

MANITOBA
THE PUBLIC UTILITIES BOARD ACT

Order No. 44/13

April 26, 2013

BEFORE: Régis Gosselin, BA, CGA, MBA, Chair
Raymond Lafond, BA, CMA, FCA, Member
Larry Soldier, Member

**MANITOBA HYDRO GENERAL RATE APPLICATION
FOR 2012/2013 AND 2013/2014 RATES:
AN ORDER WITH RESPECT TO CONFIDENTIAL DOCUMENTS
OF MANITOBA HYDRO**

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1.0.0 EXECUTIVE SUMMARY

The Public Utilities Board (PUB or Board) and Manitoba Hydro (MH) have settled certain procedural matters in respect of an outstanding subpoena issued by the Board to MH and a related appeal before the Manitoba Court of Appeal. The settlement also addresses a pending issue before the Board respecting the production of certain confidential documents of MH in the current General Rate Application (GRA) respecting rates for 2012/13 and 2013/14. The Board Panel that will conduct the pending Needs For And Alternatives To (NFAT) review process will have access to all documents which it considers relevant, including documents containing confidential information within the context of the Terms of Reference for the NFAT.

Going forward, the Board will work with Manitoba Hydro and all other interested parties who regularly appear before the Board on utility and other regulatory matters and who wish to participate in consultations for the formulation of a process for production and use of confidential information.

2.0.0 **BACKGROUND AND PROCEDURAL HISTORY**

On July 4, 2011 in a General Rate Application (GRA) for test years 2010/11 and 2011/12, the Board issued a subpoena to Manitoba Hydro requiring MH to produce to the Board export agreements between MH and three U.S. counterparties. The Board subsequently issued Order 95/11, on consideration of a Review and Vary Application by MH, which upheld the subpoena. MH sought and was granted leave to appeal Order 95/11. The appeal has been argued and a decision of the Manitoba Court of Appeal is pending. The subpoena was renewed by the Board on July 4, 2012.

On October 12, 2012, in the subsequent MH GRA for test years 2012/13 and 2013/14, the Board was provided with a sealed version of a confidential MH document, known as its Internal Power Resource Plan (Internal PRP), by counsel for The Consumers' Association of Canada (Manitoba) Inc. (CAC) so that the Board could consider use of the document in the ongoing GRA. The Board established a process and received submissions on the procedural issue respecting use and disclosure of the document in the GRA process. The Board's determination of this particular matter has also remained pending.

On November 16, 2012 The Province of Manitoba announced that a Needs-For-and-Alternatives-To (NFAT) Review process for the proposed Keeyask Generating Station and Conawapa Generating Station and associated major capital projects known as MH's Preferred Development Plan would be assigned to the Board. The Province of Manitoba has now issued Terms of Reference for a public NFAT review of MH's Preferred Development Plan. This NFAT review will proceed before a PUB panel in accordance with the powers of the Board set out in *The Public Utilities Board Act* and subject to the specific provisions of the Terms of Reference, leading to a report from the panel to the Lieutenant Governor in Council of the Province of Manitoba.

In light of all of these matters, the Board determined that a resolution of the outstanding specific confidential document matters, as identified herein, was warranted based on

the assurance that the documents will be provided to the Board in the upcoming NFAT and with a commitment to collaboratively establish a future process for disclosure and use of confidential information before the Board.

3.0.0 **BOARD FINDINGS**

The Board finds that it is in the public interest in the current circumstances to implement a settlement agreement in the form attached to this Order (The Settlement Agreement). The Settlement Agreement resolves disputed matters respecting specific confidential documents and contains the agreement of MH to file with the Board all relevant documents in the NFAT process as the Board may require to comply with the NFAT Terms of Reference, including unredacted versions of all such documents containing Commercially Sensitive Information.

The parties have further agreed to collaborate in the future to develop Board rules to protect and govern access to Commercially Sensitive Information. This collaboration will include consultation with participants who routinely appear before the Board in all of its regulatory matters. This future work could include the recommendations for legislative amendments as required.

As noted in The Settlement Agreement, the Board has not legally waived its stated positions in respect of the subject matter of the Agreement. Further and subject only to the NFAT Terms of Reference, the Agreement provides that there is no limitation on the Board's existing jurisdiction or authority. The Board's powers to take action as it deems necessary in future MH or other applications or matters before it remains intact. However, the Board seeks to resolve such future challenges via the collaborative approach referenced herein to create an access regime for confidential information that will allow for the efficient and effective exercise of the Board's jurisdiction going forward.

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 (Rules). The Board's Rules may be viewed on the Board's website at www.pub.gov.mb.ca.

4.0.0 **IT IS THEREFORE ORDERED THAT:**

1. The Settlement Agreement between The Public Utilities Board of Manitoba and The Manitoba Hydro Electric Board is hereby approved in the form attached as Schedule "A".
2. Order 95/11 of the Board is hereby varied and the Subpoena issued to Manitoba Hydro dated July 4, 2011 is hereby withdrawn.
3. The sealed envelope containing Manitoba Hydro's confidential Internal Power Resource Plan 2010-11 received by the Board and held unused is hereby returned to Manitoba Hydro by the Board concurrent with the signing of this order.
4. No further production of confidential documents is required for the General Rate Applications of Manitoba Hydro for the period April 1, 2010 to March 31, 2014 inclusive.

THE PUBLIC UTILITIES BOARD

"RÉGIS GOSSELIN, BA, CGA, MBA"
Chair

"HOLLIS M. SINGH"
Secretary

Certified a true copy of Order No. 44/13
issued by The Public Utilities Board

Secretary

BETWEEN:

THE PUBLIC UTILITIES BOARD (the "Board")

- and -

THE MANITOBA HYDRO-ELECTRIC BOARD ("Hydro")

SETTLEMENT AGREEMENT

WHEREAS the Board and Hydro have had a difference of opinion with respect to the relevance of and the right of the Board to have access to Export Contracts entered into by Hydro, and the Power Resource Plan of Hydro (both as defined herein);

AND WHEREAS a dispute with respect to access to certain Export Contracts is currently before the Manitoba Court of Appeal with a Judgment thereon reserved at the present time;

AND WHEREAS the parties have agreed to the Board's access to the Export Contracts, the Power Resource Plan, and related or other relevant documents containing Commercially Sensitive Information for an NFAT review of Hydro Electric development.

NOW THEREFORE THE PARTIES HERETO AGREE AS FOLLOWS:

1. In this Agreement:

- (a) **"Commercially Sensitive Information"** means any information the disclosure of which may reasonably be expected to cause undue financial loss to Hydro or

any of its contractual counterparties or to harm significantly Hydro's or its contractual counterparties' competitive position, including but not limited to any portions of Manitoba Hydro's Export Contracts, Load Forecast and Power Resource Plan containing such information.

- (b) **"Export Contracts"** means any and all export contracts and term sheets now and hereafter in existence for the purchase and sale of power and energy entered into between Hydro and its customers in the United States of America, including but not limited to the export contracts and term sheets currently commonly described as follows: Minnesota Power 250 MW Energy Exchange Agreement; Minnesota Power 250 MW Power Sale Agreement; Wisconsin Public Service 100 MW Power Sale Agreement; Wisconsin Public Service 108 MW Energy Sale Agreement; Wisconsin Public Service Term Sheet, Northern States Power 375/325 MW System Power Sale Agreement; Northern States Power 125 MW System Power Sale Agreement; and Northern States Power 350 MW Seasonal Diversity Agreement.
- (c) **"Load Forecast"** means the internal, non-public load forecast prepared by Hydro on an annual basis.
- (d) **"NFAT"** means "Needs For and Alternatives To".
- (e) **"Power Resource Plan"** means the Hydro document dated September 24, 2010 titled "THE 2010/11 POWER RESOURCE PLAN, Report PPD #10-07" and any further existing or future power resource plans hereafter developed by Hydro.

2. The Board will not require access to Commercially Sensitive Information for the purposes of the General Rate Applications pursuant to which rates will be approved for the period April 1, 2010 to March 31, 2014 inclusive.

3. This Agreement is effective upon execution on behalf of both parties, following which:

- (a) Hydro will file in confidence with the Board unredacted copies of the Export Contracts, Power Resource Plan, Load Forecast and any other CSI that may be required by the Board to comply with the Province of Manitoba's NFAT Terms of Reference;
- (b) the Board will withdraw its Subpoena issued to Hydro;
- (c) Hydro will withdraw its appeal in the Manitoba Court of Appeal Docket No. A1 11-30-10712, if permitted by the Court;
- (d) the parties will co-operate in registering a Consent Order dismissing the Appeal or a Notice of Discontinuance or such other order or filing as may be permitted by the Manitoba Court of Appeal to give effect to this Settlement Agreement. If a Consent Order or Notice of Discontinuance or other order of the Court of Appeal is not attainable, the other terms of this settlement will nonetheless continue in full force and effect.
- (e) the terms of this settlement will be issued in the form of an Order of the Board.

4. The parties further agree to collaborate in developing rules to protect and govern access to Commercially Sensitive Information where required in future regulatory proceedings, including the recommendation of legislative amendments as required.

5. The Provisions of this settlement are not and will not be construed as admissions of liability or a waiver of stated positions on the part of either the Board or Hydro with respect to the subject matter herein.

6. Subject only to the NFAT Terms of Reference, nothing in this Settlement Agreement should be construed as a limitation of the Board's existing jurisdiction or authority.

7. Any media releases concerning the settlement will be agreed upon in advance jointly by the Chair of the Board and the President of Hydro.

DATED this 25th day of March, 2013

THE MANITOBA HYDRO-ELECTRIC BOARD

Per: _____

THE PUBLIC UTILITIES BOARD

Per: _____