

**Manitoba Hydro 2023/24 & 2024/25 General Rate Application
Consumers Coalition Legal Argument regarding the applicable statutory
framework for ratesetting**

June 22, 2023

Exhibit CC-34

Executive Summary

1. Amendments to *The Manitoba Hydro Act*, *The Public Utilities Board Act*, and *The Crown Corporations Governance and Accountability Act* enacted on November 3, 2022 do not apply to the setting of just and reasonable rates for electricity supplied by Manitoba Hydro for periods ending prior to April 1, 2025.
2. The statutory mandate of the Manitoba Public Utilities Board (“PUB”) as it read on November 2, 2022 applies to the Board’s determination of Manitoba Hydro’s 2023/24 & 2024/25 General Rate Application and requires the Board to set just and reasonable rates in the public interest.
3. As previously found by the PUB, the applicable statutory framework requires the Board to consider the appropriate levels of reserves maintained by the corporation and the need for contributions to those reserves in setting rates for 2023/24 and 2024/25.

Introduction

4. Amendments to the statutory framework governing the setting of electricity rates in Manitoba enacted shortly before the filing of Manitoba Hydro’s 2023/24 & 2024/25 General Rate Application invite confirmation of the applicable law in the present regulatory process.
5. The following sections describe the relevant statutory amendments and their accompanying “transitional” provisions to illustrate that a principled interpretation of these provisions confirms that they do not apply to the PUB’s consideration of Manitoba Hydro’s 2023/24 & 2024/25 General Rate Application. The document concludes with a description of the applicable law that governs the PUB’s exercise of authority and discretion in setting just and reasonable rates in response to Manitoba Hydro’s present application.

*The Manitoba Hydro Amendment and Public Utilities Board Amendment Act*¹

6. As confirmed by the Manitoba Court of Appeal,² the PUB's authority to set just and reasonable rates for Manitoba Hydro is derived from three interrelated statutes:
- *The Manitoba Hydro Act*, CCSM c H190
 - *The Public Utilities Board Act*, CCSM c P280
 - *The Crown Corporations Governance and Accountability Act*, CCSM c C336
7. *The Manitoba Hydro Amendment and Public Utilities Board Amendment Act*, SM 2022 c 42 (the "*Amendment Act*"), which received Royal Assent on November 3, 2022, contained amendments to all three of these statutes. Most provisions in the *Amendment Act* came into force upon Royal Assent, but certain portions relating to the regulation of gas utility services as well as to the operations of the Public Utilities Board are not yet law. These will come into force on a day to be fixed by proclamation and are not addressed below.³
8. The provisions which came into force on November 3, 2022 made multiple significant changes to the PUB's authority to regulate Manitoba Hydro's rates for electricity services. As explained in detail below, these changes will not apply to electricity ratesetting until April 1, 2025. Summarized, the major changes are that:
- "Major new facilities" for generating or transmitting power must be reviewed by the PUB before they are approved (*Amendment Act*, s 6(2)),
 - Manitoba Hydro is required to prepare an Integrated Resource Plan covering a 10-year period, which may be referred to the PUB for review (*Amendment Act*, s 12),
 - Manitoba Hydro is required to apply for rates covering periods of three consecutive fiscal years beginning April 1, 2025, the setting of which will be governed by the following (*Amendment Act*, s 13):

¹ SM 2022 c 42. [*Amendment Act*]

² *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60 at paras 12-15.

³ *Amendment Act*, *supra* note 1 at s 66.

- A prohibition, which the responsible Minister may rebut, on the PUB issuing orders or directives governing operations, capital management, investments or expenditures,
- A policy requiring rates charged to enable the corporation to meet prescribed debt-to-capitalization ratios of 80% by March 31, 2035 and 70% by March 31, 2040,
- A restriction limiting annual rate increases for each class to the lesser of 5% and the rate of inflation, and
- A series of new “rules” to be applied to the PUB’s approval of rates, which:
 - prescribe the factors to take into account in determining Manitoba Hydro’s revenue requirement including a prohibition on reducing the amount approved by Treasury Board for the corporation’s capital spending,
 - prohibit the consideration of affordability and socio-economic factors in setting rates, and
 - specify the required contents of a PUB directive to defer the recognition of costs or revenues for the purposes of ratesetting.

Transitional Provisions

9. The above provisions are complemented by the *Amendment Act*’s transitional provisions at section 65, which dictate that despite amendments having come into force, Part 4 of *The Crown Corporations Governance and Accountability Act*, *The Manitoba Hydro Act*, and section 2 of *The Public Utilities Board Act* as they read immediately before the enactment of the *Amendment Act* “continue to apply to the determination of rates for the retail sale of power under *The Manitoba Hydro Act* for any period ending before April 1, 2025.”⁴ In their original text, section 65 reads as follows:

⁴ *Amendment Act*, *supra* note 1 at s 65.

Transitional

65 *Despite Part 1 and sections 23 and 64 of this Act, the following Acts or provisions, as they read immediately before the enactment of this Act, continue to apply to the determination of rates for the retail supply of power under **The Manitoba Hydro Act** for any period ending before April 1, 2025:*

*(a) Part 4 of **The Crown Corporations Governance and Accountability Act**;*

*(b) **The Manitoba Hydro Act**;*

*(c) section 2 of **The Public Utilities Board Act**.*⁵

10. A principled interpretation of section 65 confirms that the PUB is to exercise its authority as it existed on November 2, 2022 in its determination of Manitoba Hydro's 2023/24 & 2024/25 General Rate Application.
11. To confirm the applicable principles of statutory interpretation, commentary from the Manitoba Court of Appeal as well as the Supreme Court of Canada confirm that the standard principles of statutory interpretation, known as the "modern approach", apply "equally"⁶ to the interpretation of statutory transitional provisions, which "do not attract special rules of interpretation that are different from other legislation..."⁷
12. This means that the modern approach to statutory interpretation, which dictates that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature]",⁸ apply to the interpretation of the *Amendment Act's* transitional provisions. The following paragraphs will apply this framework to section 65 of the *Amendment Act*.

Grammatical and Ordinary Sense

13. Section 65 of the *Amendment Act* is worded clearly and plainly, and explains as written that "the following Acts or provisions, as they read immediately before the

⁵ *Ibid.* [emphasis original]

⁶ *Buhr v Buhr*, 2021 MBCA 63 at para 32.

⁷ *Ian Dmytriw et al v Jonah NK Odum et al*, 2020 MBCA 112 at para 46.

⁸ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

enactment of this Act, continue to apply to the determination of rates for the retail supply of power under *the Manitoba Hydro Act* for any period ending before April 1, 2025.”⁹ After this sentence, section 65 then lists Part 4 of the CCGAA, *The Manitoba Hydro Act* (in full), and section 2 of *The Public Utilities Board Act*. The wording of section 65 makes clear that the changes to these pieces of legislation imposed by the *Amendment Act* do not apply to electric ratesetting before the prescribed date of April 1, 2025.

14. While ancillary documents such as explanatory notes do not form part of the legislation, it is noteworthy that they have been relied on in the past by courts to inform a plain-language reading of statutes and the understanding of their contents in their ordinary sense.¹⁰ In the case of the *Amendment Act*, its Explanatory Note confirms the interpretation of section 65 proposed above by stating that “the existing legislative framework continues to apply to the determination of electricity rates until March 31, 2025.”¹¹
15. The Explanatory Note further confirms this is the case by concluding with the assertion that “*The Manitoba Hydro Act, The Public Utilities Board Act* and Part 4 of *The Crown Corporations Governance and Accountability Act* continue to apply to the determination of electricity rates for any period ending before April 1, 2025, as if those Acts had not been amended.”¹²

Context, Scheme of the Act and Object of the Legislature

16. The proposed grammatical and ordinary reading of the *Amendment Act*'s transitional provisions is consistent with the *Act*'s substantive contents, which supports the assertion that its contents do not apply to the PUB in setting electricity rates until April 1, 2025.

⁹ *Amendment Act*, *supra* note 1 at s 65.

¹⁰ See, for example, *Caithkin, Inc. v. Canada*, 2015 FCA 118 at para 24, in which the Federal Court of Appeal acknowledged that “while not necessary to [its] analysis, the Explanatory Notes [of the statute in question] confirm...the ordinary and textual interpretation...” of the provisions considered in that case.

¹¹ *Amendment Act*, *supra* note 1 at “Explanatory Note”, available online:

<https://web2.gov.mb.ca/laws/statutes/2022/c04222e.php>

¹² *Ibid.*

17. In particular, Section 13 of the *Amendment Act*, which repeals and replaces section 39 of *The Manitoba Hydro Act*, relies on a specifically defined time period to frame its contents as only being applicable beginning on April 1, 2025. To do so, Section 13 defines a “rate period” in respect of which Manitoba Hydro must apply for approval of rates pursuant to the rules and process set out in the *Amendment Act*.¹³ Importantly, the *Amendment Act* expressly defines “rate period” as the “period of three consecutive fiscal years of the corporation beginning ...on April 1, 2025...”¹⁴
18. When considering the proposed rates for a “rate period”, the new framework directs the regulator to “base its order or decision about rates on the revenue requirements for the **rate period**”. The regulator’s consideration of capital expenditures also refers to the time period bound by the rate period,¹⁵ and the maximum general rate increase provision in section 39.1(1) of *The Manitoba Hydro Act* also serves to limit rate increases for any fiscal year within a **rate period**.
19. The express statement that the “rate period” to which the new ratesetting rules apply does not begin until April 1, 2025 means that for the purposes of the *Amendment Act*, rates set for periods prior to that date are not rates set for a “rate period”. This is consistent with the proposed interpretation of the transitional provisions, confirming that that the legislation in place immediately before the enactment of the *Amendment Act* applies to rate setting until that date.
20. This is also consistent with the PUB’s finding in Order 70/22 which, based on the Bill that became the *Amendment Act* and the draft of section 65 as it read at that time, found that the “current” (as of July 5, 2022) legislation would “continue to apply to the determination of electricity rates for periods before April 1, 2025.”¹⁶

The Statutory scheme as it read on November 2, 2022 applies to the current GRA

¹³ *Amendment Act*, *supra* note 1 at s 13. [emphasis added]

¹⁴ *Ibid*, amendment to s 39(1) of *The Manitoba Hydro Act*.

¹⁵ *Ibid*, amendment to s 39(5) of *The Manitoba Hydro Act*.

¹⁶ PUB Order 70/22 at 5.

21. *The Public Utilities Board Act* requires the Board to set rates and classifications that are “just and reasonable”.¹⁷ Further, the same *Act* prohibits public utilities from charging rates that are “unjust or unreasonable, unjustly discriminatory, or unduly preferential,”¹⁸ and from imposing classifications that are “unjust or unreasonable”.¹⁹ By virtue of section 39 of *The Manitoba Hydro Act* and part 4 of *The Crown Corporations Governance and Accountability Act*,²⁰ these requirements form an integral part of the Board’s authority over Manitoba Hydro in the present proceeding.

22. Section 39(2) of *The Manitoba Hydro Act* as it read on November 2, 2022 authorized Manitoba Hydro to “fix the prices to be charged for power supplied by the corporation”, but this authority was made “subject to Part 4 of *The Crown Corporations Governance and Accountability Act*...”²¹

23. Part 4 of *The Crown Corporations Governance and Accountability Act* as it read on November 2, 2022 dictates that rates for services provided by Manitoba Hydro “shall be reviewed by The Public Utilities Board under *The Public Utilities Board Act*...”²², and requires that all changes to rates and new rates be approved by the PUB.

24. Part 4 of *The CCGAA* further dictates that *The Public Utilities Board Act* applies with necessary changes to the Board’s review of rates for services and sets out factors for the PUB to consider in approving rates for services.

25. These include:

- i. the amount required to provide sufficient funds to cover operating, maintenance and administration expenses of the corporation,
- ii. interest and expenses on debt incurred for the purposes of the corporation by the government,
- iii. interest on debt incurred by the corporation,

¹⁷ *The Public Utilities Board Act*, CCSM c P280 at s 77(a), (b). [“PUB Act”]

¹⁸ *Ibid* at s 82(1)(a).

¹⁹ *Ibid* at s 82(1).

²⁰ As they read on November 2, 2022.

²¹ *The Manitoba Hydro Act*, CCSM c H190 at s 39(2) as it read on November 2, 2022.

²² *The Crown Corporations Governance and Accountability Act*, CCSM c C336 at s 25(1), as it read on November 2, 2022. [“CCGAA”]

- iv. reserves for replacement, renewal and obsolescence of works of the corporation,
- v. any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,
- vi. liabilities of the corporation for pension benefits and other employee benefit programs,
- vii. any other payments that are required to be made out of the revenue of the corporation,
- viii. any compelling policy considerations that the board considers relevant to the matter, and
- ix. any other factors that the Board considers relevant to the matter...²³

26. In addition to the factors set out in section 25(4) of the *CCGAA*, section 25(3) of that *Act* as well as section 2(5) of *The Public Utilities Board Act* (as it read on November 2, 2022) confirm that the PUB Act applies ‘with necessary changes’ to the Board’s review of rates for Manitoba Hydro services. In particular, the MBCA has found that sections 77 and 82(1) of the *PUB Act* apply to the Board’s approval of Manitoba Hydro rates. This means that the PUB may “fix just and reasonable ... rates”,²⁴ and that Manitoba Hydro is prohibited from charging rates which are “unjust or unreasonable, unjustly discriminatory, or unduly preferential...”²⁵

27. The PUB previously found that its statutory mandate requires it to ensure (1) that Manitoba Hydro’s forecasts are reasonably reliable, (2) that its actual and projected costs are necessary and prudent, (3) assess its reasonable revenue needs in the context of its general health, (4) ensure appropriate allocation of costs between classes, and (5) consider statutory objectives in setting just and reasonable rates.²⁶

²³ *CCGAA*, *supra* note 22 at s 25(4) as it read on November 2, 2022. Note also that section 25(6) requires the PUB to consider, in addition to the factors set out in subsection (4), the costs to be incurred by Manitoba Hydro in respect of Efficiency Manitoba, as required under *The Efficiency Manitoba Act*.

²⁴ *PUB Act*, *supra* not 17 at s 77(a).

²⁵ *Ibid* at s 82(1)(a).

²⁶ PUB Order 5/12 at 27.

28. Further, the PUB has previously found the question of “what ‘reserves’ should Manitoba Hydro hold to manage risk...” to be a relevant consideration for ratesetting as part of its determination of the corporation’s reasonable revenue needs in the context of its overall general health.²⁷

Conclusion

29. Despite having come into force, the target debt-to-capitalization ratios and other changes to the ratesetting framework contained in the *Amendment Act* do not apply to ratesetting until April 1, 2025. These provisions are not applicable to Manitoba Hydro’s 2023/24 & 2024/25 GRA.

30. The PUB’s exercise of its statutory authority in determining rates for 2023/24 and 2024/25 is governed by the law as it read on November 2, 2022, which did not include prescribed debt-to-capitalization target ratios.

31. The PUB’s past findings regarding its statutory mandate continue to apply, meaning that the Board must ensure that Manitoba Hydro’s forecasts are reasonably reliable, that its actual and projected costs are necessary and prudent, assess its reasonable revenue needs in the context of its general health including contributions to appropriate levels of reserves,²⁸ appropriate allocation of costs between classes, and statutory objectives in setting just and reasonable rates.²⁹

²⁷ *The Crown Corporations Governance and Accountability Act*, CCSM c C336 at s 25(4)(a)(iv) as it read on November 2, 2022. See also PUB Order 59/18 at 62, for example, where the PUB found the question of “what ‘reserves’ should Manitoba Hydro hold to manage risk...” to be a relevant consideration for ratesetting.

²⁸ *Ibid.*

²⁹ PUB Order 5/12 at 27.