceeding of the cost to
21 provide power, it is unclear how the PUB determined that the rates it approved in Order 140/21 would
22 sufficiently address the severe financial consequences of the drought and the increasing annual revenue
23 requirements for the recently completed and soon to be completed capital projects balanced against the
24 Board's stated objective of avoiding rate shock by rate smoothing. Nor can the Board's reasons be
25 reasonably inferred from its finding that:

26 Bearing in mind the foregoing limitations related to interim rate applications, and based
27 on the evidentiary record of this Interim Application, the Board finds that it is just and
28 reasonable to approve a total of a 3.6% General Consumers Revenue increase effective
29 January 1, 2022. This increase recognizes the financial consequences of the drought and

⁷ Transcript, December 14, 2021 at pages 661-662.

⁸ Order 9/22 at page 40 and 51.

⁹ See for example Order 59/18 at page 6.

1 the Board's objective to avoid rate shock by smoothing the rate increases required to
2 address the costs of major capital projects entering service.¹⁰

3 There is also an absence of stated reasoning behind the decision in approving 3.6% given the
4 PUB's ruling that:

5 While the drought and the resulting \$398 million of reduced Net Extraprovincial Revenue
6 were major factors considered by the Board in reaching its decision to approve a 3.6%
7 increase in Manitoba Hydro's General Consumers Revenue, the Board was also concerned
8 with the increasing annual revenue requirements for the recently completed and soon to
9 be completed capital projects.¹¹

10 There is limited stated rationale offered by the PUB in Order 9/22 on the fundamental issue in the
11 Application; namely, how the PUB determined that a rate increase of 3.6%, providing revenues of
12 approximately \$20 million in 2021/22 and \$64 million in 2022/23 was in fact just, reasonable and in the
13 public interest given the evidence before it. As a consequence, it is not possible for Manitoba Hydro to
14 infer such required reasoning and rationale from Orders 137/21 and 9/22, such to make any reasonable
15 assessment of whether or not the PUB erred on the evidence before it on this fundamental issue in
16 awarding a 3.6% rate increase as opposed to the 5% increase that was requested within the Application.

17 **3.2. Resulting Prejudice or Damage from Order**

18 The absence of specific reasons and a fulsome justification for the 3.6% rate increase awarded by the PUB
19 in Orders 137/21 and 9/22 renders it impossible for Manitoba Hydro to understand and make an
20 assessment of the reasonableness of the award and those Orders. Furthermore, without any specific
21 rationale or basis as to how the PUB determined the 3.6% rate increase to be appropriate given all of the
22 circumstances, it is extremely difficult for Manitoba Hydro to assess whether the interim rate ought to be
23 varied before the filing of the next General Rate Application, or alternatively varied or confirmed with the
24 next General Rate Application as Manitoba Hydro does not have an appropriate starting point or basis in
25 attempting to understand the Board's rationale from which to properly plan and develop the next General
26 Rate Application.¹²

27 **3.3. Remedy Sought**

28 Manitoba Hydro respectfully requests that the PUB vary Order 9/22 to provide and include the specific
29 reasons, basis and rationale supporting its ultimate finding to award a 3.6% interim rate increase as
30 opposed to the 5.0% interim rate increase requested within the Application.

¹⁰ Order 137/21 at page 12.

¹¹ Order 9/22 at page 51-52

¹² Section 27 of *The Crown Corporations Governance and Accountability Act*.

1 **4. Directive 4 – Long Term Financial Forecast**

2 Directive 4 provides:

3 “4. Manitoba Hydro include in its 2022/23 General Rate Application its long-term
4 financial forecast of at least 20 years together with its underlying assumptions.”

5 Historically, long-term financial forecasts have been one tool among many used by the PUB in its
6 assessment of rate applications.

7 In Order 53/21, the PUB expressed its view that long-term financial forecasts, previously referred to as
8 Integrated Financial Forecasts, are of value in the prudent management of Manitoba Hydro’s business.¹³
9 The PUB also indicated that current planning documents being used in the management of Manitoba
10 Hydro are useful when considering rate smoothing and reasonable rate trajectory.¹⁴

11 As explained during the proceeding, Manitoba Hydro has determined that it will not prepare a long-term
12 financial forecast until key components and inputs are prepared and further developed with respect to
13 the changing conditions of the evolving energy landscape. Ms. Grewal, Manitoba Hydro President and
14 CEO, testified that development of a comprehensive long-term financial forecast was dependent upon
15 the creation of two key inputs – Provincial energy policy and an Integrated Resource Plan.¹⁵ Manitoba
16 Hydro did not prepare or file a 20 year financial forecast in this proceeding as the value of a long term
17 forecast in the rate setting process is dependent upon the forecast being grounded in “appropriate data
18 and facts and assumptions”¹⁶. As Ms. Grewal testified “we wouldn’t want to bring something forward that
19 doesn’t provide the data and information that would support the PUB in determining something as
20 material as rates”.¹⁷ For the near term, Manitoba Hydro intends to restrict financial forecasts used in the
21 management of its business to two to three years.¹⁸

22 Long-term forecasting is innately uncertain, in particular when it is based on material assumptions such
23 as normal weather and water conditions, forecasts of interest rates, and energy prices, that are inherently
24 volatile and outside of Manitoba Hydro’s control. This has always been the case. However, as noted in
25 Manitoba Hydro’s Application, the energy sector world-wide has been seeing unprecedented change in
26 recent years, due to the key trends of decarbonization, digitalization and decentralization which are
27 increasingly reshaping the energy landscape. These trends will shape and/or disrupt Manitoba Hydro’s
28 business environment in the coming years. The pace and breadth of these changes are unpredictable.¹⁹

¹³ Order 53/21 at page 21.

¹⁴ Order 137/21 at page 12.

¹⁵ December 10, 2021, Transcript, page 149-152, line 6.

¹⁶ December 10, 2021 Transcript, page 147, line 2-6.

¹⁷ December 10, 2021 Transcript, page 155, lines 18-22.

¹⁸ December 10, 2021 Transcript, page 155, lines 11-17; page 157-160; page 162-163.

¹⁹ Manitoba Hydro 2021/22 Interim Rate Application; page 47-48.

1 As such, long-term forecasting in the current environment, in advance of the completion of Provincial
2 energy policy that will influence these trends in Manitoba, and in advance of the development of
3 Manitoba Hydro’s Integrated Resource Plan that will examine how these trends will impact the utility, is
4 premature.

5 Manitoba Hydro acknowledges that longer term financial scenarios were prepared for the limited purpose
6 of demonstrating the corporation’s self-sufficiency to credit rating agencies.²⁰ As explained by Manitoba
7 Hydro witnesses, these point-in-time plans are not reflective of Manitoba Hydro’s long-term financial
8 planning or rate strategy.²¹ The financial scenario was developed for this limited purpose and included
9 clear caveats to the credit rating agencies that the scenario did not incorporate required inputs relating
10 to the evolving energy landscape and was not approved by the Manitoba Hydro-Electric Board (“MHEB”).
11 These financial scenarios are not in use by Manitoba Hydro for planning purposes, nor was it
12 recommended for use by the PUB for rate setting purposes.²²

13 **4.1. Grounds for Review**

14 Manitoba Hydro recognizes that the PUB may direct the utility to prepare documents to assist in
15 discharging its rate-setting mandate.²³ However, through use of the phrase “its long-term financial
16 forecast of at least 20 years”(emphasis added), it appears that the PUB is directing Manitoba Hydro to
17 create and utilize a 20-year forecast in its operations.

18 Manitoba Hydro respectfully submits that the PUB does not have the jurisdiction to compel Manitoba
19 Hydro to create or develop long-term financial forecasts to be used in the current management of the
20 business. Development of long-term financial forecasts for use in the operations and management of
21 Manitoba Hydro is solely within the decision-making authority of the MHEB and management.²⁴ Unlike
22 other public utilities, the PUB does not have general supervisory authority over Manitoba Hydro.²⁵
23 Jurisdiction is restricted to the approval of rates for the provision of power.²⁶

24 Manitoba Hydro’s position in this regard is supported by the comments of the British Columbia Court of
25 Appeal when it considered the jurisdiction of the British Columbia Utilities Commission in providing
26 direction to BC Hydro for the development of its Integrated Resource Plan:

²⁰ December 10, 2021 Transcript, page 166-167.

²¹ December 10, 2021 Transcript, page 167.

²² December 10, 2021 Transcript, page 167.

²³ 2019 MBCA 54 at para 39.

²⁴ Section 5(1) of *The Manitoba Hydro Act*.

²⁵ See sections 2(5) and 74(1) of *The PUB Act*.

²⁶ Section 25(1) of *The Crown Corporations Governance and Accountability Act*.

1 I earlier referred to the characterization of the issue. Counsel for the Commission
2 contended it merely related to the enforcement of the information gathering power
3 conferred on the Commission.

4 I am unable to agree with that characterization as in my opinion the IRP process is specific
5 to the planning phase of the utility's response to its statutory obligations and its
6 enforcement by order is an exercise of management as it relates neither to the
7 certification process as such nor to the supervision of the utility's use of its property
8 devoted to the provision of service.

9 It is only under s. 112 of the Utilities Act [Utilities Commission Act, SBC 1980, c 60] that
10 the Commission is authorized to assume the management of a public utility. Otherwise
11 the management of a public utility remains the responsibility of those who by statute or
12 the incorporating instruments are charged with that responsibility.

13 One of the primary responsibilities and functions of the directors of a corporation is the
14 formulation of plans for its future. In the case of a public utility these plans must of
15 necessity extend many years into the future and be constantly revised to meet changing
16 conditions. In the case at bar the effect of the Commission's directions is to place a group,
17 whose interests are disparate, in a superior position in the sequence of planning and to
18 require the directors to justify a deviation from the product of the IRP process in the
19 exercise of their responsibilities.

20 Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect
21 any intention on the part of the legislature to confer upon the Commission a jurisdiction
22 so to determine, punishable on default by sanctions, the manner in which the directors
23 of a public utility manage its affairs.²⁷

24 Despite Manitoba Hydro's explanation as to why it had determined, in exercising its statutory
25 responsibilities to manage the utility, not to produce a 20-year long-term financial forecast until other
26 necessary work is completed, the PUB directed Manitoba Hydro in Order 9/22 to produce and create such
27 a document for the next General Rate Application. Providing such direction interferes with a planning and
28 operational matter that clearly resides within the purview of management of the utility and ultimately the
29 responsibility of the MHEB; outside of the jurisdiction of the PUB. Consequently, the PUB erred in law by
30 providing such direction.

31

²⁷ *British Columbia Hydro & Power Authority v British Columbia (Utilities Commission)*, 1996 CanLII 3048 (BCCA) at para 54-58 (emphasis added).

1 **4.2. Resulting Prejudice or Damage from Order**

2 Manitoba Hydro cannot comply with Directive 4 as currently written.

3 **4.3. Remedy Sought**

4 Recognizing the PUB's stated desire to have at least a 20-year long-term financial forecast to assist it with
5 its rate-setting mandate, Manitoba Hydro will file a 20-year financial scenario in the next General Rate
6 Application. The scenario will incorporate the two to three-year financial forecast approved by the MHEB
7 and used by the management of Manitoba Hydro in the operations of the utility. The provided forecast
8 scenario will be developed for consideration and used by the PUB for its rate setting purposes only.
9 Manitoba Hydro anticipates making submissions on the appropriate weight to be given to this forecast
10 scenario as it relates to the PUB's rate setting purpose in the next General Rate Application.

11 Once the formulation and completion of a financial forecast reflecting the changing conditions of the
12 evolving energy landscape is approved by the MHEB in accordance with its statutory obligations and
13 responsibilities for the management of Manitoba Hydro, Manitoba Hydro will provide the approved
14 financial forecast to the PUB for its rate setting purpose in future General Rate Applications.

15 Consequently, Manitoba Hydro respectfully requests Directive 4 be varied as follows:

16 "4. Manitoba Hydro include in its 2022/23 General Rate Application a 20-year financial forecast
17 scenario."

18 **5. Directive 6 – Business Operations Capital Reductions**

19 Directive 6 provides:

20 6. At the 2022/23 General Rate Application, Manitoba Hydro demonstrate the savings in
21 Business Operations Capital that are found by showing the updated Business Operations
22 Capital spending compared to the spending proposed at this interim proceeding.

23 The PUB also found:

24 If the drought continues and Manitoba Hydro's cash flow concerns continue next year,
25 the Board finds that Manitoba Hydro shall seek savings in its Business Operations Capital,
26 just as it committed to do at the NFAT proceeding when it explained how it would
27 confront financial liquidity concerns related to drought. The Board will consider Manitoba
28 Hydro's steps to reduce its Business Operations Capital at the next General Rate
29 Application. While the Board does not have the legal jurisdiction to approve specific
30 capital projects or order Manitoba Hydro to reduce its capital spending, it will consider
31 Manitoba Hydro's efforts to control costs (including operating statement costs from new
32 Business Operations Capital) when adjudicating rate increases. The Board directs

1 Manitoba Hydro to demonstrate the savings in Business Operations Capital that are found
2 by showing the updated Business Operations Capital spending compared to the spending
3 proposed at this interim proceeding. Manitoba Hydro should be planning for the drought
4 to continue and it must therefore control its Business Operations Capital spending to
5 address the financial impacts of a continuing drought. However, Manitoba Hydro is to
6 seek these savings regardless of whether the water conditions recover and the drought
7 ends.²⁸

8 The PUB also made a specific finding that reduction in “cash flow outlays” are available to Manitoba Hydro
9 by reducing Business Operations Capital.²⁹

10 **5.1. Grounds for Review**

11 **5.1.1. Jurisdiction**

12 Manitoba Hydro acknowledges that, in exercising its rate setting authority, the PUB may consider several
13 factors related to capital expenditures as set out in paragraphs 25(4)(a)(ii – v) of *The Crown Corporations*
14 *Governance and Accountability Act* and paragraph 39(1)(a) and (b) of *The Manitoba Hydro Act*. However,
15 the ability to consider such factors in approving and fixing rates does not equate to the authority to direct
16 Manitoba Hydro’s capital expenditures.

17 The PUB’s jurisdiction over Manitoba Hydro is set out in Part 4 of *The Crown Corporations Governance*
18 *and Accountability Act*, which is expressly restricted to the rates for services, meaning the prices charged
19 by Manitoba Hydro for the provision of power.³⁰ The PUB has no legal authority or jurisdiction to direct
20 Manitoba Hydro with respect to any capital expenditures. All capital expenditures required to operate the
21 utility are within the purview of the MHEB and the management of Manitoba Hydro, and are reviewed by
22 the Provincial Government.

23 Contrary to well established law and the Board’s own acknowledgment that it “does not have the legal
24 jurisdiction to approve specific capital projects or order Manitoba Hydro to reduce its capital spending”³¹
25 the Board erred in law by assuming this legal authority when specifically directing Manitoba Hydro to
26 “seek savings in its Business Operations Capital” and “demonstrate the savings in Business Operations
27 Capital that are found”³², which the Board will consider in adjudicating rates. This directive and related
28 findings are inconsistent with the findings of the Manitoba Court of Appeal:

²⁸ Order 9/22 at page 31 (emphasis added).

²⁹ Order 9/22 at page 41.

³⁰ Section 2(5), *The Public Utilities Board Act* and section 25(1) of *The Crown Corporations Governance and Accountability Act*.

³¹ Order 9/22 at page 31.

³² Order 9/22 at page 31.

1 It must be emphasized at the outset that the jurisdiction of the Board is expressly limited
2 to the fixing of rates (see s. 2(5) of the [PUB] Act). Section 26(1) of *The Crown Corporations*
3 *Public Review and Accountability and Consequential Amendments Act* makes it clear that
4 "rates for service" in the case of Manitoba Hydro simply means the prices charged by that
5 corporation with respect to the provision of power. In *The Public Utilities Board v. The*
6 *Attorney General of Manitoba et al.* (unreported decision released October 3, 1989), this
7 court dealt with a stated case to determine whether the Board had jurisdiction to
8 approve, reject or vary Manitoba Hydro's capital projects. This question was answered in
9 the negative.³³

10 Directing Manitoba Hydro to "demonstrate the savings in Business Operations Capital that are found"
11 equates to a requirement to reduce the forecasted Business Operations Capital expenditures. It is
12 impossible for Manitoba Hydro to demonstrate savings unless the utility reduces its expenditures below
13 the level currently forecasted. This direction is beyond the PUB's legislated authority.

14 Manitoba Hydro reiterates that its capital expenditures are subject to substantial oversight through the
15 MHEB and the Provincial Government.³⁴ This overlapping jurisdiction has been previously acknowledged
16 by this Board:

17 The Board acknowledges that it is not alone in its oversight of the Corporation, and that
18 its jurisdiction is limited. Accordingly, the Board finds it necessary and reasonable to rely
19 upon the Corporation's Board, the Government, and Crown Corporations Council with
20 respect to administrative oversight of MH's operating and capital expenditures.³⁵

21 For the reasons outlined above, Manitoba Hydro submits the PUB erred by exceeding its jurisdiction.

22 **5.1.2. Reasons Do Not Fully Explain the Justification for the PUB's Order**

23 In addition to the fact that the PUB has no jurisdiction to direct Manitoba Hydro with respect to any capital
24 expenditures, Manitoba Hydro further submits that the Board's findings that Manitoba Hydro must
25 reduce its business operations capital, regardless of water conditions, fail to meet the standard of
26 reasonableness outlined by the Supreme Court of Canada in *Canada (Minister of Citizenship and*
27 *Immigration) v. Vavilov* and related jurisprudence. The Supreme Court of Canada held:

28 Reasons that "simply repeat statutory language, summarize arguments made, and then
29 state a peremptory conclusion" will rarely assist a reviewing court in understanding the

³³ *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro- Electric Board* 1992 CanLII 8479 at para 9 (MB CA); also see *Public Utilities Board (Man.) v. Manitoba Hydro et al.*, 1989 CanLII 7456 at para 7-8 (MB CA); 2012 MBCA 1 at para 40

³⁴ Manitoba Hydro submitted a capital expenditure forecast covering the period from 2021/22 to 2025/26 to the Treasury Board for review and approval, PUB MFR 19 at page 1.

³⁵ Order 101/04 at page 22.

1 rationale underlying a decision and “are no substitute for statements of fact, analysis,
2 inference and judgment”: R. A. Macdonald and D. Lametti, “Reasons for Decision in
3 Administrative Law” (1990), 3 C.J.A.L.P. 123, at p. 139; see also Gonzalez v. Canada
4 (Minister of Citizenship and Immigration), 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras.
5 57-59.³⁶

6 Order 9/22 demonstrates this type of reasoning and analysis – the Board summarized the arguments
7 made by the parties to the proceeding and made a peremptory conclusion that is outside of its jurisdiction.
8 The PUB did not identify any factual basis or evidence from the proceeding to support its conclusion that
9 Business Operations Capital could and must be reduced by Manitoba Hydro. The PUB’s rationale for this
10 essential finding is not addressed in any manner in Order 9/22 and cannot be inferred from the evidentiary
11 record.

12 Furthermore, in this interim process, the PUB expressly ruled “specific business operations capital
13 projects” out of scope.³⁷ Nonetheless, to comply with the information requested by the PUB for its
14 consideration of the Application, Manitoba Hydro provided general evidence as to its business operations
15 capital expenditures planned for the next 5 years, including forecast expenditures for the the 2021/22
16 test year which were approved by the Provincial Government.³⁸ Manitoba Hydro’s evidence was clear that
17 business operations capital could not be reduced without increasing risks associated with aging assets,
18 increasing costs associated with remediation of those risks and decreasing asset reliability. The impact of
19 deferral will ultimately negatively impact customers through decreased reliability and/or increased costs
20 for Manitoba Hydro that will need to be passed on to customers.³⁹ Manitoba Hydro’s evidence that ageing
21 assets is a top risk faced by the organization and that Business Operations Capital spending is key to
22 mitigating that risk was not challenged by any party.⁴⁰

23 Throughout Order 9/22, the PUB made references to and seemed to rely upon comments made during
24 the 2014 Needs For and Alternatives To proceeding (“NFAT”) by a Manitoba Hydro representative. The
25 PUB stated that Manitoba Hydro “must reduce expenditures, as it explained it would when describing
26 how it would address drought at the 2014 NFAT proceeding.”⁴¹ Manitoba Hydro submits the PUB
27 misinterpreted those statements and erred in its reliance upon them.

28 The PUB appears to interpret the comments of a former Manitoba Hydro representative in the NFAT to
29 be a commitment to reduce O&A and capital expenditures during a drought regardless of any other

³⁶ Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at para 102.

³⁷ Order 128/21 at page 16.

³⁸ MFR 19.

³⁹ MFR 22 at page 1.

⁴⁰ PUB/MH I-7 at page 2.

⁴¹ Order 9/22 at page 63; also see page 31 and 33.

1 circumstance. With respect, Manitoba Hydro submits the quotation should be read in its entire context
2 to be interpreted correctly:

3 And so during a severe prolonged drought, Manitoba Hydro will -- would provide
4 sufficient cashflows for the continuity of business operations. I mean, we're going to
5 continue to have business as usual for Manitoba Hydro. That's what happened in '03/'04.
6 And Manitoba Hydro's debt will remain to be self-supporting.

7 So what measures would we undertake? There's three (3) measures, and we would use
8 them in some combination of -- and we talk about it generally here, but the first one is
9 cash conservation. So Manitoba Hydro would curtail or delay its operating and capital
10 expenditures as required and as appropriate. And in severe circumstances, this may
11 include exercising the optionality available within the development plans.

12 But our first approach would be to see what can we do, just -- and as any homeowner,
13 any person would do when faced with a situation, we would see what can we do maybe
14 not to have as many cash outflows. And we would certainly and we would do that, and
15 we have done it and we would continue to do that.

16 The second piece to this is bridge financing. I've already indicated that we have our \$500
17 million short-term borrowing program; or, alternatively, could access the capital markets
18 for shorter-dated debt. You know, could be one (1) year, two (2) year, three (3) years,
19 such that they could be retired upon resumption of positive cashflow from operations.

20 And thirdly, increase the cash inflows through rate increases. And should circumstances
21 warrant, Manitoba Hydro could apply for higher rate increases in order to generate
22 additional cashflows.⁴²

23 The comments from the previous Manitoba Hydro witness were clear that business would have to
24 continue as usual and that cash conservation efforts may be appropriate as the circumstances warranted
25 and permitted. Manitoba Hydro did not guarantee that cost reductions would occur without consideration
26 of the circumstances of Manitoba Hydro at the time the drought occurred. In this proceeding, Manitoba
27 Hydro provided specific evidence as to why its current circumstances limited the type of cost reductions
28 that could be undertaken. In addition, as noted in response to MFR 22, Manitoba Hydro has a rigorous
29 process to prioritize and optimize capital expenditures to sustain its assets based on value and costs and
30 are allocated to areas where there is the greatest risk mitigated or benefit gained. This prioritization and
31 optimization process has been further developed and enhanced since the time of the NFAT.

⁴² Exhibit CC-4, Tab 9, NFAT Transcript, March 19, 2014, p 2833-2835 (Mr. Manfred Schulz) (emphasis added).

1 During the course of the oral hearing, Mr. Alastair Fogg provided further context and explanation to the
2 NFAT quote. Mr. Fogg firstly clarified that the NFAT comments from 2014 were premised on a “prolonged
3 drought”. Mr. Fogg indicated that we do not yet know whether Manitoba is in a prolonged or multi-year
4 drought.⁴³ Secondly, Mr. Fogg highlighted that “business as usual” for Manitoba Hydro includes work on
5 business operations capital to address operational risks associated with aging assets.⁴⁴ The cost savings
6 were only to be achieved “where possible and if they’re possible.”⁴⁵

7 The PUB’s analysis and findings on this issue contradicts the only evidence on this matter from the record
8 of this proceeding; that the Business Operations Capital expenditures in the 2021/22 Test Year as well as
9 forecasted for future years, as approved by the management of Manitoba Hydro and reviewed by the
10 Provincial Government, are necessary to maintain safe and reliable service to Manitobans.

11 Reading Order 9/22 in conjunction with the record of the Application, it is difficult for Manitoba Hydro to
12 understand the PUB’s reasoning on this critical issue, that Manitoba Hydro’s forecasted Business
13 Operations Capital expenditures are not necessary for the safe, reliable and efficient provision of power
14 to Manitobans.⁴⁶

15 **5.2. Resulting Prejudice or Damage from Order**

16 Manitoba Hydro cannot comply with Directive 6 as currently written. Manitoba Hydro is unable to ensure
17 that reductions in Business Operations Capital expenditures can be achieved without unduly risking and
18 limiting the utility’s ability to fulfill and deliver upon its statutory obligations to provide safe and reliable
19 power to Manitobans. Furthermore, Directive 6 is beyond the jurisdiction of the PUB.

20 **5.3. Remedy Sought**

21 Manitoba Hydro respectfully requests that Directive 6 be rescinded.

22 Manitoba Hydro appreciates that the PUB may consider capital expenditures in setting just and
23 reasonable rates in future proceedings. Manitoba Hydro’s Chief Financial Officer committed to continue
24 reviewing business operations capital as part of the enterprise planning process both in light of the
25 drought and to keep costs as low as possible for Manitobans, while taking into account liabilities
26 associated with deferral of projects.⁴⁷ Accordingly, in the alternative to the directive being rescinded,
27 Manitoba Hydro requests that Directive 6 be varied as follows:

28 In its next General Rate Application, Manitoba Hydro shall provide a narrative explanation of its
29 processes for assessing and optimizing business operations capital expenditures. Manitoba Hydro
30 shall further provide a comparison between the Business Operations Capital expenditures (actual

⁴³ December 13, 2021 Transcript, page 506, lines 6-10.

⁴⁴ December 13, 2021 Transcript, page 506, lines 11-20.

⁴⁵ December 13, 2021 Transcript, page 507, lines 5-6.

⁴⁶ Order 9/22 at page 30-31.

⁴⁷ Aurel Tess, December 13, 2021, Transcript page 620-621.

1 and forecasted) to the Business Operations Capital expenditures included in the 2021/22 Interim
2 Rate Application.

3 **6. Directive 7 – Operating and Administrative Expense (“O&A”) Reductions**

4 Directive 7 provides:

5 At the 2022/23 General Rate Application, Manitoba Hydro demonstrate the savings in
6 O&A expenses that are found by showing the updated O&A expenses compared to the
7 O&A expenses proposed in this interim proceeding.

8 The PUB also made several other findings related to O&A expenses including:

9 The Board directs Manitoba Hydro to demonstrate the savings in O&A expenses that are
10 found by showing the updated O&A expenses compared to the O&A expenses proposed
11 in this interim proceeding.⁴⁸

12 ...

13 While recognizing that O&A expenses were a contentious issue and not a principal focus
14 of this Interim Application, the Board finds Manitoba Hydro’s plans to increase its O&A
15 expenses in 2022/23 to be unsupported based on the evidence in this Interim
16 Application. In a time of drought, with no evidence that the drought will end in 2022/23,
17 Manitoba Hydro must reduce expenditures, as it explained it would when describing how
18 it would address drought at the 2014 NFAT proceeding.⁴⁹

19 ...

20 If the drought continues and Manitoba Hydro’s cash flow concerns continue next year,
21 the Board finds that Manitoba Hydro must seek savings in its O&A expenses in order to
22 confront liquidity concerns related to the continuing drought. The Board notes that
23 Manitoba Hydro plans to increase its O&A expenses relatively quickly in the next fiscal
24 year. Based on the record of this hearing, the Board finds that Manitoba Hydro can slow,
25 pause, or suspend planned O&A increases. The Board will consider Manitoba Hydro’s
26 steps to manage its O&A expenses at the next General Rate Application.⁵⁰

27

⁴⁸ Order 9/22 at page 34.

⁴⁹ Order 9/22 at page 63.

⁵⁰ Order 9/22 at page 63.

1 **6.1. Grounds for Review**

2 **6.1.1. Lack of Jurisdiction**

3 As set out in section 5.1.1 above, the PUB’s jurisdiction is restricted solely to the setting of rates for the
4 provision of power. Consistent with the PUB’s inability to direct Manitoba Hydro to reduce its planned
5 business operations capital, the PUB similarly does not have the legal authority or jurisdiction to direct
6 Manitoba Hydro to reduce or alter operating expenses. The planning and determination of the expenses
7 required to operate Manitoba Hydro’s business in accordance with its statutory obligations to provide
8 safe and reliable power to Manitobans, falls within the management of Manitoba Hydro and the MHEB,
9 and budgets are approved by the Provincial Government.

10 Directive 7 and the related findings on pages 34 and 63 provide an express direction to Manitoba Hydro
11 to find and demonstrate “savings” or “cuts” in O&A expenses. As with capital expenditures, the ability to
12 consider “the amount required to provide sufficient funds to cover operating, maintenance and
13 administrative expenses of the corporation”⁵¹ does not equate to any authority to direct, pre-emptively
14 or otherwise, reductions in operating, maintenance and administrative expenses as the PUB has done in
15 Order 9/22. Providing such direction to Manitoba Hydro is a legal error.

16 **6.1.2. Reasons Do Not Fully Explain the Justification for the PUB’s Order**

17 In addition to the fact that the PUB has no jurisdiction to direct Manitoba Hydro to reduce O&A expenses,
18 and that management and future planning of the utility’s forecasts are the responsibility of the MHEB and
19 management, Manitoba Hydro further submits the PUB’s findings related to O&A expenses are not
20 adequately explained and cannot be inferred by the record of this proceeding. On the issue of directing
21 reduction to O&A expenses, Manitoba Hydro has substantially the same concerns as outlined in section
22 5.1.2. Order 9/22 does not provide any analysis or rationale to enable Manitoba Hydro to determine how
23 the Board it arrived at such conclusions.

24 For example, the PUB found at page 63 that, “Based on the record of this hearing, the Board finds that
25 Manitoba Hydro can slow, pause, or suspend planned O&A increases”. Manitoba Hydro is unable to assess
26 and evaluate this important factual finding by the Board as no reference is made to any specific aspect of
27 the record that indicates how and where Manitoba Hydro could slow, pause, or suspend planned O&A
28 increases.

29 It appears from some references in Order 9/22 about the O&A expense reductions in 2020/21, that the
30 PUB incorrectly inferred similar reductions could be achieved by Manitoba Hydro in the 2021/22 Test Year
31 or in the future.⁵² The PUB commented that Manitoba Hydro “was able to adjust its O&A expenses
32 relatively quickly in response to the directive from the provincial Government to do so in light of the

⁵¹ Section 25(5)(a)(i), *The Crown Corporations Governance and Accountability Act*.

⁵² Order 9/22 at page 34.

1 pandemic.”⁵³ This finding conflicts with Manitoba Hydro’s evidence with respect to the cost reductions
2 achieved in the 2021/22 Test Year, namely:

- 3 - The reduction of expenses was specifically designed to be “only a one-time” occurrence as the
4 level of reductions were unsustainable.⁵⁴
- 5 - Reductions in O&A were achieved through rigorous workforce reductions, including complete
6 suspension of the summer student program; freeze on all external hiring and stringent vacancy
7 management, and approximately 95% of staff experienced salary reduction through the
8 implementation of three unpaid days off. Absent these steps, cost reductions would have been
9 achieved through wide-spread staff layoffs; ⁵⁵ and
- 10 - Ms. Grewal commented “It would be an understatement to say these temporary cost savings
11 were easy to achieve. It was extremely challenging.”⁵⁶

12 Furthermore, the Board’s finding that Manitoba Hydro can slow, pause, or suspend planned O&A
13 increases and must reduce current expenditures is not supported from the evidentiary record of the
14 hearing and is inconsistent with Manitoba Hydro’s evidence from the entire proceeding, which included:

- 15 - Increases in O&A expense were being driven by higher wages and salaries, which result in part
16 from costs outside of Manitoba Hydro’s control such as from salary increases ordered by the
17 Manitoba Labour Board;⁵⁷
- 18 - Increasing non-salary costs, including environmental monitoring required at Keeyask upon it
19 being placed in-service, treatment of zebra mussels at generating stations, motor vehicle costs
20 resulting from both increases in fuel pricing and increased travel associated with a return to
21 normal operations;⁵⁸
- 22 - MH’s asset base has grown to \$30 billion (new capital projects) from \$17 billion in 2014-15. With
23 a larger asset base and an increased customer base, MH needs appropriate staffing levels to
24 maintain reliability and customer/employee safety;⁵⁹
- 25 - Manitoba Hydro requires a staffing at the post-VDP level at a minimum in order to continue to
26 provide safe and reliable service to its customers and minimize the lifecycle costs of its assets. As
27 Manitoba Hydro’s assets are ageing, without proper maintenance and investment, there is
28 greater risk related to reliability, compliance, the environment and the safety of the public and
29 employees; and⁶⁰

⁵³ Order 9/22 at page 34.

⁵⁴ Ms. Grewal Transcript, December 10, 2021, page 124, lines 19-22.

⁵⁵ MFR 12 at page 1 and PUB/MH I-5 at page 3.

⁵⁶ Ms. Grewal Transcript, December 10, 2021, page 124, lines 19-22.

⁵⁷ PUB/MH I-5 at page 3.

⁵⁸ PUB/MH I-5 at page 3.

⁵⁹ PUB/MH I-7 at page 2.

⁶⁰ PUB/MH I-5 at page 4-5.

1 - Regular requirement into trades and technical trainee programs is necessary to ensure sufficient
2 numbers of qualified professionals needed to support the operation of Manitoba Hydro's
3 business. Recruitment and trading processes were negatively impacted by the 2020 external
4 hiring freeze.⁶¹

5 No reasons or commentary was provided in Order 9/22 to demonstrate whether the PUB considered this
6 evidence or how it factored these critical facts into its decision and related commentary.

7 As outlined with its commentary on Business Operations Capital, the PUB also relied upon the NFAT
8 comments to support its conclusion that Manitoba Hydro "must reduce its expenditures".⁶² Manitoba
9 Hydro repeats and relies upon its comments in section 5.1.2. With respect to O&A expenses in particular,
10 Manitoba Hydro reiterates that in March 2014 at the time the NFAT comments were made, Manitoba
11 Hydro had not yet undergone its substantial workforce reduction initiatives. Between March 2014 and
12 the hearing of this Application, Manitoba Hydro aggressively pursued workforce reductions which
13 included reducing positions by 23% between 2016/17 to 2020/21.⁶³ In light of the reductions that already
14 occurred, Manitoba Hydro's ability to further reduce expenditures is limited.

15 The Board also found that Manitoba Hydro "should have planned for the fact that the salaries of
16 employees previously working on these major capital projects would no longer be capitalized and instead
17 form part of the O&A expenses."⁶⁴ This statement is made with no other context or reference to the
18 evidence. There is no indication as to what this "planning" should have entailed, nor was this matter
19 addressed by the evidence in the Application or the proceeding. Manitoba Hydro's evidence was that
20 many of the staff involved in the major capital projects were terminated following completion; however,
21 for those staff remaining with Manitoba Hydro, there has been a shift to operating and maintenance
22 activities necessary to support the new assets.⁶⁵

23 Manitoba Hydro submits that the PUB has erred in directing Manitoba Hydro to demonstrate savings to
24 its O&A without any or proper legal authority or jurisdiction to do so. In addition, the PUB erred by
25 concluding that O&A expenses must and could be reduced, and that Manitoba Hydro could slow, pause
26 or suspend planned O&A expenditures. No evidence exists on the record of the proceeding to support
27 such a conclusion.

28 **6.2. Resulting Prejudice or Damage from Order**

29 Manitoba Hydro cannot comply with Directive 7 as currently written as it is unable to ensure that
30 reductions in O&A expenditures will be achieved.

⁶¹ PUB/MH I-5 at page 3.

⁶² Order 9/22 at page 63.

⁶³ PUB/MH I-5 at page 3.

⁶⁴ Order 9/22 at page 34.

⁶⁵ PUB/MH I-5 at page 3.

6.3. Remedy Sought

Manitoba Hydro respectfully requests that Directive 7 be rescinded.

Notwithstanding the fact that the PUB does not possess the legal authority or jurisdiction to direct Manitoba Hydro to reduce its O&A spending, Manitoba Hydro appreciates that the PUB may consider O&A expenses in setting just and reasonable rates in future proceedings. Accordingly, in the alternative to the directive being rescinded, Manitoba Hydro requests that Directive 7 be varied as follows:

In its next General Rate Application, Manitoba Hydro shall provide a narrative explanation of its processes for assessing and optimizing operating and administrative expenditures. Manitoba Hydro shall further provide a comparison between the O&A expenditures (actual and forecasted) to the O&A expenditures included in the 2021/22 Interim Rate Application.

7. Findings related to Long Term Precipitation Forecasting Capability

At page 87 of Order 9/22, the PUB held:

Even though water flow conditions are its single largest risk factor when it comes to earnings, Manitoba Hydro has no reliable long-term precipitation forecasting capability. Without reliable long-term forecasting, Manitoba Hydro must use its judgment as to when to switch its operations from seeking to maximize its extraprovincial revenues to preserving water for energy reliability purposes for domestic and firm export customers. As seen in this Interim Application, there are significant financial consequences to Manitoba Hydro ratepayers due to a drought that Manitoba Hydro is unable to forecast. The Board finds 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.

Despite this finding in Order 9/22, Manitoba Hydro is not formally directed by the PUB to retain additional expert evidence to determine what, if any, additional drought forecasting options may (have) exist(ed) to examine 2021/22 interim rates at the next General Rate Application.

7.1. Grounds for Review

Manitoba Hydro seeks clarification from the PUB with respect to this finding as there is no other supporting explanation, commentary or directive that explains or articulates the PUB's intention and expectation for Manitoba Hydro on this matter.

From Manitoba Hydro's review of the record of this proceeding, it is unable to find any discussion of whether additional expert evidence would be of value to the rate setting process. It notes that none of the parties to this proceeding challenged or raised specific concerns with respect to Manitoba Hydro's ability to forecast water flow, precipitation or drought. Manitoba Hydro employs a team of experts in the

1 area of hydrology and utilizes scientifically sound hydrological forecasting, including both physically-based
2 and statistical methods.⁶⁶ Long range flow forecasting has a high degree of associated uncertainty.⁶⁷

3 Manitoba Hydro submits it is premature to require expert evidence on this topic as Manitoba Hydro has
4 not had the opportunity to present to the Board its full process. The most efficient way forward would be
5 to allow Manitoba Hydro to provide evidence on this topic at the next General Rate Application and there
6 after the PUB can determine whether it requires additional information.

7 **7.2. Resulting Prejudice or Damage from Order**

8 Without clarification, Manitoba Hydro can not reasonably assess if this finding was meant to be a
9 directive, including how the existence or application of any other potential drought forecasting options
10 would be relevant, significant or material to any further review of the costs actually incurred by Manitoba
11 because of the drought at the next General Rate Application. Without such guidance, Manitoba Hydro
12 may act in a manner it reasonably believes amounts to compliance, but ultimately does not reflect the
13 PUB's expectation.

14 **7.3. Remedy Sought**

15 Manitoba Hydro respectfully requests that the PUB vary Order 9/22 to remove the above referenced
16 finding on page 87 of Order 9/22. In the alternative, Manitoba Hydro requests clarification on whether or
17 not the finding requiring additional expert evidence was intended to be a directive, and if so, the specific
18 objectives and deliverables for such a consultant engagement and whether the PUB intends to retain its
19 own consultant in accordance with sections 19 or 21 of *The PUB Act* or whether the PUB requires
20 Manitoba Hydro to retain a consultant to provide evidence on the objectives and deliverables at the next
21 General Rate Application.

22

23 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

24 FEBRUARY 25, 2022

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⁶⁶ Transcript, December 13, 2021 at pages 622-627.

⁶⁷ Transcript, December 13, 2021 at pages 626.