

July 11, 2017

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

Dear Mr. Christle:

**RE: MANITOBA HYDRO 2017/18 & 2018/19 GENERAL RATE APPLICATION
("GRA") – CSI PROCESS MOTION**

I. Motion

Pursuant to Rule 13(2) of The Public Utilities Board Rules of Practice and Procedure, Manitoba Hydro is seeking an Order of the Public Utilities Board of Manitoba ("PUB");

1. Establishing the process for the receipt of third party proprietary, confidential or otherwise commercially sensitive information ("Third Party Information") in the GRA including the issuance of preliminary rulings with respect to such information, , as outlined herein;
2. Appointing the Independent Expert Consultant (IEC) retained by the PUB to assist with the review of Manitoba Hydro's capital expenditures pursuant to Order-In Council 00092/2017 ("OIC 92/17") as the Party designated to access and hold in confidence Manitoba Hydro commercially sensitive information and Third Party Information related to such capital review, as outlined herein.

II. Grounds

1. Manitoba Hydro is obliged by contract and fiduciary duty to maintain certain Third Party Information in Confidence unless the Third Party consents to disclosure;
2. Manitoba Hydro has requested, and Third Parties have consented, to the disclosure of the Third Party Information to the PUB on the condition that there be no further disclosure to Intervenors or the public;

3. Manitoba Hydro expects that there may be additional Third Party Information requested during the course of the GRA and seeks to establish a process for use during the GRA which facilitates disclosure of this information to the PUB on terms which are generally acceptable to the Third Parties;
4. Rule 13(2) of The Public Utilities Board's Rules of Practice and Procedure authorizes the PUB to "receive information in confidence on any terms it considers appropriate";
5. There exists an enormous volume of information, including Manitoba Hydro commercially sensitive information and Third Party Information, which has been requested as part of the PUB's capital review Minimum Filing Requirements which, due to content, size or format, is not conducive to redaction to protect confidentiality and which will be reviewed by PUB's Independent Expert Consultant as part of its engagement to ensure the duties assigned to the PUB by OIC 92/17 are met;
6. Manitoba Hydro expects that in the performance of its duties, the Independent Expert Consultant will require access to additional information, including Manitoba Hydro commercially sensitive information and Third Party Information, which due to content, size or format is not suitable for filing with the PUB or on the public record and seeks to establish an efficient process for the review of that information in the GRA in a manner that ensure confidentiality is maintained.

Background

On April 5, 2017, the Province of Manitoba issued OIC 92/17 assigning the PUB the duty of considering capital expenditures by Manitoba Hydro as a factor in reaching its decision on Manitoba Hydro's rates for service, in a manner that balances the interests of the ratepayers and the financial health of Manitoba Hydro. OIC 92/17 directs that Manitoba Hydro is to provide the PUB with a substantial amount of information regarding its capital expenditures, together with existing records related to revenues and incomes. OIC 92/17 contemplates that certain of the required information will be commercially sensitive and authorizes the PUB to hold such information in confidence.

Manitoba Hydro is committed to conducting the General Rate Application ("GRA") in the most transparent means possible and intends to keep requests of the PUB to hold information in confidence to a minimum and only where absolutely necessary. Techniques such as aggregating information, averaging and providing summaries have been used as a means to avoid disclosing information which is confidential, proprietary and/or commercially sensitive (collectively referred to as "Commercially Sensitive Information" or "CSI") to ensure that as much information as possible can be placed on the public record. In certain situations

however it is necessary to disclose Commercially Sensitive Information in order to be responsive to a request for information.

On March 31, 2017 and April 24, 2017, the PUB issued a number of Minimum Filing Requirements (“MFRs”) requesting information from Manitoba Hydro for the upcoming (“GRA”). Manitoba Hydro identified a number of MFRs which required the disclosure of Commercially Sensitive Information. . Manitoba Hydro prepared responses to these MFRs by redacting or withholding the information that is proprietary, confidential or commercially sensitive in the filed response.

Manitoba Hydro will be filing a motion seeking to have the redacted or withheld information designated by the PUB as Commercially Sensitive Information to be held in confidence by the PUB. The materials filed in support of Manitoba Hydro’s motion will provide justification for the confidential treatment of these MFRs. Where there exists no Third Party rights with respect to the Commercially Sensitive Information incorporated in the response to an MFR, Manitoba Hydro will enclose the response with redactions removed and/or full attachments appended. Manitoba Hydro is however seeking the establishment of alternative processes for the treatment of Third Party Information as described below.

Third Party Information

A number of the PUB’s MFR requests relate to information which is not the property of Manitoba Hydro or which is subject to contractual restrictions related to confidentiality. In these situations Manitoba Hydro is obliged to obtain the consent of the owner/counterparty (“Third Party”) prior to disclosing or providing copies of the information to others. Contractual confidentiality terms typically authorize disclosure where required by law, provided notice is given to the counterparty so as to allow it to seek a protective order from a court of competent jurisdiction if the counterparty deems such step necessary. Manitoba Hydro seeks to establish a process that generally avoids the need for Third Parties to resort to this step.

Manitoba Hydro has issued requests to numerous Third Parties (eg. forecasters, contractors, export contract counterparties) seeking consent to disclose documents or information over which the Third Party has proprietary rights, which is confidential or commercially sensitive and/or over which Manitoba Hydro is contractually obliged not to disclose without first obtaining consent.

The majority of the consents provided to Manitoba Hydro authorize disclosure to the PUB on the express condition that the PUB holds some or all of the information in confidence. Manitoba Hydro is not in a position to provide assurance that information filed with the PUB

will not be disclosed further without first obtaining a ruling from the PUB. Manitoba Hydro therefore requires confirmation from the PUB that it will not release Third Party Information publicly in order for Manitoba Hydro to be able to rely on the Third Party consents and file the requested information with the PUB.

Manitoba Hydro requests that based on the information contained in Manitoba Hydro's CSI motion (to be filed), the PUB make a preliminary determination whether it will accept the documents identified in the motion as Third Party Information requiring confidential treatment. Assuming the PUB agrees to hold the information in confidence on a preliminary basis, Manitoba Hydro will be able to rely on the consent received and file with the PUB the complete response, with redactions removed and full attachments appended. If after reviewing the information in full, the PUB accepts Manitoba Hydro's submission, it would confirm its preliminary order. In the event the PUB disagrees with the need for confidential treatment and denies Manitoba Hydro's motion that the information be held in confidence, the document is to be returned to Manitoba Hydro with no public disclosure having been made.¹ Thereafter, if the PUB directs Manitoba Hydro to file the materials on the record in the GRA, consistent with Manitoba Hydro's contractual obligations, the third party will be provided notice and be entitled to take such further steps, if any, as it deems necessary.

Manitoba Hydro expects that such circumstance will be rare. However, if preliminary determinations are not incorporated into the process, Manitoba Hydro will not be able to rely on consents received and will be required to comply with contractual obligations regarding notice. Counterparties and information owners will then be left to determine what steps they wish to take to protect their information. Manitoba Hydro views triggering this step as counterproductive given the level of co-operation that has been received from many counterparties.

The PUB's Rules of Practice and Procedure provide the PUB with sufficient discretion to allow it to issue a ruling on confidentiality prior to the filing of the confidential materials. Rule 13(2) provides that the PUB may receive a document in confidence on any terms it considers appropriate in the public interest:

13(2) The Board may receive information in confidence on any terms it considers appropriate in the public interest,

¹ Rule 13(5) provides "Where the Board has decided to place on the public record any part of a document that was filed in confidence in accordance with Rule 13(2) and 13(3), the party who filed the document shall be given an opportunity to request that it be withdrawn prior to its placement on the public record." In order for Manitoba Hydro to rely on consents provided, it requires certainty that the document will be returned. The ability to make a request will not be sufficient.

a) if the Board is of the opinion that disclosure of the information could reasonably be expected

- (i) to result in undue financial loss or gain to a person directly or indirectly affected by the proceeding; or*
- (ii) to harm significantly that person's competitive position.*

or

b) if

- (i) the information is personal, financial, commercial, scientific or technical in nature; or*
- (ii) the information has been consistently treated as confidential by a person directly affected by the proceeding; and*
- (iii) the Board considers that the person's interest in confidentiality outweighs the public interest in the disclosure of the information.*

Rule 13(4) dealing with disputed claims of confidentiality provides that “... *the PUB may examine the document of other evidence in question to ascertain whether or not the claim for confidentiality or the claim for public disclosure will be sustained.*” The use of the permissive term “may” confirms that the PUB has discretion as to whether it will examine the document when making its determination.

The Role of the Independent Expert Consultant in the Capital Review

Manitoba Hydro is advised that the PUB has engaged MGF Project Services (“MGF”) to act as an Independent Expert Consultant (“IEC”) in reviewing and reporting on matters related to the capital review assigned in OIC 92/17. Manitoba Hydro believes this IEC can assist with the challenging task of protecting Commercially Sensitive Information, including Third Party Information in the context of a thorough capital expenditure review.

The materials related to the capital review involve multiple counterparties and multiple non-disclosure obligations, are voluminous, and are not conducive to a redaction exercise. For example, PUB MFRs 131, 133, 135, 136, 138, 140, 141, 156, 159, 162, 163, 166 request the tender packages, proposals and bids, and related contracts for each of the Keeyask General Civil Works, Keeyask Turbines and Generators and the BiPole III HVDC converter equipment projects.

The Request for Proposals and contracts for each of these projects contain terms which address property ownership, use rights and confidentiality obligations. These rights and obligations are complex and are different under each of the projects. They are also different within a project depending on the nature of the property in question. Samples of these provisions are as follows:

Submission Requirements

...

Manitoba Hydro shall own all information submitted by a Proponent in its Proposal and shall have the right to use such information for any purpose whatsoever. No information submitted in a Proposal, other than the Proponent's pricing information and any protected proprietary information of the Proponent, shall be required to be treated as confidential unless otherwise specified in this Request or agreed to in writing by a Proponent and Manitoba Hydro

Confidential Details

...

The Purchaser shall seek consent of the Contractor, which consent shall not be unreasonably withheld, prior to publishing or disclosing details respecting the Work which are subject to the Contractor's proprietary and protectable legal rights.

20.5 Entitlement to Equitable Relief

Notwithstanding the agreement of the Parties to rely upon Schedule XVII – Dispute Resolution Procedures, nothing in this Contract shall prevent, or be deemed to prevent either Party from seeking and/or obtaining interlocutory or permanent injunctive relief from a court of competent jurisdiction to restrain any anticipated, present or continuing breach of any provision of the Contract with respect to confidentiality, intellectual property, patent or other rights, or any matter where the party, acting reasonably, is of the view that such breach will cause it irreparable harm which cannot adequately be compensated in damages.

30.8 Licence for Contractor's Documents

The Contractor's Documents produced or provided by the Contractor or on behalf of the Contractor in the course of the Work shall become the exclusive property of the Purchaser. Ownership of any proprietary information or intellectual property contained in the Contractor's Documents shall remain with the Contractor.

33.4.12 Equitable Relief

Nothing in this Section 33.4 DISPUTE RESOLUTION AND ARBITRATION of the General Specification shall prevent, or be deemed to prevent, either Party from seeking and/or obtaining interlocutory or permanent injunctive relief from any court of competent jurisdiction identified pursuant to Section 1.4 APPLICABLE LAW of the General Specification to restrain any anticipated, present or continuing breach of a provision of the Contract with respect to confidentiality, intellectual property, patent, or other similar breach where such Party, acting reasonably, is of the view that such breach will cause irreparable harm to it which cannot be adequately compensated for in damages.

There exists a clear need to treat portions of the information contained in these tender packages, bids and proposals and contracts as confidential. Public disclosure of contractor proprietary information, which could include designs, drawings, methodologies and pricing, in a manner not contemplated in the contracts, exposes Manitoba Hydro to Contractor claims and liability. Public disclosure of the successful contractor and unsuccessful bidders' information, particularly pricing and proprietary information, in a manner not contemplated at the time the bids were submitted and contrary to industry norms also has the potential to

materially impact future Manitoba Hydro's competitive bid process. Qualified proponents may be reluctant to bid on projects due to the perception that Manitoba Hydro cannot provide assurance that information will be maintained in confidence.

The size of these documents is not conducive to a redaction exercise. For example, PUB MFR 131 requests a copy of the Keeyask General Civil Works tender package and PUB MFR 133 requests copies of the proposals and bids. The bids of the three unsuccessful proponents for the Keeyask General Civil works contain roughly 33,500 pages. Manitoba Hydro's contract with the successful proponent is comprised of an additional 9000 pages of material (PUB MFR 141ii). Document disclosure to respond to Keeyask construction related PUB MFRS 131, 133 and 141ii totals roughly 49,000 pages.

The Keeyask Turbines and Generators Tender Package (PUB MFR 137) is 317 pages, copies of the bids (PUB MFR 138) of which there are three, total roughly 27,000 pages. The contract requested in PUB MFR 141iii is 1900 pages for a total of approximately 29,220 pages.

The BiPole III HVDC Converter equipment tender package (PUB MFR 156) is 4700 pages. The proposals and bids (PUB MFR 159) are 3000-5000 pages each. The contracts requested in PUB MFR 163 (HVDC Converter equipment, Keewatinohk AC Switchyard, Keewatinohk Camp Construction, Keewatinohk Camp Services, Keewatinohk Site Development, Riel Synchronous Condensers) are 21,675 pages in length for a combined total of roughly 38,400 pages.

These voluminous materials contain a substantial amount of Commercially Sensitive Information, notably pricing and proprietary information. This information cannot go on the public record unredacted. If a redaction effort is required, it will necessitate a line by line review of these materials by Manitoba Hydro in concert with the proponents (successful and unsuccessful). Related documents such as Capital Project Justifications, engineer's estimates, summaries and third party estimate reports will require similar review. Redaction of voluminous, complex documents will be extremely time consuming and costly. The process may serve to unnecessarily precipitate disputes regarding ownership and license rights with respect to certain information. Contractors and unsuccessful bidders will likely expect to be compensated for their time. Manitoba Hydro is very concerned with any activity that potentially distracts its contractors from their primary focus – completing the major projects on time and on budget.

Proposed IEC Capital Review Process

MGF Project Services has been engaged by the PUB to prepare a report addressing Manitoba Hydro's capital expenditures to meet the requirements of OIC 92/17. Manitoba Hydro has

been advised that the PUB wishes MGF Project Services (MGF) to have immediate access to capital related documents and Manitoba Hydro staff in order to facilitate an understanding of materials, including CSI, without resorting to the more cumbersome Information Request process.² Upon execution of a Non-Disclosure Agreement, Manitoba Hydro will provide MGF Project Services with virtually unfettered access to all capital expenditure related materials, regardless of size or format.

Manitoba Hydro proposes that the PUB use the IEC process to address concerns regarding the treatment of Commercially Sensitive Information in the GRA. Specifically, Manitoba Hydro requests that it not be required to file major capital information with the PUB en masse and instead rely on MGF to sort through the materials and assess relevance.³ The filing of MGF's report should result in a focussed and efficient public review of Manitoba Hydro's capital expenditures. The relevant information will be included in MGF's report. Parties' can pose Information Requests with respect to that report and rely on MGF to verify information without disclosing Commercially Sensitive Information. To such extent that Commercially Sensitive Information impacts Intervenors' interest in the capital review portion of the GRA. Intervenors may discuss their questions or concerns with the IEC so as to allow the IEC to conduct its review of the CSI materials with those concerns in mind.

Manitoba Hydro expects that MGF will be made available for cross examination during the oral hearing process. Time should be built into the schedule to provide Manitoba Hydro an opportunity to review materials produced by MGF in an effort to ensure no Commercially Sensitive Information is disclosed. Keeping with MGF's neutral status, Manitoba Hydro expects that it would not involve itself in the cross examination of witnesses or otherwise attempt to prove or test its conclusions through the evidentiary process.

Manitoba Hydro is of the view that this IEC Process, together with the commitment not to release Third Party Information without notice to affected Third Parties meets the conditions set out in the majority of consents received from the Major Projects' contractors and unsuccessful bidders/proponents. Manitoba Hydro also believes that confirmation that the PUB will adopt these processes will alleviate concerns regarding the treatment of confidential and proprietary information expressed by many contractors and unsuccessful

² Manitoba Hydro identified that conducting dual processes of meeting with IECs and concurrently responding to IEC Information Requests during the NFAT was duplicative, extremely resource intensive and exceptionally difficult to manage. Given time constraints, Manitoba Hydro was unable to formally respond to all IEC Information Requests on the record of the NFAT. Manitoba Hydro concluded that direct meetings with IECs were far more productive than the written Information Request process. Manitoba Hydro believes the dual process defeats the purpose and advantage of providing an IEC access to Manitoba Hydro staff and information and strongly recommends against adopting such dual processes in the future.

³ Given capital review MFR responses have been prepared and in some cases redacted versions filed, Manitoba Hydro intends to file the full responses except where size or format proves unmanageable. Manitoba Hydro will identify any MFR responses which it does not propose to file and in its CSI motion.

bidders/proponents as well as other Third Parties whose information will be subject to review in the GRA.

Adoption of this process as part of the PUB's IEC process will facilitate transparency, respect the limits of the consents provided by Third Parties whose information is affected by the capital review or other components of the GRA and assist in protecting Manitoba Hydro Commercially Sensitive Information. It will contribute to establishing an efficient hearing process, recognizing competitive market sensitivities and respecting commercial terms and industry expectations.

If you have any questions or comments with respect to this submission, please contact the writer at 204-360-3946 or Odette Fernandes at 204-360-3633.

Yours truly,

MANITOBA HYDRO LEGAL SERVICES DIVISION

Per:



PATRICIA J. RAMAGE

Barrister & Solicitor

cc:

Odette Fernandes, Manitoba Hydro
Bob Peters, Board Counsel
Dayna Steinfeld, Board Counsel
Intervenors of Record