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August 14, 2018

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

Dear Mr. Christle:

**RE: CENTRA GAS MANITOBA INC.
RESPONSE TO ORDER 95/18 WITH RESPECT TO COMPLIANCE WITH ORDER 108/15
DIRECTIVE 12**

This is further to the Manitoba Public Utilities Board's ("PUB") Order 95/18 of July 20, 2018, wherein it directed Centra Gas Manitoba Inc. ("Centra") to file a detailed submission relative to the associated penalty and the effective date for Centra's cited non-compliance with Order 108/15 Directive 12.

Despite the finding of non-compliance with Order 108/15 Directive 12, Centra's position remains that any potential penalty is unwarranted and unnecessary given all of the reasons and circumstances provided in its submission of August 25, 2017, as summarized in Order 95/18, and as further set forth herein. Centra further submits that if the PUB determines that a penalty ought to be considered, that it be considered only if Centra does not file its next General Rate Application ("GRA") by November 30, 2018 and, if Centra does not file its next GRA by November 30, 2018, that any such penalty be imposed as of December 1, 2018. Furthermore, any potential penalty should be assessed well below the maximum amount of \$100.00 per day from December 1, 2018.

Section 100 of *The Public Utilities Board Act* (the "Act") states:

"In default of compliance with any order of the board under this Act, when the order becomes effective, the person so in default is subject to a penalty of \$100 per day for every day during which the default continues; and the amount of the penalty shall be fixed and determined by order of the board."

Section 100 of the *Act* clearly grants the PUB with the discretion to determine whether or not to actually impose a penalty when a utility is found to be in default of an order, the amount of any such penalty up to a maximum of \$100.00 per day for each day of non-compliance and the effective date of the penalty.

General Purpose of an Administrative Penalty

The general purpose of an administrative monetary penalty, such as that provided for in section 100 of the *Act*, is to deter non-compliance within a regulatory scheme.¹ Speaking in reference to administrative monetary penalties under the *Income Tax Act*, a majority of the Supreme Court of Canada held:

“[t]he analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance”.²

The administrative penalty must serve regulatory, rather than penal, purposes.³ The penalties designed to enforce compliance with administrative tribunal orders should not be punitive.⁴ Centra submits that the overarching intention of section 100 is not to punish public utilities for non-compliance, rather the purpose of section 100 is to promote compliance on a go forward basis.

Relevant Considerations for the Imposition of an Administrative Penalty

In exercising its discretion to impose any penalty pursuant to section 100 of the *Act*, the PUB must act reasonably, in good faith for the proper purpose, and considering only relevant factors.⁵ Procedural fairness requires the PUB to give notice of any formula, guideline or supporting analysis it intends to rely upon in the assessment of penalties.⁶ Neither the *Act* nor any PUB rule or policy provide guidelines or criteria to be applied when determining whether to impose a penalty and in setting the amount of that penalty.

The following factors are considered by other respective Canadian utility regulators when assessing the need and the fairness of imposing administrative monetary penalties for non-compliance:

- the utility’s compliance history;
- the seriousness of the offence, including the impact upon consumers; and,
- efforts to mitigate the impact of the non-compliance.⁷

¹ *Guindon v. Canada*, 2015 SCC 41 at paragraph 77.

² *Guindon v. Canada*, 2015 SCC 41 at paragraph 79.

³ *Guindon v. Canada*, 2015 SCC 41 at paragraph 81.

⁴ *Toronto Railway Company (Re)*, 1920 CanLII 368 (UK JCPC).

⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 at paragraph 53.

⁶ *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at paragraph 44.

⁷ Section 109.1(3) of *Utilities Commission Act*, R.S.B.C. 1996 c. 473; Alberta Utilities Commission, “Criteria Relating to the Imposition of Administrative Penalties”, Rule 013, February 1, 2013; *Administrative Penalties*, O Reg. 51/16, section 1(1).

Compliance History

Centra has never before been assessed a penalty or been found guilty of an offence pursuant to the Act.

Seriousness of the Offence/Impact to Natural Gas Consumers

The severity of, and consequences flowing from, any non-compliance are relevant considerations. Any penalty imposed pursuant to section 100 of the Act must be proportionate to the nature of the cited non-compliance.

Centra respectfully submits that the severity of this non-compliance and the resultant consequences are minimal and insignificant in the context of the circumstances in this case. The cited non-compliance with Order 108/15 Directive 12 has had no impact upon natural gas operations or the safe and reliable provision of natural gas to Centra's consumers.

The delay in filing a GRA by Centra was a result of competing regulatory obligations and priorities between Centra and Manitoba Hydro. The decision to prioritize the electric GRA was made in light of the relative impacts to the gas and electric consumers and was well known to the PUB itself. The default was not a result of carelessness, negligence or intentional defiance of the PUB. Rather, the PUB was informed of the status of the situation and was provided with Centra's financial and other information upon request.

As set out in Centra's submission of August 25, 2017, Centra reasonably believed, and had no reason to doubt given previous and well established PUB procedural convention, that the PUB's April 21, 2017 direction to provide additional financial and other information was in lieu of a full GRA filing from Centra given the circumstances the parties collectively faced at that time. The PUB did not provide any indication that it considered the June 1, 2017 submission to be inadequate or that an application to review and vary Order 108/15 Directive 12 was required. Fairness required early and specific notice that the PUB considered Centra in default of Directive 12 and that it intended to exercise its discretion pursuant to section 100 of the Act. Instead, the PUB imposed a penalty for default of Order 108/15 Directive 12 two months after Manitoba Hydro had filed its electric GRA. At that point in time, both Centra and Manitoba Hydro's (and the PUB's) limited resources were committed and fully consumed by the ongoing electric GRA.

The minimal impact upon Centra's rate payers was further mitigated by Centra's actions described below.

Efforts to Mitigate the Impact of the Non-Compliance

While the delay in filing a GRA impacts both Centra's rate payers and Centra itself, Centra has continually worked to alleviate the impact of the delay in the filing of its next GRA. Centra firstly

advised the PUB on January 19, 2017 that it would be unable to file a gas GRA as required by Order 108/15 Directive 12. The PUB responded approximately four months later acknowledging Centra's advice that it would not be in a position to file a GRA for some time and then directed the utility to file certain financial and other information, including rate schedules. Centra fully complied with this directive and the requested information was circulated with Interveners of Record for comment and review process recommendations. No comments were received.

Furthermore, Centra filed rate schedules that reflected the punitive reversion of its non-gas components of its rates to the level approved on an interim basis in Order 66/11 and subsequently approved as final in Order 85/13 as directed in Order 108/15 Directive 13. In recognition that the PUB intended the rate reversions to result in rate decreases for all customer classes, Centra advised the PUB that the reversion could result in rate increases for the Special Contract and Power Station customer classes. The reversion of non-gas components of rates for all customer classes, except for the Special Contract and Power Station classes, took effect on August 1, 2017. The effect of this reversion was to mitigate the impact of the delay in filing a full GRA by minimizing Centra's net income earnings through the reduction of the non-gas components of the natural gas rates.

PUB Precedent

The PUB has twice imposed a penalty to take effect at a future date as a means to ensure compliance.⁸ Notably, in Order 16/17 the PUB refused to grant the Rural Municipality of Lac du Bonnet an extension to submit an application for revised rates. The PUB found that public utility in default of its previous directive to file an application within a set time period. Notwithstanding finding the utility to be in default of its earlier order, the PUB allowed the public utility additional time to submit its application before which a penalty would be imposed.

Conclusion

Given that Centra has committed to filing its GRA by November 30, 2018, there is no need to assess a penalty to ensure compliance nor would any other purpose be served by the assessment of a penalty at this time. As the PUB is aware, Centra is actively working now to meet this deadline. As such, the imposition of a penalty prior to December 1, 2018 does not serve the regulatory purpose of promoting compliance; rather, any penalty would be purely punitive. Centra's position is consistent with the limited past PUB precedent on section 100 of the Act.

If Centra does not file its next GRA by November 30, 2018, any potential penalty should be assessed effective December 1, 2018 and such penalty should be well below the maximum amount of \$100.00 per day.

⁸ Order No. 16/17, An Order Respecting the Rural Municipality of Lac Du Bonnet Request for Extension, February 3, 2017 and Order No. 64/17, An Order in Respect of the Complaint by Husky Oil Limited Against the Town of Minnedosa's Water and Wastewater Rates, June 26, 2017.

If you have any questions with respect to this matter, please contact the writer at 204-360-3257 or Liz Carriere at 204-360-3591.

Yours truly,

MANITOBA HYDRO LEGAL SERVICES DIVISION

Per:



BRENT A. CZARNECKI
Barrister and Solicitor

cc: Mr. B. Peters, PUB Counsel