

Order No. 72/18

**AN APPLICATION BY MANITOBA HYDRO
FOR STAYS OF CERTAIN DIRECTIVES FROM ORDERS 59/18 AND 68/18
PENDING DETERMINATION OF MANITOBA HYDRO'S REVIEW AND VARY
APPLICATION**

June 6, 2018

**BEFORE: Robert Gabor, Q.C., Chair
Marilyn Kapitany, B.Sc., (Hon), M.Sc., Vice-Chair
Larry Ring, Q.C., Member**

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1.0 Executive Summary

A Panel of the Board consisting of the Chair, Vice-Chair and Board Member Larry Ring met to consider Manitoba Hydro's stay requests, set out in the Review & Vary Application ("R&V Application") filed with the Board and served on all parties on May 30, 2018.

By letter dated June 1, 2018, the Public Utilities Board ("Board") denied Manitoba Hydro's application to stay certain Directives from Order 59/18 and related aspects of Order 68/18, with reasons to follow. The Board also varied Directive 14 from Order 59/18 to remove the June 29, 2018 filing deadline established in the original Directive.

By this Order, the Board provides its reasons for the denial of Manitoba Hydro's stay requests.

2.0 Background

In its May 30, 2018 R&V Application, Manitoba Hydro requests that the Board stay the Directives 6, 7, and 14 from Order 59/18. Manitoba Hydro also requests that the Board immediately stay the operation of Order 68/18 as it relates to the approval of specific electricity rates for First Nations On-Reserve Residential class and First Nations Residential customers in the diesel zone communities.

In its R&V Application, Manitoba Hydro asks that the Board apply a rate of 8.517¢/kWh to both the Residential and First Nations On-Reserve Residential customer classes during the period of the stay, instead of the 8.527¢/kWh and 8.196¢/kWh rates that became effective June 1, 2018 for the Residential and First Nations On-Reserve Residential customer classes respectively.

The Board's Authority to Issue a Stay Pending Determination of a R&V Application

This may be the first time the Board has received an application for a stay as part of a review and vary application filing. Manitoba Hydro did not provide submissions as to the Board's legal authority to issue a stay of a Board Order or Directive pending the Board's determination of a review and vary application. After reviewing the applicable statutory and legal authorities, the Board has determined that it does have the authority to issue a stay pending determination of a review and vary application.

In the normal course, pursuant to *The Public Utilities Board Act* ("Act"), every Order of the Board comes into effect at the time prescribed in the Order. The Act prescribes that the operation of an Order of the Board is not suspended pending an appeal to the Court of Appeal, unless ordered by the Court of Appeal. The Board may, however, "suspend the operation of the order from which appeal is made until the decision of The Court of Appeal is rendered." This explicit legislative authority grants the Board the discretion to issue a stay specifically where an order has been appealed to the Court of Appeal.

The Act does not explicitly extend a similar power to the Board where a review and vary application is before the Board. However, under section 46 of the Act, the Board has broad discretion to extend the time for compliance with a Board Order if the circumstances appear to so require an extension. This broad grant of authority encompasses the power to stay the operation of an Order and/or Directive of the Board pending the Board's determination of a review and vary application.

In addition, the Act provides that the Board has the powers, rights, and privileges of the Court of Queen's Bench in certain matters, including the enforcement of its orders, and all other matters necessary or proper for the due exercise of its powers, or otherwise for carrying any of its powers into effect. The Court of Queen's Bench has the power to stay the operation of an order of the Court. As confirmed by the Court of Appeal, the applicable test for the granting of a judicial stay is:

- 1) whether there is an arguable case that the order sought to be appealed from is wrong;
- 2) whether the applicant could, unless the stay is granted, suffer irreparable harm, namely, harm that is not susceptible or is difficult to be compensated in damages; and
- 3) on the balance of convenience, which of the parties involved would suffer the greater harm from the granting or the refusal to grant a stay pending the disposition of the appeal on its merits.¹

This test is not mandatory in the exercise of the Board's discretion under section 46 of the Act; however, the Board concludes that the factors applicable to a judicial stay provide guidance as to when it is appropriate for a stay to be granted.

¹ See *Bank of Montreal v Superior Management Ltd et al*, 2010 MBCA 72.

3.0 Board Findings

Stay of Directive 6 and Related Aspects of Order 68/18

Directive 6 of Order 59/18 provides as follows:

[It is therefore ordered that] Manitoba Hydro create a First Nations On-Reserve Residential customer class. This customer class is to receive a 0% rate increase for the 2018/19 Test Year, such that the rate for this class will be maintained at the August 1, 2017 approved Residential rate. A 0% rate increase is to also apply to First Nations Residential customers in the diesel zone communities.

Further to Directive 6 of Order 59/18, in Order 68/18, the Board approved rates for all customer classes effective June 1, 2018.

The Board denies Manitoba Hydro's request to stay the operation of Directive 6 of Order 59/18 and related aspects of Order 68/18.

Order 59/18 was issued by the Board on May 1, 2018. By that Order, the Board granted an average revenue increase to be collected through rates varied by customer class effective June 1. Manitoba Hydro filed its compliance filing with rate schedules in accordance with Order 59/18 on May 15, 2018. The Board approved the compliance filing and approved specific June 1, 2018 rates for all customer classes in Order 68/18.

Manitoba Hydro did not make any request for a stay until it filed its R&V Application following the close of business on May 30, 2018. It therefore appears that Manitoba Hydro itself did not treat this matter as urgent or requiring immediate action, although it was known to Manitoba Hydro on May 1, 2018 that the new First Nations On-Reserve Residential customer class and rates for all customer classes were to take effect on June 1, 2018.

Having considered whether the operation of Directive 6 and related aspects of Order 68/18 will give rise to harm that cannot be compensated with damages, the Board concludes that, should Manitoba Hydro succeed in this part of its R&V Application, any over- or under-payment by customer classes can be addressed through rates going forward. For example, necessary rate adjustments could be made on a go-forward basis, with tools such as rate riders employed to address any discrepancy in rates paid between June 1, 2018 and the implementation of any new rate schedule as a result of the Board's ultimate determination in the R&V Application.

The Board is also not convinced that a stay would, as suggested by Manitoba Hydro, further the objectives of rate stability and certainty. Manitoba Hydro's request is that the Board stay Directive 6 and the rates that flow from the operation of Directive 6 and instead implement a new rate schedule, whereby all residential customers would receive a 3.91% rate increase during the period of the R&V Application process. Under Manitoba Hydro's request, First Nations On-Reserve Residential customers would have their rates increased by 3.91% to 8.517¢/kWh during the period of the stay, instead of the 0% increase and 8.196¢/kWh rate effective June 1, 2018. In addition, all customers in the Residential customer class would have their rates adjusted downward from the 8.527¢/kWh rate effective June 1, 2018 to a 8.517¢/kWh rate for the period of the stay. If the Board were to grant Manitoba Hydro's request and Manitoba Hydro was ultimately not successful in its R&V Application, rate adjustments for all residential customers would be required. Manitoba Hydro's request therefore does not promote the objectives that it identifies as the basis for its request.

Stay of Directive 7

Directive 7 of Order 59/18 provides as follows:

[It is therefore ordered that] Manitoba Hydro credit net-metered customers' excess energy put on the grid at the rate of 8.196¢/kWh for 2018/19. Manitoba Hydro must apply to the Board for approval of any future net-metered rate or changes to the 8.196¢/kWh rate.

The Board denies Manitoba Hydro's request to stay the operation of Directive 7 of Order 59/18.

The R&V Application with respect to Directive 7 can be addressed through the process set by the Board in its June 1, 2018 letter. Through this process, all written submissions on the R&V Application will be received by June 25, 2018.

In its R&V Application, Manitoba Hydro has not established the need to stay the operation of Directive 7 pending the completion of the hearing process. Manitoba Hydro did not provide the Board any details or specific circumstances that require the urgent action that it seeks or an explanation as to why the operation of Directive 7 must be suspended at this time as opposed to at the conclusion of the R&V Application process, should Manitoba Hydro succeed.

Stay of Directive 14

Directive 14 of Order 59/18 originally provided as follows:

[It is therefore ordered that] Manitoba Hydro retain an independent consultant to assess Manitoba Hydro's development of its asset management program and its progress in addressing the recommendations made by UMS, as well as the progress of the development of the Corporate Value Framework. Manitoba Hydro is to file with the Board by June 29, 2018 the Terms of Reference for the consultant for the Board's review and comment. Manitoba Hydro is directed to report back to the Board on its progress and the result of the consultant's assessment at the next GRA.

The Board denies Manitoba Hydro's request to stay the operation of Directive 14 of Order 59/18. By its letter of June 1, 2018, the Board varied Directive 14 so as to remove the filing deadline for the Terms of Reference for the external consultant. As such, there is no basis for staying Directive 14. This matter can properly be dealt with in the course of the R&V Application process, including whether Terms of Reference should be filed with the Board and, if so, the appropriate deadline for that filing.

4.0 IT IS THEREFORE ORDERED THAT:

1. Manitoba Hydro's application to stay Directive 6 of Order 59/18 and related aspects of Order 68/18 pending determination of Manitoba Hydro's Review & Vary Application **BE AND HEREBY IS DENIED;**
2. Manitoba Hydro's application to stay Directive 7 of Order 59/18 pending determination of Manitoba Hydro's Review & Vary Application **BE AND HEREBY IS DENIED;**
3. Manitoba Hydro's application to stay Directive 14 of Order 59/18 pending determination of Manitoba Hydro's Review & Vary Application **BE AND HEREBY IS DENIED.**

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at www.pub.gov.mb.ca.

THE PUBLIC UTILITIES BOARD

"Robert Gabor Q.C."

Chair

"Kurt Simonsen"

Associate Secretary

Certified a true copy of Order No. 72/18
issued by The Public Utilities Board



Associate Secretary