



Assembly of Manitoba Chiefs
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Darren Christle
Secretary and Executive Director
Public Utilities Board
400-330 Portage Avenue
Winnipeg, MB R3C 0C4

Via email: Darren.Christle@gov.mb.ca

Dear Dr. Christle,

RE: Assembly of Manitoba Chief's Submissions on Manitoba Hydro's Proposed Rate Changes affecting the former First Nations On-Reserve Residential Customer Class

Below are the Assembly of Manitoba Chiefs' (the "AMC") submissions with respect to Manitoba Hydro's ("Hydro") letter dated June 23, 2020 and further submissions dated July 20, 2020 in response to the Manitoba Court of Appeal decision in *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al¹* affecting the First Nations On-Reserve Residential Customer Class (the "FNORRCC").

Introduction

Hydro is requesting that the Public Utilities Board (the "PUB") approve a rate increase of 6.6% for the customers who previously formed part of the FNORRCC. It has asked the PUB for its response to its requested rate change by July 31, 2020 so that it may increase rates to the former FNORRCC ratepayers effective August 1, 2020. It has also asked that the PUB withdraw its directive not to implement the proposed rate changes on August 1, 2020 as "further review is not warranted as it does not constitute a substantial change of circumstance". In Hydro's view, this is not a rate change or a new rate as Hydro will migrate the ratepayers formerly part of the FNORRCC into the existing Residential customer class at the rate approved by the PUB in Order 69/19.

It is the AMC's position that Hydro's proposed 6.6% rate hike to the customers formerly part of the FNORRCC constitutes a rate change. This rate change is not just or reasonable and necessitates a PUB hearing. The AMC broadly opposes introducing a 6.6% rate increase on some of the most vulnerable ratepayers in the Province and submits that Hydro has not met its legal onus to show that its proposed rate increase is just and reasonable. It is the AMC's position that:

1. Given both Hydro's forecasted profit and the circumstances facing First Nations on-reserve ratepayers, the PUB should reject Hydro's proposed rate change;
2. To ensure that any response to the Manitoba Court of Appeal decision is just and reasonable and in the public interest, a PUB hearing should be held to set a new rate for the Residential customer class as a whole; and
3. Hydro's request that PUB approve its rate increase by July 31 so that it may increase rates on August 1, 2020 is unreasonable.

¹ 2020 MBCA 60 ["MBCA Decision"]

These submissions will be addressed in four parts covering the need for a PUB hearing, the financial health of Hydro, the policy considerations underpinning why the proposed rate change is not just or reasonable, and an explanation of how Hydro's response is not consistent with the Court of Appeal decision.

Hydro's Proposed Rate Increase Necessitates a Hearing

The AMC submits that a hearing must be held to ensure that the rate charged to the Residential customer class as a whole, including a review of the proposed 6.6% rate hike on First Nations on-reserve residential ratepayers, is just and reasonable and in the public interest. The AMC is also concerned with the expedited basis by which Hydro is purporting to implement its rate increase and with Hydro's request in its July 20, 2020 letter that the PUB respond to its request by July 31, 2020 so that it may implement its rate change the next day.

The Legislative Scheme Requires PUB's Approval of Hydro's Requested Rate Change

As is set out in section 25(1) of the *Crown Corporations Governance and Accountability Act* (the "*Crown Act*") "no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board."² The AMC does not agree with Hydro's opinion that "removing the FNORR customer class in accordance with a decision of the Court of Appeal cannot be considered a change that requires PUB approval where it has been determined that the FNORR rate in question was contrary to law..."³ In setting aside Directive 6 which created the FNORRCC, the Court of Appeal decision effectively resulted in a new class of ratepayers consisting of those ratepayers who used to be part of the FNORCC and the rest of the ratepayers already in the Residential customer class.

The imposition of the \$0.08740 kWh energy charge and \$8.62 basic monthly charge on this new class is a change in rate for service that must be approved by the PUB pursuant to the *Crown Act*. While Hydro is asking to charge the new composition of the Residential customer class an existing rate, it is still changing the rate charged to a specific class of customers whose composition as a whole was not considered by the PUB when it set the existing rate. By Hydro's logic, it could subsume any other existing customer class into the rate paid by the Residential customer class without oversight from the PUB. This cannot be what the legislature intended.

The existing legislative scheme is also clear that PUB does not merely rubber stamp Hydro's rates. Section 44(1) of the *Public Utilities Board Act* (the "*PUB Act*") states that:

Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as full and in all respects as if the application had been for such partial, further or other relief.⁴

As has confirmed by the Manitoba Court of Appeal, this means that "the [PUB] is free to approve a rate different from that proposed by the Corporation".⁵ By virtue of section 44(3) of the *PUB Act*, the PUB may also "review, rescind, change, alter or vary and decision or order made by it". Taken together, this suggests

² CCGGA at s 25(1).

³ Hydro letter, July 20, 2020 at p 6.

⁴ Public Utilities Board Act, s 44(1).

⁵ *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board (Man) et al*, 1995 CanLii 16229 (MBCA) at para 21.

that the PUB has broad jurisdiction to review and, if necessary, change, the rates for services Hydro charges to ratepayers in the Province.

The AMC agrees with the PUB's contention that "the Board's review and approval of the changes in rates for the service provided to the FNORR customer class and for customers in the Diesel Zone Residential class is required"⁶ and submits that the public interest necessitates a PUB hearing in this instance.

Hydro's Requested Rate Change Should Only Be Considered After A PUB Hearing

The legislative scheme is clear that Hydro must have its rates approved by the PUB. For the current proposed rate increase, a PUB hearing is necessary to determine what is a just and reasonable rate for the new composition of the Residential customer class.

Hydro is purporting to charge ratepayers previously in the FNORRCC the rate paid by the Residential customer class which was set, in part, upon the existence of the FNORRCC but also without considering the unique needs of the customers who formed the FNORRCC within the Residential class as a whole. Taken together, these factors suggest that a PUB hearing is required to ensure that the rate for the Residential class accounts for these material changes.

As is set out in these submissions, First Nations on-reserve residential ratepayers face several challenges that impact their energy consumption. These challenges should be fully considered when evaluating if Hydro's proposed rate increase is just and reasonable. The current process, which is being conducted only in writing and on an expedited timeline, is detrimental to the public interest. In the AMC's view, the current process will not provide the PUB with enough time or evidence to evaluate Hydro's requested rate change. In Order 59/18 the PUB noted that interim rate applications, and by extension the current process, provide a less vigorous overview of rates than general rate applications and limit the ability to test evidence. This is concerning given that "both ratepayers and Manitoba Hydro benefit from a robust process that results in final rates that are just and reasonable".⁷ The PUB's comments on this point are applicable to the current process as well.

A PUB hearing will allow Interveners and other interested members of the public to provide comment and assist the PUB in its determination of whether Hydro's proposed rate change is just and reasonable and in the public interest. In the AMC's view, this should include the opportunity for interveners to tender reasonable amounts of expert and/or ratepayer evidence and provide for the payment of costs in accordance with the PUB's *Intervener Costs Policy*. As both the creation of the FNORRCC and the subsequent Court of Appeal decision are unprecedented matters before the PUB, an oral hearing is in the public interest.

While a hearing on Hydro's proposed rate change will best help determine whether the rate increase is just and reasonable, the AMC is cognizant of the need to limit overall regulatory costs. Although a hearing is undoubtedly in the public interest, the AMC is of the opinion that this hearing can be limited to the narrow issue of the changed composition of the Residential customer class given the inclusion of the FNORRCC ratepayers and the unique circumstances these customers face. This would ensure that previous evidence and PUB orders unaffected by the Court of Appeal decision is not duplicated in the matter at hand. While the AMC advocates for an oral hearing in this instance, it is open to any necessary modifications that may be required due to the COVID-19 pandemic that may be implemented the discretion of the PUB. This could include holding the hearing via videoconference.

⁶ Board letter p 2.

⁷ Order 59/18 at p 171.

Any Change in Rates Charged to On-Reserve Residential Ratepayers Should Only be Implemented After Sufficient Notice is Provided

By extension, the AMC submits that the current process, which is being conducted only in writing and proceeding on an expedited basis, is insufficient to assess the long-term and far-reaching effects this rate increase will have on particularly vulnerable ratepayers. This is especially so given the COVID-19 pandemic. Many Manitobans now face uncertain economic futures, and this may be exacerbated in First Nations on-reserve Residential ratepayers.

The AMC is also concerned with Hydro's request, in its July 20, 2020 letter, that the PUB respond to Hydro's requested rate increase by July 31, 2020. Hydro further requests that the PUB set aside its directive not to implement the rate increases on August 1, 2020. Given that intervener submissions are due on July 27, 2020, the AMC is concerned that granting Hydro's request will limit the ability of the PUB to fully consider intervener submissions.

As a final note, any changes to rates paid by ratepayers in the former FNORRCC should only be implemented after ratepayers are provided with sufficient notice of the impending change. Hydro's proposed one-day turnaround time to implement its requested rate changes is troubling given its knowledge of the unique circumstances facing First Nations on-reserve residential ratepayers and their high levels of energy consumption and poverty. Moreover, in the midst of a global pandemic, raising rates by 6.6% without any notice is heavy-handed and not in the spirit of reconciliation. Any rate change must give First Nations on-reserve residential ratepayers sufficient time to economically prepare.

Hydro's Financial Health Is Not Dependent on Its Requested Rate Change and Will Add to Hydro's Profits

The AMC submits that the proposed rate change, which results in a 6.6% rate increase to First Nations on-reserve residential customers, should not be approved by the PUB as it increases Hydro's revenues when the PUB determined in Order 69/19 that rate increases are not currently necessary to maintain Hydro's financial health. While Hydro is entitled to recover its costs for service, its proposed rate change extends far beyond covering its costs for service and will instead see Hydro further profit to the detriment of some of the most vulnerable ratepayers in the Province.

Contributing to this increased revenue is the fact that the proposed rate change does not take into account that the Residential customer class's rates were set to factor in the cost of the creation and maintenance of the FNORRCC. In ordering Directive 6, the PUB acknowledged that Hydro's financial health was unaffected as the cost of the 0% rate increase for FNORRCC was subsumed into other customer classes: "Manitoba Hydro is kept whole because the cost of the 0% increase for this new customer class has been factored into the level of the average general rate increase granted for the Test Year to all other customer classes".⁸ In Order 69/19, the PUB maintained the 0% rate increase for the FNORRCC as it was in the interests of reconciliation and assisted in bill affordability. The PUB noted that the appropriate differential or spread between the FNORRCC and the rates paid by other residential ratepayers would be addressed at the next General Rate Application with the benefit of a full evidentiary record.⁹

Hydro now proposes to charge those formerly in the FNORRCC the rate paid by the Residential customer class without demonstrating how it is just and reasonable that Hydro will collect further profit from these vulnerable ratepayers. This is troubling given that the PUB was clear in Order 69/19 that rate increases

⁸ 59/18 at 232. See also 69/19 at 38.

⁹ 69/19 at 41.

are not necessary for Hydro's operations.¹⁰ This further profit is in addition to the 0.13% rate differential that Hydro will continue to collect should the Residential rates not be reduced. While Hydro has provided data that the bill impacts of this 0.13% rate differential amounts to an average of 21 cents for an electrically heated customer using 2000 kWhs per month, the PUB's approval of Hydro rates is centered on maintaining Hydro's financial health while ensuring rates are just and reasonable. Regardless of the dollar amount that Residential ratepayers may be paying due to the creation of the FNORRCC, Hydro's proposed rate increase amounts to double dipping and is not reasonable or financially necessary.

Recent information on Hydro's financial health further emphasizes that Hydro's proposed rate change must not be approved. In Order 69/19, wherein the PUB set out its reasons for, with some exceptions, approving an across-the-board 2.5% rate increase instead of the 3.5% increase requested by Hydro, it noted that approving a 3.5% increase would result in Hydro having a net income of \$115 million. In PUB's view, it would not be just or reasonable to order a rate increase that would flow into Hydro's general revenues.¹¹

Because of this, the PUB directed any additional revenue collected from increased rates to flow into a major capital project deferral account and stated, specifically, that "the rate increase approved by the [PUB] is based on the need to enhance rate stability and predictability" due to upcoming in-service dates for capital projects.¹² While, in PUB's view, a rate increase may be appropriate to assist in maintaining rate stability and predictability, Hydro's current requested rate change achieves the opposite by significantly hiking rates charged to vulnerable ratepayers in addition to maintaining the 0.13% rate differential. Hydro notes that it is forecasting additional revenue from its proposed rate increase, on annual basis, of approximately \$3.1 million, of which \$1.9 million will flow to general revenues and \$1.2 to the major capital deferral account.¹³ While Hydro also states that this additional revenue does not constitute a material change, this claim must be tested at a hearing and include further details on Hydro's allocation of this additional \$3.1 million between general revenues and the major capital deferral account.

Even in the wake of the COVID-19 pandemic, Hydro's financial projections forecast a profit this fiscal year. On June 11, 2020 in submissions to the Standing Committee on Crown Corporations, Hydro CEO Jay Grewal stated that Hydro was forecasting a \$47 million profit even after accounting for the economic impacts of COVID-19.¹⁴ It is clear that Hydro does not need to increase the rates charged to First Nations on-reserve residential ratepayers to ensure it is financially viable.

As Hydro has not demonstrated evidence of a material change in its financial circumstances or higher costs for service, the rate change must not be approved. Rejecting Hydro's requested rate change is consistent with previous PUB decisions on large rate increases. In Order 59/18, the PUB denied Hydro's request for a 7.9% rate increase, in part because PUB was concerned that the proposed increase was four times the rate of inflation in light of impending carbon taxes. The PUB opined that this affected individuals as well as Manitoba businesses, groups and organizations who all stressed that stable and predictable rate increases were crucial.¹⁵ In the present instance, the rate hike is not necessary for Hydro's costs for service and the proposed rate change unjustly targets some of the Province's most vulnerable ratepayers. Hydro has provided no evidence that its requested rate change is necessary for its financial health and in absence of any evidence of the same; its proposed rate is not a reasonable response to the Court of Appeal decision.

¹⁰ 69/19 at 3.

¹¹ 69/19 at 14.

¹² 69/19 at 17.

¹³ July 20, 2020 Hydro Letter at p 7.

¹⁴ https://www.gov.mb.ca/legislature/hansard/42nd_2nd/hansardpdf/cc3.pdf at p 92.

¹⁵ 59/18 at 172.

Hydro's Proposed Rate Change is Not Just Or Reasonable

The PUB may set fair and reasonable rates in furtherance of the public interest. This discretion suggests that all aspects of rates and their resulting implications are at issue when a rate change is before the PUB.¹⁶ In this instance, the impacts of imposing a 6.6% rate increase on vulnerable ratepayers underscores that Hydro's proposed rate change is not just or reasonable.

In Order 59/18 the PUB was clear that "in future rate applications, [Hydro] is to assess the broader impacts of rate increases beyond only the financial health of Manitoba Hydro".¹⁷ Presently Hydro's proposed rate change fails to take into account the broader implications the rate change will have on those ratepayers formerly under the FNORRCC and within the Residential customer class as a whole. While Hydro only categorizes its proposed rate change in financial terms, is not simply a financial move but rather one that will have long-lasting impacts on vulnerable ratepayers. The AMC submits that these long-lasting impacts must be considered by the PUB. Taking these broader implications into account confirms that the proposed rate increase is not just or reasonable. This is due to both to several systemic reasons facing First Nations on-reserve residential ratepayers as well as the new composition of the Residential customer class.

The Proposed Rate Increase Means the Rate Set for the Residential Customer Class as a Whole is Not Just or Reasonable

When changing existing rates, the burden of proof to show that these changes are just and reasonable lies with the Utility making the changes.¹⁸ In this instance, Hydro has not met its legal onus to establish that its proposed rate change is just and reasonable. Imposing a 6.6% rate increase on those ratepayers formerly part of the FNORRCC will result in disproportionate hardship to a uniquely vulnerable sub-set of residential ratepayers. Moreover, now that First Nations on-reserve residential ratepayers form part of the existing Residential customer class, the overall rate charged to this customer class is not just and reasonable.

In Canadian law, what is "just and reasonable" requires setting rates that are fair to both consumers and the utility while ensuring consumers do not pay more than what is necessary to cover the cost of the service they receive.¹⁹ Hydro's proposed rate change does not consider or account for the fact that the rate of Residential customer class was set, in part, to subsume the foregone revenues Hydro would lose from the creation and maintenance of the FNORRCC. As Hydro noted in its response to the PUB dated July 20, 2020, in Order 59/18 the PUB approved an average 3.6% rate increase to customer classes in addition to an average increase of 0.13% as the FNORRCC and Diesel Zone residential customer rates were maintained at their August 2017 rates.²⁰

This means that the rate charged to the Residential customer class must decrease owing both to the fact that there is no longer a need for other ratepayers to subsume the cost of the FNORRCC and the unique circumstances facing First Nations on-reserve residential ratepayers, previously not contemplated when the current Residential rate was set. Hydro's proposed rate increase amounts to double dipping and, if

¹⁶ See *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board (Man) et al*, 1995 CanLii 16229 (MBCA) at para 25 and *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60.

¹⁷ 59/18 at 172.

¹⁸ PUB Act s. 84(2)

¹⁹ *Atco Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45 at para 7.

²⁰ Hydro letter, July 20, 2020 p 2.

approved, First Nations on-reserve residential ratepayers will be forced to bear the burden of this over-collection.

Bill Affordability

Hydro's financial health is not dependent upon charging higher rates for ratepayers formerly part of the FNORCC. While this in itself underscores that Hydro's proposed rate change is not just or reasonable, other factors, including compelling policy considerations, also contribute to the fact that this proposed rate change is not in the public interest.

As was set out earlier in these submissions, a PUB hearing should be held to ensure that the new rate set for the Residential customer class fully accounts for the unique needs of First Nations on-reserve residential ratepayers not considered when the current Residential rate was set. As confirmed by the Court of Appeal in *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, "sections 77(b) and 82(1)(c) of the *Pub Act* clearly contemplate the necessity for just and reasonable rates and classifications".²¹ Moreover, as supported by the Court of Appeal, the PUB's mandate to consider "any policy considerations that the Board considers relevant to the matter" and "any other factors that the Board considers relevant to the matter" when approving Hydro rates by virtue of section 25(4) of the *Crown Act* is not limited to financial considerations.²² In the present instance, the PUB's "broad authority to make orders approving or setting rates for Manitoba Hydro that are not unjust, unreasonable or discriminatory"²³ should include an analysis of factors such as bill affordability and energy poverty.

The PUB is mandated to consider whether rates are just and reasonable in tandem with the financial health of Hydro. As has been confirmed by the Manitoba Court of Appeal, these two factors constitute the public interest:

The considerations set out in paragraph 25(4)(a) serve as a guide to the Board in exercising its mandate under section 77 of The Board Act to fix just and reasonable rates. As the Manitoba Court of Appeal held in *Consumers' Association of Canada (Manitoba) Inc v Manitoba Hydro Electric Board*, 2005 MBCA 55, this requires the Board to balance two concerns: "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."²⁴

In Order 59/18, the PUB noted that "subsection 39(1) of The Hydro Act requires that the aggregate price of power realized by Manitoba Hydro achieve full cost recovery, but this is subject to the requirement that rates must be just and reasonable."²⁵ While setting reasonable rates clearly affects ratepayers, it can also impact Hydro's financial health. In Order 59/18 the PUB stated that:

Affordability is not only relevant to the interests of the Utility's ratepayers, but also to the financial health of the Utility as rates that are in excess of what customers can afford may lead to depressed revenues through a combination of reduced energy consumption, business closure or relocation, and as acknowledged by Manitoba Hydro, potentially an increase in arrears.²⁶

²¹ 2020 MBCA 60 at para 39, emphasis original.

²² 2020 MBCA 60 at para 81.

²³ 2020 MBCA 60 at para 72.

²⁴ 2005 MBCA 55

²⁵ 59/18 at p 218.

²⁶ Order 59/18 at 217-218.

Broadly speaking, affordability is a factor that must be considered when setting just and reasonable rates.²⁷ While this benefits the consumer, it also benefits Hydro by providing certainty that ratepayers can afford the cost of service. In evidence previously before the PUB, the AMC's expert Philip Raphals noted that "electricity costs are considerably higher on First Nation reserves than in the province as a whole, for comparable income levels".²⁸ Data was also cited that confirmed many First Nation on-reserve accounts were in arrears, with payment issues and disconnections significantly higher than they were for the rest of Hydro's customer base.²⁹

This suggests that Hydro's proposed rate increase will clearly impact First Nation on-reserve residential ratepayers but may also affect the number of ratepayers in arrears and thus be a detriment to the financial health of Hydro.

First Nations on-reserve ratepayers face systemic hardships that significantly impact their consumption of energy. Evidence previously accepted by the PUB includes:

- 96% of First Nations people on reserve live in poverty with Manitoba facing the highest rate of child poverty in Canada;
- On-reserve ratepayers have poor housing stock compared to the rest of Manitobans; and
- 61 out of 63 First Nations in Manitoba do not have access to lower cost natural gas to offset their high levels of energy poverty.³⁰

As supported by the Court of Appeal decision, these factors can be considered when setting or changing electricity rates. As the prior rate set for the Residential customer class did not take these considerations into account by virtue of the fact that First Nations on-reserve residential ratepayers were in another customer class, the PUB must now – as it is mandated to do – further consider these compelling policy considerations.

Energy Poverty and Reconciliation

Tied to the above is the fact that Hydro's proposed rate change will exacerbate energy poverty on-reserve. It has been well-established in previous evidence before the PUB and PUB Orders that energy poverty is a concern for First Nations on-reserve residential ratepayers.³¹ Hydro's proposed rate hike on these ratepayers could have serious consequences by increasing their already disproportionate energy burden. As was previously described by Dr. Wayne Simpson, witness for the Consumer's Coalition in the 2018/19 General Rate Application, the "energy poverty trap" means that as energy prices rise, people facing energy poverty use larger amounts of their budget on their energy bills and have less savings to take steps that

²⁷ Order 73/15 at 29.

²⁸ Philip Raphals "Implications of Manitoba Hydro's General Rate Application" submitted to the Public Utilities Board on behalf of the Assembly of Manitoba Chiefs, October 31, 2017 at 21 [Raphals Report].

²⁹ Raphals Report at 26.

³⁰ Order 59/18 at 28.

³¹ See for example Order 59/18 at 26 and 28; Raphals Report; Philip Raphals "Energy Poverty on First Nation Reserves in Manitoba" submitted to the Public Utilities Board on behalf of the Assembly of Manitoba Chiefs, March 29, 2019; and Wayne Simpson "Energy Poverty in Manitoba and the Impact of the Proposed Hydro Rate Increase: An Assessment of the Bill Affordability Study in the Manitoba Hydro GRA" submitted by the Public Interest Law Centre.

could counteract high energy consumption.³² As there is poor housing stock on-reserve, this means that residents face higher energy bills overall and are thus disproportionately affected by rate hikes.³³ This is exacerbated by the fact that only 2 out of 63 First Nations in Manitoba have access to lower-cost gas heating.³⁴ This is stark given that, for the Province as a whole, 82.8% of residents reside in an area where natural gas is a fuel option.³⁵

Hydro has previously conceded that First Nations on-reserve residential ratepayers have higher energy consumption rates than other residential ratepayers. In the 2018/19 General Rate Application, Mr. Barnlund from Hydro's Cost of Service Panel admitted that on-reserve customers use more energy and pay more for it.³⁶ This is confirmed by the 2014 Residential Energy Use Survey (or REUS). As Dr. Raphals' analysis of this data concluded, on-reserve residential energy consumption is 23-29% higher, across all income categories, as compared to Hydro's other residential customers and consumption per square foot is between 24-47% higher than an electrically heated home off-reserve.³⁷ The fact that Hydro does not need to raise the rates charged to First Nations on-reserve residential ratepayers to recoup its costs for service coupled with the fact that it is in the PUB's mandate to take policy considerations, such as energy poverty, into account when setting rates underscores that this rate hike is unreasonable.

The long-last negative effects Hydro development and infrastructure has had on First Nations land and the concept of reconciliation further emphasizes that Hydro's proposed rate increase is unjust and unreasonable. In Order 69/19, the PUB was clear that a 0% rate increase for the FNORR was "consistent with the principle of reconciliation, the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples".³⁸ While the Court of Appeal decision set aside the FNORRCC, the AMC submits that Hydro's response to the Court of Appeal decision should still be consistent with and consider the principle of reconciliation.

Raising rates 6.6% on some of the most vulnerable ratepayers in Manitoba whose traditional lands and livelihood have been impacted by Hydro infrastructure and flooding is antithetical to reconciliation. This is especially so given that Hydro forecasts additional annual revenue of approximately \$3.1 million from its proposed rate change. Manitoba's *Path to Reconciliation Act* confirms that "reconciliation is furthered by concrete and constructive action that improves the present and future relationships between Indigenous and non-Indigenous peoples".³⁹ The present instance presents a unique opportunity to further reconciliation which can be achieved, in part, by a new hearing that fully addresses the unique circumstances of First Nations on-reserve residential ratepayers within the new Residential customer class.

While the Court of Appeal set aside the FNORRCC, it did not dictate how Hydro could or should respond to its decision. Given that rates must be just and reasonable and the fact that Hydro's costs for service are already more than covered by the existing rates, the public interest necessitates that the rates set in response to the Court of Appeal decision help alleviate the energy and rate burdens already facing First

³² 2018-2019 General Rate Application, CC-21, p7.

³³ See, from the 2018-2019 General Rate Application, Cross-examination of Dr. Simpson, Transcript, January 15, p 4695; Kelvin Shepard, Transcript, December 5, p 562, line 11.

³⁴ 2018-2019 General Rate Application, AMC/MH II-32, Att 1.

³⁵ 2018-2019 General Rate Application, PUB/MH I-125a-Attachments at p 17 of 250.

³⁶ 2018-2019 General Rate Application, Cross-examination of Cost of Service Panel, transcript, Dec 20, p2694-2695.

³⁷ 2018-2019 General Rate Application, Evidence of Philip Raphals, AMC-7-1, p 25-26. Note that this data is based off on a sample size of 35 First Nations respondents.

³⁸ Order 69/19 at 41.

³⁹ *The Path to Reconciliation Act*, CCSM c R90.5.

Nations on-reserve residential ratepayers. As previously established in PUB hearings, Hydro development and infrastructure has had negative impacts on First Nations with much of Hydro's development occurring without free, prior and informed consent. Moreover, Hydro development has destroyed or severely impacted the ability of First Nations to live off their land and has thus contributed to higher levels of poverty for First Nations people on-reserve.⁴⁰ Raising Hydro rates to the detriment of First Nations residential on-reserve ratepayers is not in the public interest.

Incremental Increases Will Ensure Rates are Just and Reasonable

While it is the AMC's position that the rates charged to the Residential customer class should be lowered as a whole, if the PUB approves a rate increase for First Nations on-reserve residential ratepayers, this increase should be enacted gradually. There are compelling policy reasons to enact a gradual increase including the unique circumstances of First Nations on-reserve residential rate payers, the increased financial stress facing all Manitobans as a result of the COVID-19 pandemic, and the fact Hydro's proposed rate change is not necessary to cover its costs for service and will result in additional profit to Hydro.

It is in both the public interest and Hydro's financial interest to ensure that rates are set at levels that the customer base can reasonably and realistically afford. Enacting the proposed rate change over a several year period and providing significant notice to First Nations on-reserve residential ratepayers can help achieve a level of affordability that will not be achieved by a one-time 6.6% rate hike. As has been established, First Nations on-reserve ratepayers face unprecedented levels of energy poverty and economic challenges. These are now further exacerbated due to the COVID-19 pandemic. The pandemic has brought economic challenges to many Manitobans as well as acute impacts to First Nations and their on-reserve residents. Because of these factors, it is in the public interest to ensure that First Nations on-reserve residential ratepayers do not face a significant rate increase.

Hydro's Proposed Rate Change is not Consistent with the Decision of the Court of Appeal

The AMC further submits that Hydro's proposed rate change and view that Hydro need not approve the same is inconsistent with the decision of the Court of Appeal.

Specifically, the Court of Appeal stated that it "would grant the appeal and set aside the directive" creating the FNORRCC.⁴¹ By no means did the Court of Appeal state that Hydro could implement rates in response to this Order without the approval of PUB as is clearly mandated by the legislative scheme.

The Court of Appeal confirmed that all aspects of a rate are at issue when PUB approves a rate. This includes both the actual rate set as well as customer classifications.⁴² While the Court of Appeal may have decided that the direction from the PUB to Hydro to create the FNORRCC was beyond the jurisdiction of the PUB, this does not mean that Hydro can effectively create a new class of customers by charging First Nations on-reserve residential ratepayers the rate of the existing Residential customer class without proper review.

The Court held that the FNORR was contrary to section 39(2.2)(b) of the *Hydro Act* as it was a regional-based customer class.⁴³ The Court also noted that the FNORR may have been contrary to 82(1)(a) and 82(1)(c) of the *PUB Act* as "it cannot be just and reasonable for disadvantaged individuals on reserve to

⁴⁰ 2018-2019 General Rate Application, AMC Undertaking #69.

⁴¹ 2020 MBCA 60 at para 99.

⁴² 2020 MBCA 60 at paras 40-41.

⁴³ 2020 MBCA 60 at para 54.

pay a lower price than other similarly disadvantaged individuals on reserve or elsewhere in the province”.⁴⁴ This does prevent the PUB, in view of the fact that Hydro is currently forecasting a profit beyond its costs for service, from exercising its jurisdiction to address issues of bill affordability and energy poverty by reviewing the current rate set for the Residential customer class as a whole.

Moreover, the AMC notes that the period by which parties with standing may seek leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada has not yet closed. The AMC is currently considering all of its legal options including whether to seek to leave appeal. In light of this, it is the AMC’s view that Hydro’s requested rate change and its intent to implement this change immediately and without notice to affected customers, is premature.

Costs

The AMC submits that the PUB should exercise its discretion to award costs to the AMC in this process. As set out in section 56 of the *PUB Act*, “the costs of, and incidental to, any proceeding before the board are in the discretion of the board, and may be fixed in any case at a sum certain or may be taxed”. This jurisdiction and discretion are confirmed in the *Intervener Cost Policy* at section 2.0.

The AMC has actively participated as an intervener in the PUB process surrounding the FNORRCC and subsequent Court of Appeal decision and has made a significant contribution therein. The on-reserve residents of the AMC’s member First Nations also stand to be directly impacted by the PUB’s decision on Hydro’s requested rate change. For these reasons, the AMC submits that it should be entitled its costs for its participation in the current process.

Conclusion

The PUB must ensure that rates paid by ratepayers in Manitoba are fair while “balancing the interests of multiple consumer groups with those of the utility.”⁴⁵ With the decision of the Manitoba Court of Appeal, the PUB must now consider how to address the unique circumstances facing First Nations on-reserve residential ratepayers within the purview of the Residential customer class as a whole or consider whether it is just and reasonable to direct the creation of a new FNORRCC that is within the authority of the PUB as set out by the Court of Appeal.

Hydro is entitled to recover its costs for service. The projections provided by Hydro note that it expects to receive around \$3.1 million in additional annual revenue if its proposed rate change is approved. While Hydro is of the view that this does not result in a material change in circumstance for the Utility, this will result in material change for First Nations on-reserve residential ratepayers who already spend disproportionate amounts of income on Hydro bills. As some of the most financial vulnerable ratepayers in the Province, a 6.6% increase is significant.

Beyond the fact that Hydro’s requested rate change is not necessary to maintain its financial health, the rate hike that will affect First Nations on-reserve ratepayers is also not just or reasonable nor in the public interest. Forecasting a large profit even in the midst of a global pandemic, Hydro’s rate change would see the Utility further profit off of a uniquely vulnerable population, many of whose lands have been negatively impacted by Hydro development. Such a proposal does not further reconciliation and the principles set out in the *Path to Reconciliation Act*. It is the AMC’s position that the health and safety of First Nations in Manitoba is paramount during the COVID-19 pandemic. The requested rate increase fails to account for the policy considerations facing on-reserve residential ratepayers including energy poverty, poor housing stock and lack of access to gas heating, all of which affect the health and safety of First

⁴⁴ 2020 MBCA 60 at para 55.

⁴⁵ *Consumers Association of Canada (Man) Inc v Manitoba Hydro, Electric Board*, 2005 MBCA 55 at para 63.

Nations on-reserve ratepayers during this pandemic. These factors underscore that Hydro's proposed rate change is not reasonable.

While the Court of Appeal has set aside Directive 6 and the FNORRCC, the Court of Appeal did not dictate how Hydro and the PUB would comply with this decision and confirmed the PUB's jurisdiction to consider policy matters that extend beyond financial considerations. A fulsome PUB hearing will help best decide how to include First Nations on-reserve residential ratepayers in the larger Residential class while ensuring the public interest is served.

Sincerely,

ASSEMBLY OF MANITOBA CHIEFS



Grand Chief Arlen Dumas

Cc: Grand Chief Garrison Settee, MKO