

Order No. 90/18

**AN APPLICATION BY MANITOBA HYDRO
TO REVIEW AND VARY ORDER 59/18 AND ORDER 68/18**

July 13, 2018

BEFORE: Robert Gabor, Q.C., Chair
Marilyn Kapitany, B.Sc., (Hon), M.Sc., Vice-Chair
Hugh Grant, PhD., Member
Sharon McKay, BGS, Member
Larry Ring, Q.C., Member

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1.0 Executive Summary

On May 30, 2018, Manitoba Hydro applied to review and vary certain aspects of Orders 59/18 and 68/18 (the “Application”). Specifically, Manitoba Hydro seeks to review and vary the following:

- The Board’s establishment of a First Nations On-Reserve Residential customer class and the 0% rate increase awarded to that class (“Directive 6”), along with the resulting rate schedules for that class and the Residential customer class;
- The Board’s directive that Manitoba Hydro credit net-metered customers’ excess energy put on the grid at a rate of 8.196¢/kWh and that Manitoba Hydro apply to the Board for approval of any future net-metered rate or changes to the 8.196¢/kWh (“Directive 7”);
- The Board’s directive 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 its development of the Corporate Value Framework (“Directive 14”);
- The Board’s Order that Manitoba Hydro participate in a technical conference hosted by Board Staff or an external consultant retained by the Board for the consideration of the establishment of a minimum retained earnings or similar test to provide guidance in the setting of consumer rates for use in rule-based regulation (“Directive 9”); and
- The Board’s directive that Manitoba Hydro file with the next General Rate Application a time-of-use rate design proposal including the results of consultation undertaken with General Service Large customers prior to filing with the Board (“Directive 29”), as well as the Board’s findings respecting the timing of future rate increases and requirements for future rate filings (“Timing Findings”).

By this Order, the Board grants Manitoba Hydro’s Application in part.

The Application with respect to net-metered rates in Directive 7 is granted and Directive 7 is set aside. The issue of the Board’s legal jurisdiction to approve the rates applied by

Manitoba Hydro to credit customers for excess energy returned to the grid will be considered at the next General Rate Application (“GRA”), along with the issue of Non-Utility Generators sale of excess power to Manitoba Hydro as it relates to load displacement, bidirectional metering, and Demand Side Management programs.

The Board orders a further process for consideration of the Application with respect to the time-of-use rate proposal ordered in Directive 29. Manitoba Hydro is directed to provide its comments as to when Directive 29 can be completed for filing with the next GRA within two weeks on receipt of this Order.

The Board also varies its finding that it will not consider a three-year rate proposal in the next GRA. The Board has the authority to grant rates for up to three years. The Board finds that it will determine the appropriate number of Test Years in the next GRA after it is filed with the Board.

All other aspects of the Application are denied.

2.0 Background

Under Manitoba law, the Public Utilities Board (“Board”) must set electricity rates for Manitoba Hydro’s customers that are just and reasonable. In doing so, as confirmed by the Manitoba Court of Appeal, the Board balances two concerns: the interests of Manitoba Hydro’s ratepayers and the financial health of Manitoba Hydro. Together and in the broadest interpretation, these interests represent the general public interest.

The Board’s mandate with respect to the regulation of Manitoba Hydro (or “the Utility”) is derived from *The Public Utilities Board Act* (“Board Act”), *The Crown Corporations Governance and Accountability Act* (“Crown Act”), and *The Manitoba Hydro Act* (“Hydro Act”). Pursuant to subsection 25(1) of the Crown Act, the prices charged by Manitoba Hydro with respect to the provision of power (“rates for services”) are reviewed by the Board under the Board Act. No change in rates for services can be made and no new rates for services can be introduced without the approval of the Board.

In 2017, Manitoba Hydro filed with the Board a GRA, seeking approval of changes to all of the Utility’s consumer rates. Specifically, Manitoba Hydro sought approval of three general rate increases: (1) finalization of the 3.36% interim rate increase that was effective August 1, 2016, (2) finalization of the 3.36% interim rate increase that was effective August 1, 2017, and (3) a 7.9% rate increase to all components of all consumer rates, effective April 1, 2018.

On May 1, 2018, following a written and oral evidentiary hearing process that included Manitoba Hydro and approved Interveners, the Board issued its Order 59/18 with respect to the rate increases sought by Manitoba Hydro. By Order 59/18, the Board also ordered the completion of a number of directives by Manitoba Hydro. The rate schedules resulting from Order 59/18 were subsequently approved by the Board in Order 68/18.

The Board's Authority to Review and Vary Board Orders and Decisions

The Board Act provides that the Board may review, rescind, change, alter, or vary any decision or order made by it. The Board Act further provides that proceedings of the Board shall be governed by rules adopted by the Board.

Rule 36 of the Board's Rules of Practice and Procedure sets out the process for the Board's exercise of its authority to review, rescind, change, alter, or vary its own decisions and orders, also known as a "review and vary" power. A review and vary may be undertaken on the Board's own initiative or on written application by any person.

Where a written application is filed, the Board must first determine the preliminary question of whether the matter should be reviewed. This requires consideration of whether there is reason to believe that the order or decision should be rescinded, changed, altered, or varied.

If the Board determines that the matter should be reviewed, the Board must then decide whether the application should be dismissed, granted, or the subject of a hearing or proceeding. In response to Manitoba Hydro's Application, a written hearing process was conducted.

An application to review and vary may be dismissed:

- where the applicant has alleged an error of law or jurisdiction or an error of fact, and the Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness of the Board's order or decision, or
- where the applicant has alleged new facts not available at the time of the original hearing or a change of circumstances, and the Board is of the opinion that the applicant has not raised a reasonable possibility that the new facts or the change in circumstances could lead the Board to materially vary or rescind the Board's order or decision.

The process established by Rule 36 reflects the legal principle that, once a final decision or order is issued, the matter cannot be re-opened except in limited circumstances. As set out in the submissions of the Consumers Coalition, an Intervener, in response to Manitoba Hydro's Application, the onus to establish that the Application should be granted lies with Manitoba Hydro. An application is not an opportunity for a party to reargue its case and the issue is not whether reasonable persons would have come to a different conclusion based on the same evidence.

Procedural History

On May 5, 2017, Manitoba Hydro filed a Letter of Application with the Board requesting rate approvals as part of its GRA for fiscal years 2016/17, 2017/18 and 2018/19. On May 12, 2017 and May 26, 2017, respectively, Manitoba Hydro filed copies of the Revenue Requirement information with its Integrated Financial Forecast ("IFF") MH16 and the Rate Design and Cost of Service Study information in support of its GRA. Manitoba Hydro subsequently filed updates to MH16, specifically MH16 Update and MH16 Update with Interim.

Pursuant to procedural Orders, the Board approved as Interveners in the GRA the Assembly of Manitoba Chiefs, Business Council of Manitoba, Consumers Coalition (Consumers' Association of Canada (Manitoba) / Winnipeg Harvest), a joint intervention of Representatives of the General Service Small and General Service Medium Customer Classes and Keystone Agricultural Producers, Manitoba Industrial Power Users Group, Manitoba Keewatinowi Okimakanak, and the City of Winnipeg.

On May 1, 2018, following a written and oral evidentiary hearing process – including 31 days of oral evidence and 4 days of oral legal argument, the Board issued Order 59/18 in which the Board approved final rates for the fiscal years that were the subject of the GRA. Specifically, the Board finalized the previously approved interim rates and denied Manitoba Hydro's request for a rate increase of 7.9% effective April 1, 2018. The Board approved a 3.6% average revenue increase to be recovered in Manitoba Hydro's consumer rates effective June 1, 2018, with the recovery of these additional revenues to

be through rate increases at a different level for each customer class to address past and current under- and over-payment of costs by the customer classes.

In addition to the Order 59/18 rate approvals, the Board issued a number of directives to Manitoba Hydro.

On May 15, 2018, Manitoba Hydro filed a schedule of rates reflecting the Board's decisions in Order 59/18 ("Compliance Filing"). On May 29, 2018, the Board issued Order 68/18, which approved the rate schedules contained in the Compliance Filing.

On May 30, 2018, Manitoba Hydro filed its Application to review and vary Order 59/18 and Order 68/18. Specifically, Manitoba Hydro requests that the Board review and vary the following specific aspects of Order 59/18 and the related rate schedules approved in Order 68/18. In its Application, Manitoba Hydro also requested interim relief pending the Board's determination of its Application and sought to stay certain Directives from Order 59/18.

By letter dated June 1, 2018, the Board denied Manitoba Hydro's request to stay certain Directives and related aspects of Order 68/18. The Board also varied Directive 14 from Order 59/18 to remove the June 29, 2018 filing deadline established in the original Directive. The Board's letter also established a process for the hearing of Manitoba Hydro's Application. The reasons for the Board's June 1, 2018 decision were provided in Order 72/18, issued on June 6, 2018.

On June 18, 2018, pursuant to the process established by the Board, the Assembly of Manitoba Chiefs, Manitoba Keewatinowi Okimakanak, Green Action Centre, the Manitoba Industrial Power Users Group, and the Consumers Coalition provided written submissions in response to Manitoba Hydro's Application. Manitoba Hydro filed a written reply to the Intervener submissions on June 25, 2018.

3.0 Bill Affordability and First Nations On-Reserve Residential Class

Directive 6 of Order 59/18 directed as follows:

IT IS THEREFORE ORDERED THAT:

6. 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.

In Order 68/18, the Board approved rate schedules for the customer classes in accordance with the Board's directives in Order 59/18. The Board approved a 4.04% rate increase for the Residential customer class, with the new Residential rate of 8.527¢/kWh effective June 1, 2018. Order 68/18 also approved a 0% rate increase for the new First Nations On-Reserve Residential customer class, with the rate of 8.196¢/kWh maintained effective June 1, 2018.

Manitoba Hydro seeks to review and vary Directive 6 on the ground that the Board has exceeded its jurisdiction and made an error of law, particularly in the conclusion that the Board has jurisdiction to order a bill affordability program and to take into account affordability as a factor in setting just and reasonable rates.

Manitoba Hydro also seeks to review and vary Directive 6 on the ground that the Board's conclusion that First Nation On-Reserve Residential customer class is consistent with the requirements of the Hydro Act constitutes an error of law and fact, and the conclusion that the Board possesses jurisdiction to order the creation of a new customer class constitutes an error of jurisdiction and law.

Manitoba Hydro requests that the Board set aside Directive 6 and review and vary the rate schedules approved in Order 68/18, so as to replace the rate schedules with revised rate schedules reflecting a rate of 8.517¢/kWh for all Residential customers, including those living on-reserve. This would increase the rate for Residential customers living on-reserve by 3.92% and all other Residential customers would have their rates adjusted

downward by 0.12% from the rates in effect on June 1, 2018. Other customer classes, such as General Service customers, will experience a similar downward adjustment to their rates as experienced by Residential customers.

In the alternative, Manitoba Hydro requests that the Board state a case in writing for the opinion of the Court of Appeal as to the Board's jurisdiction to (1) order the implementation of lower-income rate assistance program or other bill affordability program and (2) direct the establishment of a First Nation On-Reserve Residential customer class and direct the application of different rates for service for that class than are applied to other Residential customers.

Directive 6 and the Order 68/18 rate schedule approvals resulted from the Board's confirmation in Order 59/18 that, as the Board found in Order 116/08 and Order 73/15, it has legal jurisdiction to order implementation of lower-income rate assistance. In Order 59/18, the Board considered legal arguments made by the parties regarding the Board's authority to order a bill assistance program. The arguments before the Board canvassed the statutory interpretation of the Board's constating legislation, and considered whether the Board's legislation is akin to that in Ontario, where the Ontario Superior Court of Justice held that the Ontario Energy Board can consider income level in setting rates, or to that in Nova Scotia, where the Court of Appeal concluded that the Nova Scotia Public Utility and Review Board's jurisdiction did not include the ability to implement rate assistance for lower income customers.

In Order 59/18, the Board unanimously determined that its jurisdiction, as established by the Board Act, the Crown Act, and the Hydro Act, includes the ability of the Board to consider the affordability of Manitoba Hydro's rates, whether broadly or within a class or sub-set of its customers. The Board found that the scope of its discretion in reviewing Manitoba Hydro's rates is not limited to Manitoba Hydro's mandate of providing for the supply of power adequate to meet the provinces needs and to promote economy and efficiency in all matters related to the generation, transmission, distribution and use of power, as set out in section 2 of the Hydro Act. Instead, the legislature chose to grant the Board broad discretion to consider "any compelling policy considerations" and "any other

factors” that the Board considers relevant to the matter. As such, the Board concluded that affordability is a factor that the Board may consider when setting rates.

The Board further held that the legislation in Nova Scotia is considerably more restricted than the Board’s statutory framework, and that the Board’s jurisdiction is more closely aligned with the statutory framework in Ontario, which does permit taking into account income levels to achieve the delivery of affordable energy to lower-income customers as this would meet the objective of protecting consumer interests.

While Manitoba Hydro did not propose or support a bill affordability program or lower-income rate in the GRA, the Board heard both expert and fact evidence regarding bill affordability in Manitoba, including from Manitoba Hydro’s witnesses. Green Action Centre, Manitoba Keewatinowi Okimakanak, and the Assembly of Manitoba Chiefs submitted that the Board should order a bill affordability program. The Assembly of Manitoba Chiefs argued that the Board should order Manitoba Hydro to immediately implement bill affordability measures that offer discounts to residential customers in on-reserve First Nations communities. Manitoba Keewatinowi Okimakanak argued that the Board should create a separate class for First Nations residential and General Service Small and General Service Medium ratepayers – a class which can be easily identified with existing Manitoba Hydro data – and apply affordability measures to the separate class.

The Board unanimously recommended that the provincial government introduce a comprehensive bill affordability program run by a government department to address energy poverty issues faced by Manitobans throughout the province.

A majority of the Board directed Manitoba Hydro to establish the new First Nations On-Reserve Residential customer class for existing First Nations reserves, with the new class receiving a 0% rate increase for the 2018/19 Test Year. Board member Larry Ring provided dissenting reasons on this issue.

The majority reasons noted the recognition by Manitoba Hydro’s President and Chief Executive Officer that, while Government has a role to play in addressing the issue of bill

affordability, so too does Manitoba Hydro. The Board held that an appropriate starting point for bill affordability in Manitoba is a program targeted at on-reserve ratepayers, with the creation of the new customer class justified by the need to address energy poverty on-reserve and the evidence that 96% of First Nations people on-reserve live in poverty, that reserves in Manitoba have the highest rates of child poverty in Canada, the poor housing stock on reserves in Manitoba, and the fact that 61 out of 63 First Nations communities have no access to the more economic option of natural gas for heating. The Board found that the new customer class and related affordability measure of a 0% increase for the First Nations On-Reserve Residential customer class for existing First Nations reserves are also consistent with the principle of reconciliation.

The Board also reviewed the requirements of the Hydro Act and the majority found that the First Nations On-Reserve Residential customer class is consistent with those requirements because the class is not defined solely on the basis of the region of the province in which the customers are located or population density. The Board held that on the evidence in the GRA proceeding, even if the classification were based in part on the region of the province in which the customers are located, many more factors distinguish on-reserve residents as electricity ratepayers.

Party Submissions

Manitoba Hydro relies on its written argument provided to the Board in the course of closing submissions in the GRA proceeding. Manitoba Hydro further identifies or expands upon those areas where it states that the Board erred in findings of jurisdiction, law, and fact in Order 59/18.

With respect to the Board's authority over bill affordability matters, Manitoba Hydro argues that the Board failed to consider subsections 25(1) and (2) of the Crown Act, which the Utility states limit the Board's jurisdiction to reviewing and approving changes in the price charged by the Utility for electrical power. Rate assistance and rate programs are not contemplated in the wording of the Crown Act or the Hydro Act. Manitoba Hydro submits that the Board's discretion in the factors that can be taken into account in setting rates

can only be used to fulfill the Board's narrow mandate of setting the price charged by Manitoba Hydro for power, and does not extend to the creation of terms and conditions of services as is required to establish new rate assistance programs. According to Manitoba Hydro, only the Manitoba Hydro-Electric Board can establish such terms and conditions of service. In addition, Manitoba Hydro argues that the Hydro Act prohibits the use of the Utility's customer-generated funds for government purposes, such that it is an error in law for the Board to create, adopt, or support a policy consideration. While the Board may turn its mind to principles under *The Path to Reconciliation Act*, the Board cannot expand the scope of its jurisdiction based on that statute or *Charter* values. The Hydro Act also, in Manitoba Hydro's view, prevents charging a sub-set of residential ratepayers less than the remainder of the class.

Manitoba Hydro argues that the Board's majority decision to create a First Nations On-Reserve Residential customer class offends the uniform rates requirements in the Hydro Act. It is Manitoba Hydro's position that the Board reasoning was flawed in concluding that reserves are defined by the legal relationship between First Nations people and the Crown, and not the region of the province in which reserves are located. The legal definition of reserves links the legal relationship and geographic region, as a reserve is a "tract of land ... that has been set apart by Her Majesty for the use and benefit of a band... includes designated lands". According to Manitoba Hydro, Order 59/18 recognizes that reserves are located in regions throughout the province. In Manitoba Hydro's view, the sole criterion for the customer class is residency within the geographic bounds of a First Nation as the additional circumstances ascribed by the Board to the new class are not unique to customers living on reserve and vary among reserves. These additional circumstances support the Board's motive in creating the class, but are not the criteria for the creation of the class. Manitoba Hydro also rejects the Board's reliance on *The Path to Reconciliation Act*, which requires the government to take the lead on reconciliation.

Manitoba Hydro also argues that the Board does not have the authority to create a new customer class. Manitoba Hydro states that the creation of new customer classes is not contemplated in the wording of the Crown Act or Hydro Act and that only the Manitoba Hydro-Electric Board can create terms and conditions of services as is required to create

new customer classes. The Board's discretion in the factors that can be taken into account in setting rates does not authorize the Board, in Manitoba Hydro's position, to create policy or otherwise broaden its mandate beyond approving the price for power sold by Manitoba Hydro. Manitoba Hydro argues that subsection 2(5) of the Board Act limits the Board's role to setting rates for services and the Board does not have jurisdiction over all of the matters referenced in sections 77 and 82 of the Board Act. While the Utility may refrain from exercising its legislative power to create customer classes through establishing terms and conditions of service, this does not mean that the Utility lacks the power.

The Consumers Coalition states that Manitoba Hydro's arguments are substantially reiterative of submissions that were considered in Order 59/18. It is the position of the Consumers Coalition that the Board acted reasonably and within its jurisdiction. The Consumers Coalition argues that Manitoba Hydro's statutory interpretation would neuter central aspects of the Board's rate approval authority. The Board is not a mere rubber stamp and does not have to take customer classes as sacrosanct; rather, the Board has authority over all aspects of the rates. The Consumers Coalition states that the definition of rate classes is central to the price paid for the provision of power and the Board's approval of rates requires approval of the allocation of costs among classes. This implicitly includes the determination of the appropriate classes, which is also supported by the Board's authority under the Crown Act to consider "all relevant policy considerations" in setting rates.

The Assembly of Manitoba Chiefs similarly submits that Manitoba Hydro has not met its onus on its Application. It states that many of the Utility's submissions rehash argument and evidence already thoroughly considered and rejected by the Board, and that there is no substantial doubt as to the correctness of Directive 6.

On the matter of the Board's jurisdiction over bill affordability matters, the Assembly of Manitoba Chiefs argues that there is no need to revisit arguments that were considered by the Board in the GRA process. In the view of the Assembly of Manitoba Chiefs, the Board can target a program to match a specific need while keeping the Utility financially

whole. In addition, the Assembly of Manitoba Chiefs submits that, as Manitoba Hydro is kept financially whole, there is no argument that the Utility's funds are being used for government purposes at all.

The Assembly of Manitoba Chiefs further submits that the Board has the authority to define a new customer class. The Board's jurisdiction is not limited to approving the price for power proposed by Manitoba Hydro; rather, the Board is to consider the fairness and reasonableness of rates in a manner consistent with public policy objectives. This Intervener argues that the creation of a new customer class is not the kind of term or condition contemplated in subsection 28(1) of the Hydro Act and moreover, Manitoba Hydro's customer classes are not defined in any regulations or statute. The Board's jurisdiction is supported by the Board Act, which in subsection 82(1) prevents unjust or unreasonable classifications in setting rates. It is open to the Board to set conditions to secure the approval of Manitoba Hydro's proposed price, including modifying the customer classes. The Assembly of Manitoba Chiefs submits that the Board's jurisdiction is also supported by the Crown Act, which empowers the Board to consider "any compelling policy considerations.

The Assembly of Manitoba Chiefs argues that the creation of the First Nations On-Reserve Residential customer class does not offend the uniform rates requirements contained in subsections 39.(2.1) and (2.2) of the Hydro Act. First, the legislation does not require a single residential customer class. Second, there is no need for the Board to determine if "geographic location" is the "defining feature" lurking behind the analysis as neither "defining feature" nor "geographic location" are part of the legislation. Third, there is no argument that reserves are a particular region of the province. All customers are located in specific geographic locations and customer classes such as the industrial customer classes are likely located in specific areas zoned for industrial use. Fourth, the intent of the legislation was to cure a particular mischief regarding zonal rates connected to population density, not applicable to the new customer class. Fifth, the evidence in the proceeding supports the Board's conclusion that the class is not based solely on region of the province or populations density. Finally, the Board can properly consider principles

of reconciliation and *Charter* values in interpreting its jurisdiction, both of which support the Board's conclusions in Order 59/18.

Manitoba Keewatinowi Okimakanak also argues that Manitoba Hydro has not raised any substantial doubt in its Application but rather relies on an argument that is almost identical to that put forward in the GRA proceeding. This Intervener further submits that the Board has a right to limit Manitoba Hydro's managerial discretion over key decisions, including prices and service offerings, and may impose any reasonable condition on a rate decision. Moreover, the new class is not solely governed by geographic considerations and is justified by the ample evidence in the proceeding as to the unique circumstances for on-reserve customers.

The Green Action Centre states that nothing in Order 59/18 departs from the Board's prior decisions on its bill affordability jurisdiction, and that the arguments on this issue need not be repeated. The Board has the authority to sub-divide the Residential class to recognize the differing needs of a lower-income high energy burden subgroup. On the general question of bill affordability, the Green Action Centre's position is that the problem is not just a social policy problem for the government, but also a Utility problem.

The Manitoba Industrial Power Users Group argues that the Board has authority beyond setting a price for power for customer classes established by Manitoba Hydro. The Board is not bound to find a single rate for a class as defined by the Utility if the customers being charged the rate are not similarly situated. This is supported by the Board Act, which gives the Board the authority to set rates which are not unjustly discriminatory. The Manitoba Industrial Power Users Group submits that the Board should deny the Application on the issue of the Board's jurisdiction to create a new customer class, but grant the Application on the Board's bill affordability jurisdiction and the interpretation of the uniform rates requirements of the Hydro Act by stating a case to the Court of Appeal on these issues.

Board Findings

The Board denies Manitoba Hydro's Application to review and vary the findings in Orders 59/18 and 68/18 related to the rates and new customer class for First Nations On-Reserve

Residential customers for existing First Nations reserves. The Board finds that Manitoba Hydro has not established a substantial doubt as to the correctness of the Board's decision. The Board has determined that all of the grounds raised by Manitoba Hydro on this aspect of the Application are matters that are within the domain of the Board's authority to set just and reasonable rates.

Manitoba Hydro's Application relies in large part on arguments already heard and considered by the Board in Order 59/18, particularly regarding the Board's jurisdiction over bill affordability and the requirements of the uniform rates provisions of the Hydro Act. The Board repeats and relies on the reasons set out in Order 59/18. The Board also notes that at least two prior Orders over the last decade dealt substantially with the Board's jurisdiction over bill affordability and these decisions were never reviewed or appealed. Pursuant to the Board's Directive in Order 73/15, which flowed from the Board's findings as to its jurisdiction over bill affordability, Manitoba Hydro established and funded the Bill Affordability Working Group. Manitoba Hydro now identifies the Board's reliance on the same statutory provisions and decisions from other jurisdictions that were considered in prior Orders as being in error in Order 59/18.

The Board's rate-setting jurisdiction is broad. While Manitoba Hydro's Application urges the adoption of a narrowly circumscribed view of the Board's jurisdiction, such a view is not consistent with the statutory framework. As Manitoba Hydro argued before the Manitoba Court of Appeal in *Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro, Electric Board*, 2005 MBCA 55 ("CAC v MHEB"), the Crown Act gives the PUB its jurisdiction and does not mandate or direct a particular level of review or methodology be employed when approving rates. In that case, Manitoba Hydro took the position that the Board has wide discretion in fixing a just and reasonable rate, as supported by the decision in *British Columbia Hydro and Power Authority v Westcoast Transmission Co. Ltd et al*, [1981] 2 FC 646:

There are no like provisions in Part IV of the National Energy Board Act. Under it, tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the broadest of terms to make orders with respect

to all matters relating to them. Plainly, the Board has authority to make orders designed to ensure that the tolls to be charged by a pipeline company will be just and reasonable. But its power in that respect is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved. In particular, there are no statutory directions that, in considering whether tolls that a pipeline company proposes to charge are just and reasonable, the Board must adopt any particular accounting approach or device or that it must do so by determining cost of service and a rate base and fixing a fair return thereon.

In Trans Mountain Pipe Line Co. Ltd. v. National Energy Board , Pratte J., with whom the other members of the Court agreed, described the function of the Board and of this Court on an appeal from the Board's decision as follows [at p. 121]:

Under sections 50 and following of the Act, the Board's duty was to determine the tolls which, in the circumstances, it considered to be "just and reasonable."

Contrary to the broad view of the Board's jurisdiction put forward by Manitoba Hydro in *CAC v MHEB*, in its Application presently before the Board, Manitoba Hydro relies on Nova Scotia case law to now argue that the Board's jurisdiction is narrow and does not include the consideration of affordability as a factor in setting rates. The interpretation of the Board's constating legislation and the arguments regarding the legislation in Ontario and Nova Scotia were canvassed extensively in the GRA proceeding and addressed by the Board in Order 59/18. In repeating the arguments raised in its closing submissions, Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's decision. The Board continues to be of the view that the Board's jurisdiction is more closely aligned with the statutory framework in Ontario than the restrictive regime in Nova Scotia. As in Ontario, the Board is broadly empowered under the Crown Act to set just and reasonable rates, taking into account "any compelling policy considerations" and "any other factors the Board considers relevant to the matter". As confirmed by the Manitoba Court of Appeal:

The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple

consumer groups with those of the utility... (Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro, Electric Board, 2005 MBCA 55)

The Board's jurisdiction to set just and reasonable rates extends to the authority to approve, disapprove, and/or define customer classes. Taking Manitoba Hydro's argument to its logical conclusion would mean that the Board has no authority over the classification of customers, even if the Board disagrees with a class presented by Manitoba Hydro or is asked to approve a new class. This is inconsistent with the purpose of the Board's role as an independent regulator of Manitoba Hydro, a monopoly utility.

The class to whom a rate applies is a necessary corollary of the setting of just and reasonable rates, and distinctions between customers within a class may support the use of a new customer class in order to ensure that customer rates are just and reasonable. As submitted by the Consumers Coalition, the Board is not a mere rubber stamp and it does not have to take classes of customers as sacrosanct. It would unduly narrow the Board's jurisdiction in a manner inconsistent with the statutory framework to limit the Board's authority to approving the price for power proposed by Manitoba Hydro. This was confirmed by the Manitoba Court of Appeal in *Coalition of Manitoba Motorcycle Groups v Manitoba (Public Utilities Board)* (1995), 102 Man R (2d) 155. On a review of the Board's rate-setting jurisdiction under Part IV of the Crown Act, the Court of Appeal agreed that "If the Board has discretion to set any rate that is fair and reasonable upon the evidence and in the public interest, then all aspects of the rates are "in issue" when the Board holds a public hearing on rates."

The definition of rate classes is central to the price paid for the provision of power and rate approval requires approval of the allocation of costs among classes. As the Manitoba Court of Appeal has confirmed, the Board reviews and approves Manitoba Hydro's Cost of Service Study methodology to be used as a tool in setting rates. The Board may consider the results of the Cost of Service Study in setting rates and may address over- and under-payments of costs by the customer classes. The definition of the customer classes is not distinct from, but rather integral to, the setting of rates.

As noted above, the Board has broad jurisdiction in the factors it may consider when setting rates, including “any compelling policy considerations” and “any other factors the Board considers relevant to the matter”. Beyond this, the interaction of the Crown Act and the Board Act support the Board’s authority to review and define classes of customers. While the Board’s jurisdiction is limited by subsection 2(5) of the Board Act, the Crown Act prescribes that the Board Act applies with necessary modifications to rate proceedings under Part IV of the Crown Act. The Board Act extends the Board’s jurisdiction beyond fixing just and reasonable rates to fixing just and reasonable standards and classifications. The Board Act also prohibits the imposition of unjust or unreasonable classifications in the making of rates. Further, under the Board Act, the Board, in making any order, may impose such terms and conditions as it considers proper and an order may be general or particular in its application. This is similar to powers of the Ontario Energy Board considered by the Ontario Court of Appeal in *Toronto Hydro-Electric System Limited v Ontario Energy Board*, 2010 ONCA 284. In that case, the Ontario Court of Appeal held that, under the Ontario Energy Board’s broad rate-setting power, that Board is guided by its mandate, which includes protecting the interests of consumers, and may impose such considerations as it considers proper in setting rates. These considerations apply equally to the statutory regime in Manitoba.

The Board does not agree with Manitoba Hydro’s contention that the legislative power to create customer classes lies exclusively with the Manitoba Hydro-Electric Board. As noted by the Assembly of Manitoba Chiefs, Manitoba Hydro has not exercised this power in order to create customer classes – including the existing multiple residential customer classes. Rather, customer classes have been designed as part of the rate-setting process, without the use of regulations created under subsection 28(1) of the Hydro Act. The necessary conclusion is that the creation of customer classes is not exclusively within the power of the Utility. Moreover, the legislature has expressly provided for the review and setting of classifications elsewhere – specifically in the Board Act - but has not done so in the Hydro Act. As such, the absence of such express language in subsection 28(1) indicates that the legislature did not intend to grant the Utility the exclusive right that it now asserts it has.

Finally, with respect to the requirements of the subsections 39(2.1) and (2.2), Manitoba Hydro has not established any substantial doubts as to the correctness of the Board's decision. Manitoba Hydro largely reiterates arguments already canvassed fully in the GRA proceeding.

The Hydro Act prohibits defining grid-connected customers solely on the basis of population density or the region of the province in which the customers are located. The Board's interpretation of the legislation is supported by a reading of the words of the Hydro Act 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. On such a reading, the Board agrees with the Assembly of Manitoba Chiefs that the legislation cannot be interpreted as prohibiting the use of geographic location as the "defining feature" of the definition of the class. Neither geographic location or defining feature are part of the legislation, nor does the Hydro Act require a single residential class. The only requirements are that population density or region of the province in which customers are located cannot be the sole basis for the classification. While Manitoba Hydro argues that Hansard demonstrates that intent of the legislature was to create one single residential class and create a single rate for residential hydro users, Hansard evidence is of limited weight and reliability (see *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27). In this matter, Manitoba Hydro's view of the Hansard finds no expression in any aspect of the legislation itself and therefore must be rejected.

The Board therefore maintains its finding that the new rate class does not offend the requirements of the Hydro Act. There is no argument that the First Nations On-Reserve Residential class is classified on the basis of population density. The prohibition against classifying customers solely on the basis of the region of the province in which the customers are located is also not contravened. The Board accepts the submission of the Assembly of Manitoba Chiefs that all customers, and even a single customer, can be said to be located in a specific "region" of the province. The First Nations On-Reserve Residential customers cannot be classified by the region in which the customers in the class are located as reserves are located in all regions of the province.

As the region of the province in which the First Nations On-Reserve Residential customers are located is not the basis for the classification of those customers, the Board need not determine whether it is the sole basis. However, the Board finds that Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's decision that the classification is, in any event, founded in other bases. The findings as to the additional circumstances on which the classification is based were supported by the evidence in the GRA proceeding. On considering the arguments provided by the parties on the Application, the Board is satisfied that no substantial doubt as to the correctness of the Board's findings has been established.

4.0 Excess Energy Purchase Rate

Directive 7 of Order 59/18 directed as follows:

IT IS THEREFORE ORDERED THAT:

7. Manitoba Hydro credit net-metered customers' excess energy put on the grid at a 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.

Directive 7 resulted from the Board's conclusion that it has legal jurisdiction to review and approve the electricity rate Manitoba Hydro applies to customers participating in the Solar Energy Program, or to customers with any on-site generation, for the return of excess energy to the grid. The Board expressed concern that Manitoba Hydro implemented the Solar Energy Program with a rate for excess solar energy without prior Board approval.

As detailed in Order 59/18, the Solar Energy Program was introduced by Manitoba Hydro as a two-year pilot program in 2016, scheduled to end in April of 2018. This energy efficiency and load displacement program was targeted at residential and small commercial customers with less than 200 kW of electric load and offered incentives toward the capital cost of solar photovoltaic ("PV") generating systems that produce direct current energy from sunlight. Once participating customers installed solar PV systems and successfully completed the required electrical inspection, Manitoba Hydro installed a bi-directional meter that monitors power imported from the grid as well as power exported from the customer site to Manitoba Hydro's electricity grid. The Utility's billing system would charge for monthly consumption of grid electricity at the Board-approved residential energy rate and would credit customers at the Board-approved residential rate for the value of the amount of excess energy put on the grid by the customer's solar PV system.

In Order 59/18, the Board also directed Manitoba Hydro to provide at the next GRA additional details on the Solar Energy Program and other net metering installations in Manitoba.

Manitoba Hydro seeks to review and vary Directive 7 on the grounds that the Board's conclusion that it has legal jurisdiction to review and approve the electricity rate that Manitoba Hydro applies to customers for the return of excess energy to the grid is based upon errors of jurisdiction, law, and fact. Manitoba Hydro further seeks clarification in order to identify which Manitoba Hydro programs are affected by these errors.

Party Submissions

Manitoba Hydro submits that the Board does not have jurisdiction over Manitoba Hydro, except for the Board's limited power to approve "rates for services" – the prices charged by Manitoba Hydro with respect to the provision of power supplied by the Utility. Manitoba Hydro states that this approval does not extend to prices paid by Manitoba Hydro to Non-Utility Generators, including solar generators. These are power purchases, not prices charged by Manitoba Hydro for the supply of power. The Board's legislated ability to review the price for power paid to the Utility only arises in limited circumstances where the Lieutenant Governor in Council has requisitioned the power.

Manitoba Hydro argues that the Board's decision incorrectly referred to "net metering" and constitutes an error of fact. It states that, under Manitoba Hydro's Non-Utility Generation policies, customers' energy use and production is not assessed on a net annual or net monthly basis. Rather, credit is applied against the amount owing by a customer on their monthly bill. The use of the term "net metered customers" gives rise to confusion regarding whether the Board intended its ruling to apply only to Solar Energy Program participants, or all Non-Utility Generators, including much larger installations. Manitoba Hydro states that this has caused uncertainty in contractual relationships between Manitoba Hydro and Non-Utility Generators and that negotiations for power purchases cannot continue if the 8.196¢/kWh rate is to apply as it does not represent the value of the product to Manitoba Hydro. The issue should be resolved forthwith, without holding a further hearing on the matter.

The Consumers Coalition submits that the Board's decision raises important legal issues not well canvassed in the proceeding and recommends that the Board grant the

Application on this issue in order to hold a paper review process to consider the Board's jurisdiction and the appropriate criteria for setting the rate. The Consumers Coalition states that the Board has jurisdiction to examine the value of credits to customers in determining whether Manitoba Hydro's actual costs are necessary and prudent.

The Manitoba Industrial Power Users Group submits that Manitoba Hydro has provided new facts that support the Board granting the Application on this issue and stating a case to the Court of Appeal. This Intervener states that clarity regarding the boundary of the Board's jurisdiction is required.

Board Findings

The Board finds that Manitoba Hydro has raised new facts that meet the necessary threshold for granting the Application on this issue. In particular, Manitoba Hydro has identified concerns regarding the application of the Board's Order to Non-Utility Generators with large installations intended for the sale of power, as opposed to customers who use on-site generation to reduce their own consumption. Directive 7 was not aimed at capturing large installations such as wind farms or the Wuskwatim Limited Partnership.

The new facts raised by Manitoba Hydro give rise to a concern that the matter of Non-Utility Generation was not fully canvassed in the evidence at the GRA or in legal argument, including with respect to the Board's jurisdiction. In addition, at the close of evidence in the GRA, Manitoba Hydro's plans with respect to the Solar Energy Program or other similar customer self-generation energy efficiency and load displacement Demand Side Management programs were not known.

Therefore, the Board grants the Application on this issue and sets aside Directive 7. The issue of the Board's legal jurisdiction to approve the rates applied by Manitoba Hydro to credit customers for excess energy returned to the grid will be considered at the next GRA, along with the issue of Non-Utility Generators sale of excess power to Manitoba Hydro as it relates to load displacement, bidirectional metering, and Demand Side Management programs. As a result, unless and until the Board exercises jurisdiction in

this area after a full canvassing of the evidentiary and legal issues in a future proceeding, Manitoba Hydro will continue to set the rates it provides to Non-Utility Generators under its Non-Utility Generation policies and/or contractual arrangements.

5.0 Retain Consultant to Report on Asset Management Program, Progress of UMS Report and Corporate Values Framework

Directive 14 of Order 59/18 directed as follows:

IT IS THEREFORE ORDERED THAT:

14. 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 results of the consultant's assessment at the next GRA.

By letter dated June 1, 2018, the Board varied Directive 14 to remove the June 29, 2018 deadline for filing of the Terms of Reference:

IT IS THEREFORE ORDERED THAT:

14. 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 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.

As detailed in Order 59/18, asset management means providing the required level of service in the most cost effective manner – the “right” work undertaken to achieve the desired performance outcomes in the most efficient and financially responsible manner. Mature and competent asset management enables the application of analytical data-driven approaches to managing assets over the different stages of their life cycle.

In Orders 116/08 and 73/15, the Board directed Manitoba Hydro to develop asset condition assessments, which are a necessary component of mature asset management

processes. Manitoba Hydro has since developed asset condition assessments and health indices for many of its asset classes, however the evidence in the GRA was that there are still many asset classes for which there are no condition assessments and the corresponding health indices are based solely on the assets' ages.

In Order 59/18, the Board reviewed the evidence regarding Manitoba Hydro's asset management program and found that the health of certain asset classes is characterized solely by the age of the assets. The Board held that Manitoba Hydro must continue to develop asset condition assessments for all of its major asset classes so that it has the necessary data to make prudent spending decisions within its asset management framework. The Board determined that more mature asset management processes are required so that Manitoba Hydro is in a position to objectively prioritize and optimize its spending across business units based on a common definition of risk. As such, and recognizing that developing a modern asset management system takes time, the Board concluded that it should monitor Manitoba Hydro's progress.

Manitoba Hydro seeks to review and vary Directive 14 on the ground that the Board erred in fact in assuming that all of the UMS recommendations are to be implemented and on the ground that the Board erred in law and jurisdiction by usurping the function of Manitoba Hydro management. Manitoba Hydro requests that the Board set aside Directive 14 or, in the alternative, state a case in writing to the Manitoba Court of Appeal regarding the Board's jurisdiction to require Manitoba Hydro to expend monies to retain a consultant and to require Manitoba Hydro to retain a consultant to assess the development of Manitoba Hydro's business operations capital asset management program.

Party Submissions

Manitoba Hydro argues that it follows from the Board's lack of jurisdiction over capital projects that the Board cannot direct Manitoba Hydro to prepare reports on capital. Order in Council 92/17 did not expand the Board's jurisdiction to require capital studies. It is the Utility's position that determinations regarding retaining external consultants and the

adoption or rejection of consultant recommendations is a management function. It is the position of Manitoba Hydro that the Board does not have the jurisdiction to require Manitoba Hydro to incur expense for the preparation of reports to assess capital planning processes or to order Manitoba Hydro to improve the level or quality of service. Manitoba Hydro further submits that the Board does not have jurisdiction to ensure that the Utility's costs are necessary and prudent; the Board's role is confined to testing Manitoba Hydro's actual and forecast expenditures and evaluating the reliability of forecasts in setting rates for future test years. The Board's ability to request information under the Hydro Act is expressly limited. However, Manitoba Hydro states that it is prepared to include a status report for information purposes in future GRAs regarding Manitoba Hydro's asset management program, including its progress on specific development initiatives. The Utility advises that it may also, at its discretion, commission an extern consultant to refresh the asset management gap assessment initially performed by UMS.

The Consumers Coalition submits that this aspect of the Application is devoid of merit. This Intervener takes the position that, as an element of the Board's approval of just and reasonable rates, the Board has the ability to ensure that actual and projected costs are necessary and prudent. Directive 14 is supported by the evidence in the hearing indicating Manitoba Hydro's longstanding and ongoing challenges in this area. In addition, the Consumers Coalition argues that the Board is the master of its own procedure and has the express statutory as well as implicit right to request additional information from Manitoba Hydro. The fact that there are expenditures associated with a Board directive does not remove it from the Board's authority any more than would a directive asking Manitoba Hydro to spend internal money or staff time.

The Manitoba Industrial Power Users Group recommends that the Board deny the Application as it relates to Directive 14 as Manitoba Hydro has not raised issues of a material nature that would justify granting the Application. The Manitoba Industrial Power Users Group states that the Board can indicate to the Utility that certain information will be required in the future to persuade the Board and that the difference between such indication and directing that information be provided is not material. Moreover, the Hydro Act provides that the Board can request information from Manitoba Hydro.

Board Findings

The Board denies this aspect of the Application. The Board finds that Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's decision.

The Manitoba Court of Appeal has established the scope of the Board's mandate as follows:

The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer groups with those of the utility...

The role of the PUB under the Accountability Act is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro...

The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. (Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro, Electric Board, 2005 MBCA 55)

Due to the operation of subsection 2(5) of the Board Act, the Board does not have the legislative authority to approve or disapprove Manitoba Hydro's capital spending. This was confirmed by the Manitoba Court of Appeal in *Manitoba Keewatinowi Okimakinak v Manitoba Hydro-Electric Board* (1992), 78 Man R (2d) 141 ("MKO"). An order that Manitoba Hydro improve the level or quality of service, as was at issue in the MKO case, would require that the Utility make capital expenditures and would thus run afoul of subsection 2(5). Such an order is, however, distinct from a directive that Manitoba Hydro retain a consultant to assess its progress with its asset management program.

There are no capital expenditures, approvals, or disapprovals required as a result of Directive 14. Rather, Directive 14 is within the Board's jurisdiction as the regulator of Manitoba Hydro, a monopoly utility that recovers its costs from ratepayers. In reviewing and approving rates, the Board is entitled to assess the expenditures that Manitoba Hydro

is making and to find that the recovery of certain expenditures from ratepayers would not be just and reasonable. It bears repeating, as held by the Manitoba Court of Appeal, that “the intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the [Board] deems appropriate.” As set out in Order 59/18, the Board is concerned about Manitoba Hydro’s progress in developing asset condition assessments and more mature asset management processes and therefore wishes to monitor Manitoba Hydro’s progress so that the Board may make decisions in the public interest that are informed by the evidence.

The Board also notes that in prior Orders, including 116/08 and 73/15, the Board directed Manitoba Hydro to develop asset condition assessments, which are a necessary component of mature asset management processes. Manitoba Hydro did not take issue with the Board’s jurisdiction to order the Utility to develop asset condition assessments, and in fact has developed asset condition assessments and health indices for many of its asset classes. The Directives in 116/08 and 73/15 were made pursuant to the Board’s power to assess the expenditures that Manitoba Hydro is making. Directive 14 is consistent with these earlier Directives and is squarely within the Board’s powers.

There is therefore no substantial doubt as to the correctness of the Board’s decision to require that the Utility retain an independent expert to assess matters that form part of Manitoba Hydro’s revenue requirement.

The Board directs that Manitoba Hydro file with the Board by August 31, 2018 the Terms of Reference for the consultant for the Board’s review and comment.

6.0 Technical Conference on Minimum Retained Earnings

Directive 9 of Order 59/18 directed as follows:

IT IS THEREFORE ORDERED THAT:

9. Manitoba Hydro participate in a technical conference hosted by Board Staff or an external consultant appointed by the Board for the consideration of the establishment of a minimum retained earnings or similar test to provide guidance in the setting of consumer rates for use in rule-based regulation.

In Order 59/18, the Board concluded that there is merit to gaining better understanding of the financial reserves required for Manitoba Hydro under various circumstances, including consideration of risk tolerances, what risks should be protected by reserves, and the circumstances which would guide the need for more aggressive rate increases to continue full cost recovery for Manitoba Hydro. The Board held that consideration of the appropriate level of financial reserves, for example a minimum retained earnings test, is best done through a collaborative approach with stakeholders. As such, the Board directed a technical conference to consider a test or rule bases on maintaining the appropriate or minimum levels of retained earnings and meeting other financial metrics in the face of potential risks to the Utility. Order 59/18 provided that the Board would develop the terms of reference for the technical conference and that parties would be invited to contribute to the scope and terms of reference for the initiative.

Manitoba Hydro applies to review and vary Directive 29 on the ground that the Board made errors of law and fact in directing the terms of reference for the technical conference for the purpose of establishing rule-based guidance limited to a minimum retained earnings or similar test. Manitoba Hydro also applies on the basis that the Board erred in fact if it concluded that it supported the long-term objective of meeting a 25% equity target while also endorsing a minimum retained earnings test.

Manitoba Hydro seeks variation of Directive 9 to remove the reference to a “minimum retained earnings or similar test” and asks that the Board clarify the objectives and scope

of the technical conference by providing comment on the following: (1) Is the minimum retained earnings test meant to be a shorter term approach until the conclusion of the major capital projects? (2) is the objective to determine a rate which only meets the minimum retained earnings test or does the Board anticipate rules which will determine rates which will allow progression towards 25% equity? (3) should it be assumed that the Board endorses achievement of a 25% target over 19 years or some other period, and if so, what period? (4) what can the technical conference consider regarding the step change in Manitoba Hydro costs with the in-service of Keeyask?

Party Submissions

Manitoba Hydro states that it interprets Directive 9 as the Board seeking to use a technical conference to establish for itself an objective, quantitative means of setting rates to assure a reasonable probability that Manitoba Hydro maintains minimum retained earnings during the test year. This means that, going forward, so long as retained earnings are at a minimum level, then rates will be set such that there is a reasonable probability of Manitoba Hydro achieving zero net income.

Manitoba Hydro submits that the Board abandoned financial targets in place for decades and provided no clarity on how or when the achievement of the equity target will be actioned or on what a long term plan acceptable to the Board will look like. Manitoba Hydro says that the parties require guidance regarding the longer-term objectives for Manitoba Hydro's financial condition. While the matters of financial targets, capital structure, and pace for achieving the equity target were in scope for the GRA, Order 59/18 fails to make the Board's intention clear on these matters. Moreover, the Board failed to appreciate the impact of following a minimum retained earnings test policy on debt levels and the susceptibility of Manitoba Hydro's customers to rising interest rates. Manitoba Hydro argues that the Board repudiated the qualified expert testimony of the Manitoba Hydro senior executive team steeped in experience managing large scale financial risk and setting financial policies and targets, as well as expert reports from RBC Capital Markets in 1995 and KPMG in 2015 and 2017 regarding the importance of the 25% equity

target. In the submission of the Utility, there is no path forward for Manitoba Hydro to develop its next rate application.

The Consumers Coalition states that this aspect of the Application is devoid of merit as Manitoba Hydro has not presented legal argument or new facts but instead is attempting to express disappointment in the Board's decision. This Intervener submits that Manitoba Hydro's hyperbole is not warranted and that the questions identified by Manitoba Hydro would begin to be addressed through the technical conference.

The Manitoba Industrial Power Users Group argues that this is not an appropriate matter for an application to review and vary and that the Board should not remove the phrase "minimum retained earnings or similar test" from Directive 9. It is the Manitoba Industrial Power Users Group's position that Manitoba Hydro has misstated Directive 9 and excessively over-interpreted the scale and impact. The Manitoba Industrial Power Users Group submits that the Board only directed the holding of a technical conference, only for the consideration of establishing a minimum retained earnings test, and only to provide guidance in setting rates. The very purpose of the technical conference is to add clarity. Order 59/18 does not assert that a minimum retained earnings test will be adopted, much less be the dominant or sole test. This Intervener states that Manitoba Hydro can provide its views as to a possible minimum retained earnings test at the technical conference. The Manitoba Industrial Power Users Group further states that the Board made no direct findings about the relevance or credibility of the financial expertise among Manitoba Hydro's senior financial managers nor the Board of Directors.

The Green Action Centre recommends that the Board grant the Application on this issue as the Board's decision is unclear and potentially contradictory. The Green Action Centre submits that the technical conference should not be too narrowly defined by the commitment to a minimum equity threshold and that the Board should not subvert the need for long-term planning.

Board Findings

The Board denies this aspect of the Application. Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's decision or new facts that meet the threshold to review and vary. The Board accepts the submission of the Consumers Coalition that Manitoba Hydro's Application does not present legal argument or new facts as is required to support granting an application to review and vary.

Manitoba Hydro appears to have misinterpreted Order 59/18 as requiring that a minimum retained earnings test be established and that all other financial metrics will be abandoned. This misreads the Board's intent. Order 59/18 sets out that the aim of the technical conference is to gain a better understanding of rule-based regulation in Manitoba Hydro's particular operational context and circumstances. As such, Directive 9 provides for a Board-hosted technical conference that will be a forum for stakeholders to discuss and explore the use of rule-based regulation that considers the level of financial reserves required by Manitoba Hydro under various circumstances and meeting other financial metrics in the face of potential risks to the Utility. The technical conference is to bring clarity on these matters, which were discussed in the evidence at the GRA but not fully canvassed as to whether and how rule-based regulation could be employed by the Board going forward. As set out in Order 59/18, the scope of the technical conference will be determined by the Board following the receipt of comments from the parties.

The parties are invited to provide comments to the Board on the scope and process for the technical conference. These comments should be provided in writing to the Board by August 15, 2018. On receipt and consideration of these comments, the Board will develop and circulate the Terms of Reference for the technical conference.

7.0 Determination of Timing of a Future Rate Increase and Time of Use Rate Proposal

Directive 29 of Order 59/18 directed as follows:

IT IS THEREFORE ORDERED THAT:

29. Manitoba Hydro file with the next GRA a time-of-use rate design proposal including the results of consultation undertaken with General Service Large customers prior to filing the proposal with the Board.

The Board stated in the Order that it continues to be of the view that time-of-use rates should be implemented for General Service Large customers, but that due to the updated marginal values filed in the GRA, further study is required.

Order 59/18 also provided comments as to the timing of the filing of future rate applications:

- In the absence of unforeseen and emergency circumstances, the Board will not consider future interim rate increases;
- Filing of a GRA after September 1, 2018 but before December 1, 2018 is required for consideration of a request for a revised rate in fiscal year 2019/20; and
- For the next GRA, the Board will not consider rate increases for more than two Test Years.

In the GRA proceeding, Manitoba Hydro expressed a desire to establish a regulatory timetable that does not require the use of interim rates. In closing submissions, Manitoba Hydro stated that interim rate increases are a challenge for both the Board and for Manitoba Hydro, and that Manitoba Hydro would like the Board's assistance in getting out of the cycle that gives rise to the use of interim rates. In evidence, Manitoba Hydro communicated the importance of receiving a rate increase at the start of its fiscal year – April 1 – for the practical purpose of aligning with the fiscal year, but also because that timing is more effective at generating the cash flow required by Manitoba Hydro due to the effect of compounding. Manitoba Hydro stated in evidence that, at the conclusion of

the GRA, the Utility would want to work with the Board to move to a regulatory cycle whereby rate increases would be effective on April 1 of each year going forward.

Manitoba Hydro seeks to review and vary Directive 29 on the basis of the Utility's inability to complete all tasks required in advance of the next GRA within the timeline prescribed by the Board. Manitoba Hydro also states that the Board made errors of law in finding that it will not consider future interim rate increases, that filing of a GRA after September 1, 2018 but before December 1, 2018 is required for consideration of a revised rate in fiscal year 2019/20, and that the next GRA will not be for more than two Test Years.

Manitoba Hydro asks the Board to set aside Directive 29. Manitoba Hydro also asks that the Board reconsider its comments regarding interim rates and the requirements for the filing of the next GRA, as well as to work with Manitoba Hydro to develop a timetable to accommodate the processes requiring review by the Board.

Party Submissions

Manitoba Hydro states that the Board directed a significant amount of work to be completed before the next GRA and that it is simply not possible to do so by September 1 or December 1, 2018 given the Utility's competing priorities, including with respect to its natural gas business. More specifically, Manitoba Hydro advises that there is no path that would allow the preparation of an electric GRA in the 2018 calendar year. Manitoba Hydro further advises that it does not require rate changes to be made on April 1 of each year. The Utility's aim is to establish a regular regulatory cycle and it suggests that Board staff meet with the Utility to set priorities and develop a timetable. Manitoba Hydro submits that the Board must determine the pacing of its requirements taking into account its other regulatory commitments and priorities along with the Utility's capacity to implement directives and other filings. It suggests that communication, and not further hearings, presents the best way of addressing the regulatory timetable.

Manitoba Hydro argues that the Board's filing deadlines and comments rejecting a three-year rate proposal are contrary to procedural fairness. The timing of future rate increases

and the number of Test Years should be determined once a GRA is filed and the application can be judged on its merits.

While Manitoba Hydro agrees that interim rate increases should not be the norm, it states that the Board cannot fetter the ability of a future Board panel to review an application on its own merits. The Board Act does not require that conditions of urgency, unforeseen, or emergency circumstances be met in order for an interim rate to be awarded.

The Consumers Coalition submits that the Board's comments regarding interim rates and future filings have a basis in good regulatory policy. While Manitoba Hydro can apply for three Test Years, it is open to the Board to reject consideration of three years. This Intervener expresses concern that Manitoba Hydro is not properly managing rate applications and is failing to engage with stakeholders and consumers on a regular and ongoing basis. The Consumers Coalition advises that it is open to meeting with the Utility, Board staff, and stakeholders in the near future to discuss Manitoba Hydro's engagement with stakeholders and consumers and to develop a plan for an orderly regulatory process.

The Manitoba Industrial Power Users Group recommends that the Board hold a hearing on the scheduling and sequencing of the next filing based on the new facts raised in the Application about Manitoba Hydro's capabilities and timelines. It suggests that the technical conference held pursuant to Directive 9 be complete and the time-of-use rate design in accordance with Directive 29 be developed before the next GRA filing, which may not be possible for a September 1, 2018 filing deadline. However, on the matter of interim rates, the Manitoba Industrial Power Users Group submits that Manitoba Hydro is rearguing its case on this issue. It is this Intervener's position that the Board is entitled to set parameters for the exercise of its discretion to grant an interim rate.

The Green Action Centre recommends that there be time in the regulatory process for Manitoba Hydro and Interveners to discuss issues and arrive at a proposed resolution of issues on a consensus basis. The Green Action Centre states that this is no possible within the timelines set in Order 59/18.

Board Findings

The Board grants this aspect of the Application in part. As detailed below, the Board varies its comments regarding the rejection of three-year rate proposals and directs a process with respect to Directive 29. The remaining requests are denied.

Number of Test Years

The Board acknowledges that Manitoba Hydro may file an application consisting of up to three years of rate proposals. The Board's intention in Order 59/18 was to signal that the Board may not consider rate proposals for more than two years. The determination as to the number of Test Years that will be considered will be made on the Board's receipt of the GRA filing. The Board therefore varies its comments in Order 59/18 that it will not consider more than two Test Years in the next GRA. The Board finds that it will determine the appropriate number of Test Years in the next GRA after it is filed with the Board.

Directive 29 – Time-Of-Use Rate Proposal

As detailed in Order 59/18, Manitoba Hydro previously applied for time-of-use rates in the 2014/15 & 2015/16 GRA, but the Board determined that the issue would be addressed in the Cost of Service Study review. At the request of Manitoba Hydro, the Cost of Service Study proceeding ultimately excluded the review of rate-related matters from scope and deferred these to the next GRA. In this GRA, however, Manitoba Hydro did not submit a time-of-use rate proposal.

The Board continues to be of the view that time-of-use rates should be implemented for General Service Large customers. In its Application, Manitoba Hydro does not take issue with this conclusion. Rather, the matter raised is one of timing. While Manitoba Hydro states that the work directed cannot be completed by September 1 or December 1, 2018, the Utility has not provided enough information for the Board to make a determination with respect to the Application. As such, pursuant to Rule 36, the Board will hold a written process. Manitoba Hydro is to file its position as to when Directive 29 can be completed for filing with the next GRA within two weeks on receipt of the Order.

Timing of Future Rate Increases

Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's comments regarding the timing for the filing of the next GRA.

Manitoba Hydro's position before the Board at the GRA was that it wished to work with the Board to establish a regular regulatory cycle. The Utility gave evidence that it views the implementation of new rates on April 1 of each year to be a regular regulatory cycle, and explained the importance of that date with respect to Manitoba Hydro's financial health.

In Order 59/18, the Board directed that the rate increase for the 2018/19 Test Year be effective June 1, 2018 in order to begin to move Manitoba Hydro back to a regulatory cycle that is consistent with the start of its fiscal year. The Board accepted that there is a benefit to both Manitoba Hydro and ratepayers in moving back to a regular regulatory cycle. The Board held that if Manitoba Hydro does not adjust its planning to allow for sufficient time for the Board's review of the next GRA, any rate increase granted will not be effective April 1, regardless of the Board's intention to return the Utility to a regular regulatory cycle.

The Application now before the Board presents a different view than that put forward by Manitoba Hydro in the course of the GRA. While Manitoba Hydro expresses that it is unable to complete the regulatory work directed in Order 59/18 within the timelines set out in the Order, Manitoba Hydro has not provided the Board with any information as to its internal capabilities and when it will be in a position to complete the various items. Without this information, and outside of Directives 9 and 29 which by their nature require more substantial process steps, the information requested for the next GRA as identified in the Application appear to be matters that are readily available to Manitoba Hydro. The Board is left without an understanding of what Manitoba Hydro's aim is regarding the establishment of a regulatory timetable for its rate applications.

The Board's intention was to assist Manitoba Hydro in achieving its apparent aim of establishing a regular regulatory cycle in order to receive new rates effective April 1 of

each year. The Board's comments were in the nature of regulatory signalling in accordance with this intention. The Board recognizes that Manitoba Hydro will determine when it will file its next GRA; however if the Utility desires a new rate within a specific timeframe, it should plan accordingly, taking into account competing regulatory schedules at the Board.

Interim Rate Proposals

Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's comments regarding interim rate proposals. The Board finds that Manitoba Hydro is rearguing matters already considered in depth by the Board in the interim rate and GRA hearing processes. More particularly, Manitoba Hydro has not refuted the Board's conclusions from Order 59/18 regarding the problems associated with interim rate processes. As detailed in the Order, in the GRA process, there was a lack of testing by Interveners and lack of focus by Manitoba Hydro regarding the two interim rates at issue. Interim rates are set without the benefit of a full evidentiary record, involve an abbreviated process, and are adjudicated against a less onerous legal standard than are final rates. This deprives all parties of the benefits of a robust process that results in final rates that are just and reasonable. Interim rate proposals should not become a matter of convenience as a substitute for proper planning for a full GRA.

Order 59/18 does not fetter the discretion of any future Board panel from considering an interim rate proposal. As the Manitoba Industrial Power Users Group submits, Order 59/18 provides clarity as to how the Board intends to proceed in the future as a guide to assist the Utility in planning for future application activities. Given the Board's broad discretion over any interim rate approvals, the Board may set out the parameters of how it intends to exercise that discretion. The Board's signalling regarding the proper use of interim rate proposals is supported by section 48 of the Board Act, which expressly emphasizes the importance of full hearing processes. In *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, the Supreme Court of Canada explained the emergent nature of interim rate orders and the resulting process distinctions from a final order:

Traditionally, such interim orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim order.

Manitoba Hydro remains able to file an interim rate application in the future. The merits of that application will be determined by the Board on consideration of the filing.

8.0 Appendix F to Manitoba Hydro's Application

Along with Appendices A through E of Manitoba Hydro's Application, which set out the grounds for the Application, Manitoba Hydro provided an Appendix F. Not formally part of the Application, Appendix F contains Manitoba Hydro's comments on certain recommendations made by the Board in Order 59/18 related to Business Operations Capital spending, Demand Side Management spending, and macroeconomic impacts. Manitoba Hydro does not seek relief on the matters contained in Appendix F. Manitoba Hydro states that it provides it comments on these matters because they:

arguably serve to create expectations regarding operational decision making in the near term as a result of misunderstanding of the evidence and matters which are not within the purview or control of Manitoba Hydro. In addition, the Board justified its decision to reduce the requested rate increases in Order 59/18, in part, taking into consideration these Recommendations and findings.

The Board does not make any findings on the matters that are the subject of comment by Manitoba Hydro in Appendix F. These matters do not form part of the Application and as no relief is sought, no decisions are required. As Manitoba Hydro is aware, the proper process for disagreement with findings, decisions, and/or Orders of the Board is to file an application to review and vary or to appeal to the Court of Appeal. In the absence of allegations of errors for which relief is sought, there is no procedural forum for parties to merely express discontent, in whole or in part, with a decision of the Board.

9.0 IT IS THEREFORE ORDERED THAT:

1. Manitoba Hydro's Application to review and vary Directive 6 of Order 59/18 and related rate schedules contained in Order 68/18 BE AND HEREBY IS DENIED;
2. Manitoba Hydro's Application to review and vary Directive 7 of Order 59/18 BE AND HEREBY IS GRANTED. Directive 7 of Order of Order 59/18 is set aside;
3. Manitoba Hydro's Application to review and vary Directive 14 of Order 59/18 BE AND HEREBY IS DENIED. Manitoba Hydro is to file with the Board by August 31, 2018 for the Board's review and comment the Terms of Reference for the independent consultant directed to be retained by Manitoba Hydro in Directive 14 of Order 59/18;
4. Manitoba Hydro's Application to review and vary Directive 9 of Order 59/18 BE AND HEREBY IS DENIED;
5. Manitoba Hydro's Application to review and vary the Board's Order 59/18 findings regarding future interim rate increases BE AND HEREBY IS DENIED;
6. Manitoba Hydro's Application to review and vary the Board's Order 59/18 findings regarding multi-year rate applications BE AND HEREBY IS GRANTED in part. The finding is varied to state that the Board finds that it will determine the appropriate number of Test Years in the next GRA after it is filed with the Board ;
7. Manitoba Hydro's Application to review and vary the Board's Order 59/18 findings regarding the requirements for the timing of the next General Rate Application filing BE AND HEREBY IS DENIED; and
8. The Board directs a further process to consider Manitoba Hydro's Application to review and vary Directive 29 of Order 59/18. Manitoba Hydro is directed to file its position as to when Directive 29 of Order 59/18 can be completed for filing with the next General Rate Application within 2 weeks of the issuance of this Order.

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"

Acting Secretary

Certified a true copy of Order No. 90/18
issued by The Public Utilities Board



Acting Secretary