

July 28, 2020

**BY EMAIL**

Public Utilities Board of Manitoba  
400 – 330 Portage Avenue  
Winnipeg, Manitoba R3C 0C4

**Attention: Dr. Darren Christle**  
**Secretary and Executive Director**

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Dear Sir:

**Re: Manitoba Hydro – First Nation On-Reserve Residential Customer Class**

Please be advised that Ms. Ramage is presently out of office and as counsel of record at the Court of Appeal hearing of this matter, Manitoba Hydro requested I review the submissions of the Intervenor regarding the PUB's request for comments regarding revised rates schedules and whether they are consistent with the Court of Appeal's decision to set aside Directive 6 of Order 59/18. Intervenor submissions address matters beyond that requested by the PUB and proposes general rate changes be implemented, hence Manitoba Hydro requests the opportunity to reply.

As the parties are well aware the PUB sought to create a separate rate applicable to First Nations on Reserve and Diesel Residential customers, the result of which was that effective June 1, 2018 the approved rate for all other customers increased marginally to account for the rate not applied to First Nations on Reserve.

Manitoba Hydro appealed Directive 6 from the 2017/2018 & 2018/2019 General Rate Application (GRA). The Appeal was allowed. The rate now sought by Manitoba Hydro as applying to First Nation on Reserve Customers is based on the evidence lead at the GRA and directives and orders which followed. The 2017/2018 and 2018/2019 GRA fully canvassed the rate request made by Manitoba Hydro at the time and in the context of the prevailing economic circumstances of Manitoba Hydro and its cost of service. All parties lead evidence and/or cross examined Manitoba Hydro on its evidence. The plan by Manitoba Hydro to implement the Court of Appeal ruling is not a new rate, nor a substantial change in circumstances which would trigger a rate review.

The "rate shock" which MKO, Consumers Coalition and MIPUG suggest has arisen represents the rate dilemma contemplated in the Reasons arising from the 2018 GRA (at page 238) by Member Ring. He raised then that the implementation of a differential rate would be difficult to unwind. This concern did not cause the PUB to issue a stay of the Directive as requested by Manitoba

Hydro in 2018. It should not cause the PUB to hesitate now in implementing the order from the Court of Appeal.

Manitoba Hydro reminds the parties that it followed all of the processes set out in the *Manitoba Public Utilities Board Act* and *Crown Corporations and Governance Act* in pursuing the Appeal. It sought an order to review and vary Order 59/18 from the PUB. This was denied. It sought leave to Appeal to the Court of Appeal. This was granted. The Appeal itself was granted and Directive 6 was found to be invalid. There is nothing in the reasons of the Court of Appeal, nor in the arguments presented by the PUB nor of any of the Intervenors before the Court of Appeal to suggest that if the Appeal was granted that there would have to be a full review of the rates approved in the 2017/2018 & 2018/2019 GRA in order to “unwind” their previous decision. Such an interpretation of the Court of Appeal reasons would be to impute an outcome to the Appeal that was not contemplated by any of the parties. The reasons do not contemplate sending the rate review back to the PUB for further consideration, a step often considered and addressed in an Appeal where the Court is being asked to reconsider a lower Court decision on penalty or damages. The Court itself may substitute its own findings where it is just to do so. No party raised this with the Court.

Unless a party is choosing to go to the Supreme Court, there is no further appeal and there has been no request for a stay of the Court of Appeal Proceeding, a step which would be contemplated if an Appeal to the Supreme Court was planned. It is further noted that the Court of Appeal Rule 40 (5) states that its decisions are effective upon pronouncement. An appeal does not serve as an automatic stay. The Court of Appeal reasons must therefore be followed.

MIPUG, in its submission reproduced paragraph 98 of the Court of Appeal Reasons and the applicable Section 58 (5) of the *PUB Act*. It is clear from that section of the Act that the PUB is directed to implement the Court of Appeal decision.

The *Public Utilities Board Act* states that all orders are final. As such, there is nothing more to discuss at the PUB with respect to Order 59/18 and the subsequent Orders all of which are final.

While Section 26 (3) of the *Crown Act* permits the PUB on its own motion or by application of the Corporation or by any interested person to request a review and modification of an order it is only available where there has been a “substantial” change to the circumstance of the Corporation.

### **Changed circumstances**

#### 26(3)

Where The Public Utilities Board is satisfied that the circumstances of a corporation have changed substantially, The Public Utilities Board may, of its own motion or on the application of the corporation or an interested person, review an order made pursuant to this section and modify the order in any manner that The Public Utilities Board considers reasonable and justified in the circumstances.

Significantly, the substantial change contemplated by the section only applies to the circumstances of the Corporation. While MIPUG and Consumers Coalition suggests that the variance meets the test of substantial change (or as described by Manitoba Hydro a .13% reduction to residential customers), it is because MIPUG and Consumers Coalition argue that it is a substantial impact on their clients. This is not what the section contemplates and directs the PUB to consider. Rather it is when the “circumstances of the corporation have changed” the section applies. MIPUG’s assertion that the variance is “significant” to its members and that they thus want the PUB to review is so that their member might seek a *refund*. It is not because of a concern about the Corporation’s change in circumstance nor out of concern about the implementation of the Court of Appeal reasons to rate shock on customers who had received a benefit which was not permitted pursuant to the legislation and whose rates must now be in conformity with the Court of Appeal decision.

As noted in Manitoba Hydro’s July 20, 2020 correspondence the impact of implementing \$2 million dollars annually comparison to Manitoba Hydro’s \$1.7 billion annual general consumers revenue base this does not constitute a material change in circumstance and is well within normal revenue variation from load and weather fluctuations.

There can be no analogy to the recent PUB decision relating to the reduction of MPI rates as is suggested by the Consumers Coalition. The factual circumstances which underpinned the MPI rate review and reasons have no applicability in the current circumstance. MPI sought the rate reduction as part of its annual rate review. It was not going back to a rate hearing and the final reasons which had been delivered two years earlier to seek a reassessment of the earlier reasons.

Manitoba Hydro disagrees with the statement that the Court of Appeal did not address diesel rates. To the contrary, the court set aside Directive 6 which directed Manitoba Hydro to apply a 0% rate increase to the diesel residential class (the equivalent treatment to its grid counterparts). Manitoba Hydro accepts that despite a long standing practice/policy of applying the grid Residential rate to the Diesel Residential class, upon the setting aside of directive 6, the currently approved rate for the Diesel Residential class is that in place immediately prior to the issuance of Order 59/18. As such Manitoba Hydro in its July 20, 2020 letter requested the PUB’s continued approval to apply the residential grid rate to Diesel residential customers. Manitoba Hydro submits that such outcome is consistent with the Court of Appeal’s decision. If this is an issue which the PUB cannot resolve as an outcome of the history of the 2017/2018 & 2018/2019 GRA, Manitoba Hydro submits that the current rates remain in effect pending further review.

The Certificate (Order) in the Appeal has not yet been submitted for signing.

In consideration of the concerns raised by the parties, Manitoba Hydro will hold off filing the Certificate until the interpretation of the Court of Appeal reasons is resolved.


# MLT AIKINS

WESTERN CANADA'S LAW FIRM

All of which is respectfully submitted,

Yours truly,

**MLT AIKINS LLP**

Per: 

Helga D. Van Iderstine

HDV:jm