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VIA EMAIL & ORIGINAL TO FOLLOW BY MAIL

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

Attention: Darren Christle / Kurt Simonsen

Dear Sirs/Mesdames:

Re: Manitoba Hydro (MH) Motions re Commercially Sensitive
Information in the Manitoba Hydro 2017/18 and 2018/19
General Rate Application
Our Matter No. 0147961 AFH

The Manitoba Industrial Power Users Group (MIPUG) is in receipt of the MH September 7 and 21, 2017 Motions with respect to CSI. This submission addresses both filings.

MIPUG reserves the right to raise evidentiary issues at the hearing with respect to the implications of failure to fully provide reports such as the credit rating reports and Boston Consulting Group reports. If the content of such reports is relevant to rate making considerations of the Public Utilities Board (PUB), and is being relied on by MH, MIPUG gives notice that it may take the position that the authors need to be called by MH to testify so they can be tested on what has been written. Although the PUB is not bound by the law of evidence, we submit that it should be extremely cautious on allowing third party reports into evidence (much less CSI) if those reports contain untested evidence which relates to key issues identified in the upcoming hearing. The usual rules of fairness would dictate that any reports filed without having the authors testify cannot be taken for the truth of the report's content. Alternatively, MIPUG reserves its right to submit that little or no weight be given to any third-party reports if MH has not undertaken to call the author as a witness. Cross-examination provides the opportunity to elicit relevant information and clarify relevant information. The decision not to call the authors will eliminate the opportunity to provide this assistance to the PUB.



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MIPUG has attempted to coordinate its submission on responding to the September 7, 2017 Motion by MH with the submission of the Consumer Coalition on some issues given the joint retainer of Morrison Park Advisors.

MIPUG notes that pursuant to *The Public Utilities Board Act* its hearings and the taking of evidence is to be open to the public and that it cannot make rules of practice inconsistent with that *Act*:

Public hearings

15(3) All sittings of the board or of a member for hearing applications and **taking evidence shall be open to the public.**(emphasis added)

PROCEDURE

Procedure governed by rules

24(1) All hearings and investigations conducted by the board shall be governed by rules adopted by the board.

Rules of evidence not binding on board

24(2) The board is not bound by the technical rules of legal evidence.

Rules of practice, their publication

24(3) The board may make rules of practice, not inconsistent with this Act, regulating its procedure and the times of its sittings, but the rules do not come into force until they are published on the board's website.

Board to have powers of Court of Queen's Bench in certain matters

24(4) The board, except as herein otherwise provided, as respects the attendance and examination of witnesses, the amendment of proceedings, **the production and inspection of documents,** the enforcement of its orders, the payment of costs, and **all other matters necessary or proper for the due exercise of its powers, or otherwise for carrying any of its powers into effect, has all**



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such powers, rights, and privileges as are vested in the Court of Queen's Bench or a judge thereof. (emphasis added)

MIPUG therefore submits that any departure from the “public hearing” rule must be extremely limited. Where possible, the information relied on in the hearing should be presented so it can be put on the public record. Thus, where possible, if specific information cannot be disclosed it should at least be presented in aggregate so it can be tested. If information can be sufficiently protected by having a “B” file with a deemed undertaking not to use it except for purposes of the hearing, that should be done. If it is an option for the PUB to exercise its documentary production powers through Minimum Filing Requirements to require production of a third party report at no cost, that power should be exercised. Only if none of these options exist should the parties be required to sign a confidentiality agreement with reasonable terms and conditions with a corresponding portion of the hearing being conducted in camera if any CSI is being dealt with.

It is MIPUG’s position that there are relevant powers given to the PUB contained in the Court of Queen’s Bench rules for deemed undertakings related to information required to be produced in discovery (Minimum Filing Requirements) or required to be produced in Interrogatories. We reproduce extracts from those rules for the PUB’s convenience.

"B" FILES

Establishment of "B" file

Restricted access

4.09(2) Access to the contents of the "B" file in a proceeding shall be restricted to the parties to that proceeding and their lawyers.

RULE 30.1

DEEMED UNDERTAKING

Application

30.1(1) This Rule applies to

- (a) evidence obtained
- (i) under Rule 30 (discovery of documents),
- (ii) under Rule 31 (examination for discovery),



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(v) under Rule 35 (procedure on interrogatories), and

(vi) from the report of an expert witness referred to in rule 53.03 that is filed or deposited with the court in a "B" file under subrule 4.09(1);

(b) information obtained from evidence referred to in clause (a).

Deemed undertaking

30.1(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

The policy which led to the creation of this deemed undertaking rule, which essentially codified common law obligations, was to ensure parties obtained full disclosure in the public court process to ensure that a decision is made after a review and testing of all relevant evidence. As is the case in this hearing, in the Court process, parties are often required to produce confidential information. Parties and the Courts were concerned that their adversaries in Court would make use of this confidential information for purposes other than the Court process. This resulted in the imposition of the deemed undertaking rule.

In appropriate circumstances, the Court creates a "B" file which is not accessible to the general public. The "B" file is only accessible by the parties, their consultants and their lawyers. This "B" file, when coupled with the deemed undertaking, provides a structure to protect confidentiality while ensuring a proper and fair determination of rights. This is an approach which is less restrictive than the more stringent approach of requiring confidentiality and non-disclosure coupled with in camera hearings.

We submit that creating a file "B" coupled with a deemed undertaking approach to dealing with documents would be an appropriate approach for all credit rating reports and any documents related thereto.

In responding to MH's motion regarding Round I CSI IRs dated September 21, 2017 MIPUG has organized comments according to the appendices used by MH. In instances where MIPUG takes no position, MIPUG will not provide comments.

Appendix A and B export contracts and forecasts

With respect to export contracts and export forecasts, MH requests confidentiality where it has typically been granted in the past. So long as there is some form of public confirmation that the values



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are being used correctly (e.g., by qualified IEC's conducting a review and publicly publishing their results), MIPUG does not challenge the claim for confidentiality with respect to confidential contract details and confidential or third-party forecasts. MIPUG has also suggested enhancing the scope of review of this information by the PUB's Independent Experts to advise where the forecasts are reasonable for approach and outcome based on expert review and analysis, providing directional indication where feasible (i.e. high, low or mid-range). MIPUG is of the view that disclosure by MH of aggregated information should not be a concern for MH (e.g., IR Coalition/MH-I-101 should be answered at the aggregate level). MIPUG therefore requests that MH release aggregated information combined with an assessment of the PUB's Independent Experts of where the forecasts are in the zone of reasonableness.

Appendix C - Industrial Load Forecasts

MIPUG is of the view that aggregating this information (as has already been provided publicly) is the appropriate way to deal with any load forecast related CSI. MIPUG supports the position of MH with respect to the treatment of this information. As has previously been noted by MIPUG in the NFAT review regarding internal load forecasts, specific industrial forecasts contain sensitive company-specific information and these forecasts are provided to Manitoba Hydro on a confidential basis, in a good faith effort to assist in planning activities, with the expectation that the information will not be shared publicly. Individual industrial customers in Manitoba would be harmed by public release of this information, and in some cases there are even instances of companies within Manitoba competing with each other to the point that Hydro has assigned different customer representatives to the companies to prevent inadvertent information disclosure. There is no evidence the NFAT proceeding, which relied heavily on this same information, was hampered by treating these forecasts as CSI.

Appendix D – Corporate Risk Management Reports

MIPUG takes no position with respect to Hydro's proposals in light of the following comments. MIPUG notes that PUB MFR-9 (the Corporation Risk Management report) contains extensive redactions to topics shown as section 3.3.3 (page 13 of the report) and topic "I" (page 21 of the report) which is among only 2 risks that Hydro classifies as "high likelihood, high consequence" (the other being drought). Given aspects of this hearing will implicitly or explicitly deal with Hydro's own portrayal of the risks it faces, and the repositioning of these risks in light of new personalities involved with Hydro's senior management and Board, MIPUG is concerned that important risk information is being redacted. Recognizing that internal documents outlining risks at times must remain confidential, MIPUG is prepared to make no objection to these redactions so long as there is no weight placed on the material that will remain untested publicly in the final rate determinations.

Appendix E - Credit Rating reports

As indicated earlier in this submission, the credit rating reports and related documents should be produced in a file "B" with a deemed undertaking not to use them for purposes other than this hearing. This appears to be consistent with the terms and conditions of the credit rating agencies who have requested that the information be filed in confidence with the PUB.



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We note that the terms and conditions of Moody's provide:

15. Notwithstanding the provisions of Section 1 of this Agreement Subscriber may, as part of and in the ordinary course of its business, redistribute (orally, in writing or by electronic means) to its clients and in its own business applications.

The application to the PUB for a rate increase is certainly part of a "business application" and falls within the exceptions where its consent is not required. The file "B" and deemed undertaking approach provides protection to both MH and Moody's that its information is used only for the purposes of this hearing.

We note that the terms and conditions of Standard & Poor's focus on not publishing the credit rating report publically. Again the file "B" and deemed undertaking approach respect the spirit of the public non-disclosure provisions.

Although reimbursing the parties for the charges of these rating agencies might be an option, it is MIPUG's submission that it should not be necessary to incur these additional costs following MIPUG's proposed treatment. If either of Moody's or Standard & Poor's have an issue with the proposed file "B" and deemed undertaking approach, they can so indicate. MIPUG has significant concerns that Hydro (and other parties to the hearing) intend to make credit ratings major point of support for the rate increase, and this is inconsistent with failing to make available the very reports that provide the information Hydro intends to rely on, much less the failure to provide the authors of the report for cross-examination.

Appendix F – Documents related to Major Project Construction

MIPUG does not object to Hydro maintaining confidentiality at this time regarding the noted tender and proposal documents. At this time it is not apparent that any individual item covered by the Appendix is uniquely central to issues at hand in the proceeding, in a manner that will not be adequately addressed by the IEC's (notably MGF Project Services), including the revisions to the scope of work proposed by MIPUG regarding contingencies (and accepted by the IEC counsel). MIPUG to date has not identified any specific need for review of the noted documents.

Appendix G – Great Northern Transmission Line

MIPUG requests answers to PUB/MFR-20 be placed in the hearing record, but does not oppose the remainder of the Appendix remaining as CSI. The information sought in the PUB/MFR-20 is already aggregated. It is important to know how this project is affecting O&M versus reported interest costs and debt levels (which do make a difference in financial targets). In regard to information belonging to third parties, the requested information for the response to PUB/MFR-20 isn't Minnesota Power's info, it's Manitoba Hydro's forecast of financial impacts – as a result MIPUG does not consider this information to be within the scope of the letter from Minnesota Power requesting that their information be maintained confidential (App G Sch A). The projected costs with respect to this project have been disclosed and discussed on a recurring basis. However, based on information on the record it appears the latest budget increases with regard to this project are now considered confidential. It is difficult to understand why the



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information has suddenly attracted confidentiality and why meaningful information which is relevant to the GRA can't be shared with parties.

Appendix I – Boston Consulting Group

MIPUG has been unable to review each of the redactions in the 600+ pages of Boston Consulting Power Point presentations (Attachment to PUB-MFR-72). In one specific example, MIPUG notes that MH has redacted the cost of the report and rates paid to Boston Consulting. Ratepayers bear 100% of the cost for this report, and should be entitled to receive information on the cost and rates. This type of information should not be redacted.

MIPUG also notes that the scope of the Boston Consulting Group report included “how sound was the original rationale for the project”. We note that MH has submitted to the PUB that this type of analysis by the PUB Independent Experts is not useful at this juncture as commitments have been made and decisions can only be made regarding how to proceed, not how to re-write history. However, it appears that the Manitoba Hydro Electric Board thought the question was sufficiently relevant and important to spend a considerable amount of money on Boston Consulting Group to review. There does not seem to be any principled reason to not produce the entire Boston Consulting Group report, except where derivative of confidentiality topics discussed previously in this submission. Any alleged CSI can be dealt with in a file “B” approach. The parties should at least have the opportunity to review it on that basis to be in a position to make a reasonable assessment and submission on whether the limited portions really qualify for the extreme exception of a confidentiality agreement and corresponding in camera evidence session.

We thank the PUB for giving us the opportunity to comment on MH's September 7, 2017 and September 21, 2017 CSI motions.

Yours truly,

THOMPSON DORFMAN SWEATMAN LLP

Per: *Antoine F. Hacault*

Antoine F. Hacault*

AFH/ab

cc: Bob Peters, Board Counsel
Dayna Steinfeld, Board of Counsel
Intervenor of Record

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