

**Manitoba Hydro 2017-18 & 2018-19 General Rate Application**

**Written Submissions**

**Assembly of Manitoba Chiefs**

Manitoba First Nations are in a unique position with respect to Manitoba Hydro's Application. Hydro's infrastructure sits on their traditional and ancestral territories and has deeply affected their livelihoods, but the bulk of the economic benefits of this infrastructure has not flowed to them. While the Treaties were meant to set up relationships for sharing the land, that promise has not been kept. Instead, a disproportionate share of First Nations people in Manitoba are low-income. The rate increases sought by Hydro will hit Manitoba First Nations especially hard and exacerbate existing inequalities.

Although Hydro rates are not the only issues facing First Nations in Manitoba, they are a significant part of the cost of living on reserve. Concomitantly, the decision of the Board cannot rectify every inequality between First Nations and other communities in Manitoba, but it can make a difference within the area of its jurisdiction, which is the regulation of Hydro's rates and services to First Nations. To that end, the Assembly of Manitoba Chiefs ("AMC") will take the following positions in these submissions:

1. AMC takes no position on Hydro's revenue requirement, but submits that Hydro's needs must be balanced against the needs of low-income ratepayers.
2. The Board should order Hydro to implement bill affordability measures immediately that offer discounts to residential customers in on-reserve First Nations communities.

3. The Board should order Hydro to design a bill affordability program and report back to the Board for approval of this program within a year. AMC is willing to assist Hydro in this process if provided with capacity funding.
4. The Board should order Hydro to improve its collection of data on reserve. AMC is also willing to assist Hydro in this process if provided with capacity funding.

Manitoba's Legislature has recently sought to set the Province on "the Path to Reconciliation"<sup>1</sup>. As the Board considers our submissions and those of the other parties, we urge the Board to keep this goal of reconciliation in mind.

## **HYDRO'S APPLICATION FOR A RATE INCREASE**

In the present application, Hydro is asking to confirm the 3.36% interim rate increase effective August 1, 2017, and for a further 7.9% rate increase effective April 1, 2018.<sup>2</sup> Hydro projects that it will be asking for 7.9% rate increases through 2023-24.<sup>3</sup> Cumulatively this will represent a 40.5% increase over 2016 rates by 2024.<sup>4</sup>

Based on Hydro's projections, this rate increase will lead to 15.2% of Manitoba households spending 6% or more of their income on energy by 2024.<sup>5</sup> In the same

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<sup>1</sup> *The Path to Reconciliation Act*, CCSM c R90.5

<sup>2</sup> MH-64, p24.

<sup>3</sup> *Ibid.*

<sup>4</sup> AMC/MH II-23-ac, p4 of 16.

<sup>5</sup> MH-98, p2 of 7.

year, 60.5% of households at LICO-125 (at 125% of the low-income cut off) will be spending 6% or more of their income on energy.<sup>6</sup> In other words, by 2024, about one in six households in Manitoba will be energy poor, and six in ten low-income households in Manitoba will be energy poor.

Even if Hydro's application for an increase were only partially granted, the consequences remain serious. Hydro has modelled a scenario where the increases are more gradual but must be carried out over a longer duration. Again, based on Hydro's own calculations, if Hydro were granted 4.14% increases from 2018 through 2033, one in nine households in Manitoba would be energy poor by 2024, but the figure would rise to one in eight by 2032.<sup>7</sup>

Additionally, Hydro's modelling of these energy poverty impacts is based on a 3% annual income growth for low income households. Dr Gregory Mason, who performed this modelling on behalf of Hydro, conceded that this assumption is likely optimistic, and therefore, that the real rates of energy poverty are likely to be even higher than forecast.<sup>8</sup>

Dr Simpson described a phenomenon that the social science literature has described as the "energy poverty trap". He described it as follows:

as energy prices begin to rise and it eats a bigger and bigger portion of the budget, individuals who are at or near energy poverty will be less and less able

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<sup>6</sup> MH-98, p3 of 7.

<sup>7</sup> MH-98, p5-6 of 7.

<sup>8</sup> Cross-examination of Cost of Service Panel, Transcript, Dec 20, p2723.

to have any money savings to use to weatherize or improve the energy efficiency of their homes in order to realize savings down the line [...].<sup>9</sup>

Energy poverty can be a trap because high energy costs saddle households with costs so high that they are rendered unable to take the actions necessary to avoid high energy consumption. This kind of trap could be a consequence of the rate increases Hydro is proposing. The higher the rate, the more people will get caught in this trap, and the harder it will be for them to get out.

This is a situation which Hydro itself recognizes as serious. The CEO of Hydro, Mr Kelvin Shepherd, has himself recognized that the rate increases asked for in this application are “unprecedented”.<sup>10</sup> Mr Shepherd rightly recognized that there are “some customers that will have a difficult time affording any rate increase”<sup>11</sup>. He also recognized that the “higher rates will have a bigger impact on First Nations communities than many other communities”<sup>12</sup>. Mr Shepherd commendably offered his “personal commitment as the CEO that we'll make it a priority to move forward” with solutions to energy poverty.<sup>13</sup>

In AMC's submission, the Board must balance Hydro's financial needs with the impact that the proposed rate increases will have on ratepayers, especially low-income ratepayers and ratepayers on reserve. If part of the justification for Hydro's increased revenue requirement is to reduce Hydro's financial risk profile, this reduced risk must

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<sup>9</sup> CC-21, p7.

<sup>10</sup> Transcript, Dec 5, p570, line 23.

<sup>11</sup> Transcript, Dec 5, p515, lines 1-2.

<sup>12</sup> Transcript, Dec 5, p573, lines 1-3.

<sup>13</sup> Cross-examination of Mr Shepherd, Dec 5, p587.

be balanced against the certainty that increased rates will cause more hardship for a significant number of households in Manitoba.

In a cold climate where many residents – especially those living in northern and isolated areas of the Province, have no alternative to electricity for their heating needs, we urge the Board to bear in mind that the only available option for many people is to turn down the heat in order to make ends meet, a choice that Dr Simpson, witness for the Consumer’s Coalition, characterized as a “very difficult and uncomfortable energy decision”<sup>14</sup>.

## **IMPACT OF RATE INCREASE ON FIRST NATIONS**

As serious as the impacts of Hydro’s Application are on Manitoba ratepayers generally, they are even more serious for on-reserve customers, for a number of systemic reasons. In assessing the impact of the proposed rate increases on First Nations, several contextual factors must be borne in mind. First, for a number of reasons, infrastructure serving First Nations is not as well developed as the infrastructure serving other communities in Manitoba. As well, the Province of Manitoba has interpreted First Nation - Crown Treaties in a way that denies First Nations economic benefit derived from traditional lands, and perpetuates poverty.<sup>15</sup>

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<sup>14</sup> CC-21, p7; transcript, Jan 15, p4687-4688.

<sup>15</sup> AMC Undertaking #69.

According to census data, 96% of residents in First Nations communities live below the poverty line, with a median annual income of \$11,915.<sup>16</sup> Reserves in Manitoba had the highest rates of child poverty in Canada, at 76%.<sup>17</sup>

## **Impact of Infrastructure on Reserve**

First Nations communities are especially vulnerable to a rate increase not only because of poverty, but because of infrastructure. Housing infrastructure in reserve communities has suffered from years of chronic underfunding. Hydro's CEO, Mr Shepherd, himself described the housing conditions of many of the First Nations he had visited as "abysmal"<sup>18</sup>.

Mr Shepherd's observations are confirmed by the report of the Standing Senate Committee on Aboriginal Peoples from June 2015, which described "severe housing shortages and overcrowding; poorly constructed housing that is in serious disrepair; and barriers which First Nations members and communities confront as they try to find innovative housing solutions to meet their housing needs."<sup>19</sup> The Committee found that the cost of meeting the immediate infrastructure needs on reserve in 2013 was \$8.2 billion, a figure expected to increase to \$9.7 billion by 2018.<sup>20</sup> While these are national figures, there is no indication that the infrastructure deficit in reserve communities in Manitoba are somehow better off. The Senate Committee noted the general consensus

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<sup>16</sup> Evidence of Phil Raphals, AMC-7-1, p18.

<sup>17</sup> Evidence of Phil Raphals, AMC-7-1, p19.

<sup>18</sup> Transcript, Dec 5, p562, line 11.

<sup>19</sup> AMC-13, p1.

<sup>20</sup> AMC-13, p6.

“that federal funding allocations are inadequate to properly manage and maintain housing and infrastructure on reserve.”<sup>21</sup> It also noted that the federal funding formula taking into account the increased construction costs for remote and isolated communities is “not reflective of the needs of these communities, and that the amount allocated for the remoteness factor ‘must be greatly increased’”.<sup>22</sup> Moreover, even if significant federal funding were to flow to immediately begin to rectify this infrastructure shortfall, it is of such a scale that it would take years to improve the housing infrastructure in First Nations communities, long beyond the time horizon of the current rate increases.<sup>23</sup> As the Senate Committee noted, “[t]he majority of witnesses that appeared before the committee stated that it will be almost impossible to address the housing and infrastructure deficit with federal funding alone.”<sup>24</sup>

Moreover, building code does not apply to on-reserve housing the same way as it does to off-reserve construction – if it does at all. Mr Shepherd acknowledged that he had been told that neither federal nor provincial building code applies on reserve.<sup>25</sup> Hydro’s witness, Ms Morrison, noted that housing and renovations funded through the Canada Mortgage and Housing Corporation may now need to comply with the federal code, but that other on-reserve housing would not need to comply in the same way.<sup>26</sup>

As the Standing Senate Committee on Aboriginal Affairs found,

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<sup>21</sup> AMC-13, p12.

<sup>22</sup> AMC-13, p25.

<sup>23</sup> Cross-examination of Dr Simpson, January 15, p4700.

<sup>24</sup> AMC-13, p11.

<sup>25</sup> Transcript, Dec 5, p573, lines 17-19.

<sup>26</sup> Transcript, Dec 20, p2673, lines 3-22.



While building codes are in place and systematically enforced throughout Canada, the committee has heard that this is not the case in many First Nation communities. The absence of enforceable building codes on reserve has resulted in housing that deteriorates rapidly as well as unsafe living conditions for some people who live in First Nations communities. Building codes were not applied when much of the existing housing stock on reserve was built, which has contributed to the low quality of housing on reserve – this problem persists today.<sup>27</sup>

A number of witnesses agreed that low quality of construction would mean that residents would need to use more energy to maintain heat in their houses.<sup>28</sup> Dr Simpson agreed that housing stock on reserve “will generally be poorer than the rest of the population”<sup>29</sup>. This means these residents receive higher bills, and will also disproportionately experience the hardship of a rate increase.

## **Impact of Consumption on Reserve**

All of the evidence in the record suggests that on-reserve residential customers had higher consumption than Manitoba Hydro’s other residential customers. As Mr Barnlund from Hydro’s Cost of Service panel admitted, as a group, on-reserve customers use more power and pay more for it.<sup>30</sup> Where the evidence differed was regarding how much higher it is. In Mr Raphals’ evidence, he noted that on-reserve

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<sup>27</sup> AMC-13, p20.

<sup>28</sup> Cross-examination of Mr Shepherd, transcript, Dec 5, p574; AMC-14, Presentation of Mr Raphals, p18; Cross-examination of Mr Chernick, transcript, Jan 9, p3669.

<sup>29</sup> Cross-examination of Dr Simpson, Transcript, Jan 15, p4695.

<sup>30</sup> Cross-examination of the Cost of Service Panel, transcript, Dec 20, p2694-2695.

residential consumption is higher than consumption in Manitoba Hydro's other residential customers, across all income categories, by between 23% to 29%.<sup>31</sup> He also noted that the consumption per square foot of an on reserve home was between 24% to 47% higher than an electrically heated home in a non-reserve community.<sup>32</sup> This data is derived from the 2014 Residential Energy Use Survey ("REUS") that Hydro conducted. Hydro noted that given that they had only received responses from 35 First Nations respondents, that the sample size may not be sufficient from which to draw conclusions.<sup>33</sup>

Nonetheless, the differences between on-reserve and off-reserve consumption observable in the 2014 REUS data may not be so far off the mark. Based on Hydro's billing data, in comparing the average on-reserve electric space heating ("ESH") home with the average off-reserve ESH home, the average on-reserve home consumes 29.4% more than the average off-reserve home.<sup>34</sup>

Subsequently, Hydro, in response to a request from the Consumer's Coalition, undertook to compare the average consumption in electrically heated single detached homes on reserve versus electrically heated single detached homes off reserve.<sup>35</sup> Hydro's response indicated that the average on-reserve detached home consumed 13.1% more than their off-reserve counterpart.

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<sup>31</sup> Evidence of Phil Raphals, AMC-7-1, p25.

<sup>32</sup> Evidence of Phil Raphals, AMC-7-1, p25-26.

<sup>33</sup> AMC/MH I-23, p2 of 2.

<sup>34</sup> Presentation of Phil Raphals, AMC-14, p18, analyzing data from AMC/MH II-1, p3, and COALITION/MH I-130b, p5.

<sup>35</sup> MH-108.

In his presentation, Mr Raphals noted that in considering the two pieces of evidence together, that the 29.4% figure and the 13.1% figure are reconcilable. The 29.4% is based on all ESH homes, while the 13.1% figure is based on only single detached homes. Mr Raphals opined, therefore, that roughly half of the difference between on-reserve and off-reserve ESH consumption can be attributed to housing types, and the remainder can be attributed to climate and housing stock quality.<sup>36</sup>

Yet it may be misleading to consider the comparison of single detached homes on reserve and single detached homes off reserve as an apples-to-apples comparison. Given that on-reserve poverty rates are much higher than off-reserve, it is important to recall that the category of off-reserve single detached homes will include some very large and wealthy homes in urban areas, while such homes are less likely to be found on reserve. As such, the 13.1% figure may be entirely compatible with the conclusion from the 2014 REUS that on a kWh per square foot basis, on reserve consumption could be 24% to 47% higher than off reserve.

Based on the above analysis, it is incontrovertible that on-reserve residential ratepayers consume more, as a class, than off-reserve residential ratepayers.

Were an on-reserve resident wanting to improve her home to make it more energy efficient, she would encounter barriers as ownership arrangements are not structured like off-reserve homes, where one either owns one's own home or rents from a landlord. As Dr Simpson confirmed, many or most on-reserve residents do not

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<sup>36</sup> Presentation of Phil Raphals, AMC-14, p18.

own their own homes, and must wait for the federal government to decide, as a matter of policy, to maintain and renovate their homes.<sup>37</sup> Responding to energy cost increases by renovating a home is not as simple as it may be for an off-reserve resident, and involves a policy decision of a government based on Ottawa. Dr Simpson further agreed that on-reserve ratepayers might have difficulty seeking meaningful assistance from the federal government to pay for renovations to reduce their energy consumption.

It is also salient that for on-reserve residents, switching to gas heating is almost non-existent as an option. Having such an option can make a big financial difference to ratepayers. As Mr Barnlund of Hydro's Cost of Service Panel recognized, heating costs for ESH customers are about double those of those customers who heat with gas.<sup>38</sup> Yet out of 63 First Nations in Manitoba, only 2 have gas service.<sup>39</sup> No northern First Nation has gas service. Even southern First Nations almost never have gas service. Even for the two First Nations communities who have gas service somewhere within their community boundaries, it appears that the preponderance of households are still using electric space heating.<sup>40</sup> It may be that the houses themselves were not built to be able to use gas heating, or that gas distribution service has not been built to reach individual households. As Hydro's Mr Barnlund conceded, even if you live in an area where gas is available does not mean that you get gas in your house.<sup>41</sup> Renovations

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<sup>37</sup> Cross-examination of Dr Simpson, Jan 15, p4693; AMC-13, p10.

<sup>38</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 19, p2423-2424.

<sup>39</sup> AMC/MH II-32, Att 1.

<sup>40</sup> Cross-examination of Dr Simpson, Transcript, Jan 15, p4701-4704.

<sup>41</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2444.

that make it possible for an existing structure without gas heat to be able to use gas heat may also be prohibitively expensive.<sup>42</sup> Dr Yatchew echoed these views by testifying to the “limited possibilities for energy substitution” in First Nations.<sup>43</sup>

In contrast, when considering the Province as a whole, 82.8% of residents live in an area where natural gas is available as a heating fuel.<sup>44</sup> The options for fuel switching that are available to off-reserve customers simply are not available to on-reserve customers.

### **Impact of DSM on Reserve**

In Hydro’s final submissions, its discussion of the bill affordability problem for First Nations communities focused almost exclusively on demand-side management (“DSM”) measures. It may be that Manitoba Hydro’s DSM programming has the potential to eventually bring the efficiency of on-reserve homes up to the standards of off-reserve homes. As Mr Raphals suggested in his report, Hydro’s DSM programming represents “a serious effort [...] to reach First Nations communities.”<sup>45</sup> However, it is not clear that existing DSM programs can substantially close the gap in consumption levels that exists between on-reserve and off-reserve communities, let alone do it in time to seriously mitigate the impact of the rate increases proposed by Hydro. The

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<sup>42</sup> Cross-examination of Dr Simpson, Transcript, Jan 15, p4703.

<sup>43</sup> Evidence of Dr. Yatchew, Transcript, Jan 12, p4432.

<sup>44</sup> PUB/MH I-125a-Attachments p17 of 250.

<sup>45</sup> AMC-7-1, p27.

centrepiece of Hydro's Power Smart program as it applies to on-reserve ratepayers is directed towards the installation of insulation.<sup>46</sup> However, only 3778 of 16,344 on-reserve homes are eligible for this program, meaning 77% of homes are simply not eligible.<sup>47</sup> According to Hydro's evidence, in many cases Hydro has deemed that these homes have sufficient insulation and therefore did not qualify.<sup>48</sup> Even so, improved insulation may not be sufficient to deal with the problem of lower housing quality on reserve. Although the Indigenous Power Smart program was launched in December 2014,<sup>49</sup> the consumption gap on-reserve has persisted into recent consumption data disclosed in this proceeding.

In contrast to the insulation-focused efforts of Indigenous Power Smart, Hydro also provides other energy-efficiency programming for new homes on reserve, which includes, in addition to insulation, various airtightness measures, and energy efficient windows and frames.<sup>50</sup> Hydro conceded under cross-examination that it may not be economical to offer such measures to existing homes and that no measures beyond insulation were indeed being offered to existing homes.<sup>51</sup> Moreover, as Dr Mason's presentation pointed out, "[r]etrofitting homes is a good option that Manitoba Hydro actively offers. But... this requires that houses have sufficient structural integrity"<sup>52</sup>. In our submission, Hydro's current DSM programming is unlikely to make

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<sup>46</sup> MH-88, p35.

<sup>47</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2662.

<sup>48</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2664.

<sup>49</sup> MH-88, p36.

<sup>50</sup> AMC/MH II-8(i).

<sup>51</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2669.

<sup>52</sup> Presentation of Cost of Service Panel, MH-88, p61.

major progress in closing the gap in consumption levels between on-reserve and off-reserve homes.

Taken together, the evidence shows that on-reserve residential ratepayers have systemically distinct features from off-reserve residential ratepayers. Incomes are much lower and poverty much higher. The building code regime on reserve is weaker than that off-reserve, resulting in housing stock that is systematically of lower quality. This in turn results in higher energy consumption, a fact that has been quantified through Hydro's own billing data. Moreover, as a class, on-reserve residents at this time have almost non-existent recourse to alternative sources of heating. As well, DSM efforts are unlikely to significantly impact the differences between on-reserve residents and off-reserve residents in the foreseeable future. We are therefore likely to see persistently different consumption patterns on-reserve throughout the period when the rates sought in the present Application will be valid.

## **HYDRO'S PRESENCE ON INDIGENOUS LANDS**

Another of the contextual factors that this Board must bear in mind is that First Nations customers are also in a unique relationship with Manitoba Hydro. As Mr Shepherd conceded, Hydro's infrastructure is situated on the ancestral and traditional lands and waters of First Nations across Manitoba.<sup>53</sup> It is AMC's understanding that the preponderance of Hydro's infrastructure is on First Nations lands without their

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<sup>53</sup> Cross examination of Mr Shepherd, Dec 5, p 554.

consent.<sup>54</sup> Mr Shepherd also acknowledged that Hydro's infrastructure has negatively impacted the exercise of constitutionally-guaranteed Treaty rights.<sup>55</sup> Mr Shepherd also conceded that besides the Keeyask and Wuskwatim projects, Hydro had not obtained the consent of the communities, through a vote, in whose territories the infrastructure sits.<sup>56</sup>

At the same time, it is not disputed that Manitoba Hydro's infrastructure enables export sales that lower electricity prices for all Manitoba ratepayers.<sup>57</sup>

The negative impacts of Hydro's infrastructure on Treaty rights is not an issue that the Board can rectify in this proceeding. However, insofar as those impacts are being slowly addressed in other forums, it is AMC's submission that it is within the Board's jurisdiction to consider the fact that those impacts remain unaddressed as a contextual factor in the determination of rates for on-reserve customers.

## **ORDERING A BILL AFFORDABILITY PROGRAM FOR ON-RESERVE RESIDENTS**

We will argue that the characteristics of on-reserve residents support a finding that the Board has the jurisdiction to order a bill affordability program targeted at them, and that the Board should exercise its jurisdiction to do so forthwith.

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<sup>54</sup> AMC Undertaking #69.

<sup>55</sup> Cross examination of Mr Shepherd, Dec 5, p 555.

<sup>56</sup> Cross examination of Mr Shepherd, Dec 5, p 560.

<sup>57</sup> Cross examination of Mr Shepherd, Dec 5, p 554.



Some of the parties have raised concerns about administrative hurdles to implementing a bill affordability program, but these concerns by and large do not apply to on-reserve customers. Similarly, some concerns were voiced about whether a Board-ordered bill affordability program would be duplicative of benefits conferred under social assistance programs. In our submission, social assistance recipients could be excluded from the bill affordability programming initially while the Board supervised a process to determine the best way to integrate them into the bill affordability program.

## **Jurisdiction of the Board**

In AMC's submission, the Board has the jurisdiction to order a bill affordability program, including one that provides for discounted rates for on-reserve customers.

The Board has twice decided, in Orders 116/08 and 73/15, that it has the jurisdiction to order the implementation of a bill affordability program. There is no reason for the Board in the current application to depart from this view. No material change has occurred in either the statutory or jurisprudential environment that would justify departing from the position set out in previous decisions of the Board.

As the Board noted in Order 73/15, s.26(4) (now s.25(4)) of *The Crown Corporations Governance and Accountability Act* ("CCGAA") specifically authorizes the Board to consider "any compelling policy considerations that the Board considers

relevant to the matter.”<sup>58</sup> On this approach, “affordability is a factor to consider when setting just and reasonable rates”<sup>59</sup>.

It must be noted that the Board made these comments in a context where Hydro was applying for a 3.95% rate increase,<sup>60</sup> and that the affordability considerations identified by the Board in Order 73/15 apply *a fortiori* here, where a 7.9% increase is on the table, and further increases of that level are explicitly contemplated for a further 5 years.

Hydro, in its final submissions, urged this Board to depart from the position that it has settled on since Order 116/08. In AMC’s submission, Hydro’s argument should be rejected. Hydro correctly notes that two court decisions have dealt with the jurisdiction of an energy utility regulator to order low-income rates. In the first decision, *Dalhousie Legal Aid Service v Nova Scotia Power*, a 2006 decision of the Nova Scotia Court of Appeal, the Court found that the Nova Scotia regulator did not have this jurisdiction.<sup>61</sup> The second decision, *Advocacy Centre for Tenants-Ontario v Ontario Energy Board*, a 2008 decision of the Ontario Divisional Court, the Court explicitly considered the approach in the Nova Scotia case, and rejected it.<sup>62</sup> Although each case was analyzing the enabling statutes of the utilities regulator for each respective

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<sup>58</sup> Order 73/15, p29 of 108, citing *The Crown Corporations Public Review and Accountability Act*, CSSM c C336 (now *The Crown Corporations Governance and Accountability Act*).

<sup>59</sup> Order 73/15, p29 of 108.

<sup>60</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 19, p2487).

<sup>61</sup> *Dalhousie Legal Aid Service v Nova Scotia Power*, 2006 NSCA 74 (“*Dalhousie*”).

<sup>62</sup> *Advocacy Centre for Tenants-Ontario v Ontario Energy Board*, 2008 CanLII 23487 (Ont Sup Ct J – Div Ct).

province, and not Manitoba law, the logic of each decision may be of some use to this Board in interpreting Manitoba law.

In *Dalhousie*, the Nova Scotia Court of Appeal noted that the Nova Scotia statute requires that “rates shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate”.<sup>63</sup> In *Advocacy Centre*, the Divisional Court of Ontario noted that the enabling statute of the Ontario Energy Board provides for much broader powers. The Ontario board is authorized to use “any method or technique it considers appropriate” to fix “just and reasonable rates”.<sup>64</sup> The Divisional Court concluded that the Ontario Energy Board did indeed have jurisdiction to set a low-income rate.

In AMC’s submission, the Manitoba statutory framework is not nearly as restrictive as the Nova Scotia framework, and similar in nature to Ontario’s. The CCGAA, at s.25(4), empowers this Board in a rate-setting context to take into account “any compelling policy considerations that the board considers relevant to the matter”, and “any other factors that the Board considers relevant to the matter”<sup>65</sup>. The only potentially relevant restriction to these broad grants of authority can be found at s.39 of the *Manitoba Hydro Act*. Section 39(2.1) of the *Manitoba Hydro Act* sets out that:

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<sup>63</sup> *Dalhousie*, *supra* note 60, para 21.

<sup>64</sup> *Advocacy Centre*, *supra* note 61, para 53.

<sup>65</sup> CCGAA, *supra* note 57, s.25(4).

The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province.<sup>66</sup>

However, s.39(2.2) provides an interpretive framework for s.39(2.1). Section 39(2.2)(b) of the *Manitoba Hydro Act* establishes that:

(b) customers shall not be classified based solely on the region of the province in which they are located or on the population density of the area in which they are located.<sup>67</sup>

While the classification of customers (i.e. the formulation of a class of customers) based solely on geography is prohibited, the classification of customers that accounts for other salient characteristics, such as income, is not prohibited. As such, the classification of customers as low-income is not prohibited by s.39(2.2).

In AMC's submission, the Board's jurisdiction extends to ordering a bill affordability program targeted at on-reserve ratepayers. We recognize that s.39(2.2)(b) prohibits the classification of customers solely based on the region of the province where they are located. Although First Nations reserves are geographical units, a rate targeted to First Nations reserves would not be a classification of customers "based solely on the region of the province in which they are located." As discussed above, many more factors distinguish on-reserve residents as electricity ratepayers than geographical location. The jurisdictional distinction of being an on-reserve community means that building codes apply differently from other communities in Manitoba, or

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<sup>66</sup> *Manitoba Hydro Act*, CSSM c H190, s.39(2.1).

<sup>67</sup> *Ibid.*, s.39(2.2).

perhaps not at all. The funding mechanism for on-reserve infrastructure is entirely different from other communities in the Province. Energy consumption patterns are also different for on-reserve communities versus off-reserve communities. Gas options are not nearly as available as for non-reserve residents. The history of First Nations communities and the impact of Hydro infrastructure on their traditional harvesting is also entirely different. Incomes are much lower and poverty is much higher.

By analogy, one might consider the example of industrial customers. It may be true that all of the industrial customers are located within industrial zones. Being in an industrial zone is a geographical fact, but there are many other features which distinguish the consumption patterns of industrial users from residential or general service ratepayers. The fact that they might all be found in an industrial zone does not make the industrial rate a rate established “based solely on the region of the province in which they are located”. The prohibition on geographical classifications surely does not prohibit the establishment of the industrial customer class.

A rate discount targeted toward on-reserve residential ratepayers would be justified on any number of grounds besides geographical location. It does not classify a customer based solely on the region in which they are located. Therefore it is not prohibited by s.39(2.2)(b) of the *Manitoba Hydro Act*.

## **Charter Values**

In AMC’s submission, the interpretation of the Board’s enabling legislation clearly permits it to establish both low-income rates and on-reserve rates. However,

should the Board feel that additional interpretive aids are needed to properly establish the scope of the Board's jurisdiction, AMC submits that Charter values fully support the authority of the Board to do so.

#### **A. The Board's decision must be consistent with Charter values**

The Public Utilities Board, like all administrative decision-makers, must act consistently with the values that underlie the grant of its statutory discretion. This includes the values enshrined in the *Charter of Rights and Freedoms*.<sup>68</sup>

A decision is consistent with *Charter* values where it reflects a proportionate balance between the statutory objectives pursuant to which the decision-maker acts and the *Charter* values engaged by their decision – that is, where the *Charter* values at stake are protected as fully as possible in light of the statutory objectives.<sup>69</sup>

The Board's statutory objectives in this case are set out in *The Crown Corporations Governance and Accountability Act*, CCSM c336. Section 25(4) sets out a list of relevant considerations that may guide the Board in making a decision in relation to a rate application:

- (i) the amount required to provide sufficient funds to cover operating, maintenance and administration expenses of the corporation,

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<sup>68</sup> *Doré v Barreau du Quebec*, 2012 SCC 12, para 24, 35; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999] 2 S.C.R. 81 at para 65

<sup>69</sup> *Doré v Barreau du Quebec*, *ibid.*, paras 55-56; *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613 at para 39.

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs,

(vii) any other payments that are required to be made out of the revenue of the corporation,

(viii) any compelling policy considerations that the board considers relevant to the matter, and

(ix) any other factors that the Board considers relevant to the matter;

This provision directs the Public Utilities Board towards certain objectives – ensuring the financial solvency of the Hydro Corporation; maintenance of Hydro infrastructure; and that obligations of Hydro to its employees can be fulfilled. It also

specifically empowers the Board to consider other compelling factors. These are the objectives pursuant to which this Board may decide whether to approve a rate application, and with which the *Charter* values engaged by its decision must be proportionality balanced.

The primary *Charter* value engaged by the Board's decision is the value of equality, as reflected in s. 15(1) of the *Charter*.

Equality as protected under s. 15(1) of the *Charter* is concerned primarily with groups identified by the grounds enumerated in the *Charter*, like race or sex, or analogous grounds, like sexual orientation.<sup>70</sup> As the Supreme Court of Canada explained in *Corbiere v Canada*, these are characteristics that “we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.”<sup>71</sup> First Nations living on reserve are protected under s. 15(1) on the basis of their race and ethnic origin and likely also of their residence on reserve.<sup>72</sup>

The root of equality values under the *Charter* is our shared “awareness that certain groups in society have been historically discriminated against and that the perpetuation of such discrimination should be curtailed.”<sup>73</sup> Policies, practices and procedures will run afoul of *Charter* protection of equality if they serve to “freeze” a

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<sup>70</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at p 182

<sup>71</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13

<sup>72</sup> *Corbiere*, *supra*, paras 6, 10.

<sup>73</sup> *Quebec v. A*, 2013 SCC 5 at para 332, per Abella J (for the majority on s.15)



discriminatory status quo or widen “the gap between a historically disadvantaged group and the rest of society.”<sup>74</sup>

Treating everyone the same is not enough to realize the animating norms of s. 15(1) of the *Charter*:

It must be recognized at once [...] that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.<sup>75</sup>

In some cases, “discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public.”<sup>76</sup>

Whether a given policy or decision undermines equality is therefore a contextual question, focusing on the real outcomes of the policy or decision on members of a protected group, in light of the social and economic context in which it unfolds.<sup>77</sup>

The key question before the Board is whether the rate proposal exacerbates the historical disadvantages endured by First Nations people living on reserve in Manitoba.

First Nations in Manitoba, particularly those living on reserve, are a historically disadvantaged group, especially relative to non-Indigenous people living in Manitoba.

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<sup>74</sup> *Ibid* at para 332.

<sup>75</sup> *Andrews v Law Society of British Columbia*, *supra* at p 164

<sup>76</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 78; *First Nations Child and Family Caring Society v Canada*, 2016 CHRT 2 at para 403.

<sup>77</sup> *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras 17,19, 21

As we noted above, 96% of residents in First Nations communities live below the poverty line, with a median annual income of \$11,915.<sup>78</sup> They are more likely to live in overcrowded homes and homes in need of major repair, the result of chronic underfunding.<sup>79</sup> Mr. Shepherd, Hydro's CEO, described the housing conditions of many of the First Nations he had visited as "abysmal."<sup>80</sup>

Most significantly, however, First Nations people living on reserve in Manitoba are historically disadvantaged in relation to the provision of and access to Hydro services. As we have explained above:

- a. Hydro's gas lines have been extended to reach only 2 of the 63 First Nations in Manitoba.<sup>81</sup> This limited access to infrastructure cannot be explained by the remoteness of First Nations since even southern and more accessible First Nations have been excluded from switching to alternative forms of energy that could help them reduce their energy costs. This is in contrast 82.8% of Manitoba households that have access to natural gas as an energy source.
- b. The costs of providing hydro services already inequitably fall on First Nations communities. Hydro's infrastructure is situated on the ancestral and traditional lands and waters of First Nations across Manitoba.<sup>82</sup> It has

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<sup>78</sup> Evidence of Phil Raphals, AMC-7-1, p18

<sup>79</sup> AMC-13, p1.

<sup>80</sup> Transcript, Dec 5, p562, line 11

<sup>81</sup> AMC/MH II-32, Att 1.

<sup>82</sup> Cross examination of Mr Shepherd, Dec 5, p 554.

been placed there largely without their input or consent.<sup>83</sup> This has negatively impacted First Nations people's ability to exercise their treaty-protected hunting and gathering rights<sup>84</sup>, and as a result, reduced their ability to earn a livelihood. In a very real sense, members of Manitoba First Nations have already paid, and paid dearly, for their electricity.

Although it is neutral on its face, the rate structure proposed by Manitoba Hydro would exacerbate this historic disadvantage. Living in a home that is in need of major repair means consuming more electricity. A number of witnesses in the hearing agreed that the low quality of construction on reserve means that residents would need to use more energy to maintain heat in their houses.<sup>85</sup> Mr Barnlund from Hydro's Cost of Service panel admitted that, as a group, on-reserve customers use more power and pay more for it.<sup>86</sup> Hydro's CEO, Mr. Shepherd, acknowledged that "higher rates will have a bigger impact on First Nations communities than many other communities".<sup>87</sup> Although limited efforts are in place to provide insulation and other energy efficiency innovations on reserve, these programs do not compensate for the significant issues with the existing housing stock on reserve that create higher energy needs.<sup>88</sup> We have outlined this evidence in detail above. As a result, First Nations households on reserve

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<sup>83</sup> Cross examination of Mr Shepherd, Dec 5, p 560.

<sup>84</sup> Cross examination of Mr Shepherd, Dec 5, p 555.

<sup>85</sup> Cross-examination of Mr Shepherd, transcript, Dec 5, p574; AMC-14, Presentation of Mr Raphals, p18; Cross-examination of Mr Chernick, transcript, Jan 9, p3669.

<sup>86</sup> Cross-examination of the Cost of Service Panel, transcript, Dec 20, p2694-2695

<sup>87</sup> Shepherd -Transcript, Dec 5, p573, lines 1-3.

<sup>88</sup> AMC/MH II-8(i); Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2669.

will consume between 13% and 29% more than those living off-reserve, and they will pay the price for that difference.<sup>89</sup>

In addition, as noted above, First Nations have fewer options to reduce their usage of electricity because they are not connected to the gas lines that Hydro has established.<sup>90</sup> The result is that, unlike other rate payers, they are held hostage to a rate increase that many will not be able to afford.

Hydro's high rates proposal therefore has the effect of widening the gap between First Nations living on reserve and other residents of Manitoba. First Nations people living on reserve have no choice but to pay more than others in Manitoba, exacerbating their historic and ongoing socio-economic disadvantage and their particular disadvantage in relation to Hydro services. This is discriminatory, and contrary to the values of equality protected by the *Charter*.

The Board is obligated to protect equality values as fully as possible in light of its statutory objectives, including maintaining the financial solvency and well-being of the corporation, enabling Hydro to maintain its infrastructure, and ensuring Hydro can fulfill its obligations to employees. The proposal Hydro has put to this Board, while facially neutral in the sense that it offers the same rates to all ratepayers, makes no effort to accommodate the particular disadvantage of First Nations reserve communities in order to avoid exacerbating their disadvantage. Hydro in fact admits it

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<sup>89</sup> Presentation of Mr Raphals, AMC-14, p18.

<sup>90</sup> AMC/MH II-32, Att 1.

will lead to First Nations people living on reserve paying more for their Hydro power than other rate payers.<sup>91</sup>

There may be a range of proposals that Hydro could put forth that would effect a more proportionate balance between equality values and its statutory objectives – different strategies to accommodate the real social and economic context facing on reserve residents in Manitoba through an equitable and just rate structure. In our submissions below, we will detail a rate design that, in our view, promotes the Charter value of equality. The rate design that we urge upon the Board suggests that the lost revenues should be recovered from other ratepayers, either only from the non-First Nation residential class, or from all classes. Any risk to Hydro’s financial solvency from our proposal is minimal, and is well outweighed by the benefits to the promotion of equality that our proposal would engender.

However, Hydro’s own proposal, which is utterly indifferent to equality values, must be rejected by the Board as it does not reflect such a proportionate balance.

**B. Equality and fairness are compelling policy considerations under s. 25(4)**

Equality values are also part of the Board’s statutory discretion and mandate. Under s. 25(4) of *The Crown Corporations Governance and Accountability Act*, CCSM c C336, in review rates for Hydro services, the Board may take into consideration,

- (viii) any compelling policy considerations that the board considers relevant to the matter, and

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<sup>91</sup> Transcript, Dec 5, p573, lines 1-3.

(ix) any other factors that the Board considers relevant to the matter;

The equality and fairness considerations, as set out above, are compelling and relevant policy considerations that the Board should consider when it decides whether to approve a rate application, distinct from their role as constitutional limits on the exercise of the Board's discretion.

## **JUSTIFICATION FOR AN ORDER FOR AN AFFORDABILITY PROGRAM**

In Order 73/15, its decision on Hydro's last General Rate Application ("GRA"), this Board recognized that "higher electricity rates will have an impact on lower income ratepayers", and noted that there is a particular concern "with respect to all-electric customers, many of whom live in areas in which natural gas is not available as an alternative heating source."<sup>92</sup> Although the Board noted that it had already concluded that it had the jurisdiction to order such a program in Order 116/08, the Board stopped short of ordering Hydro to implement a bill affordability program. Instead, it asked the parties to participate in a collaborative process to generate options to bring back to the Board. The Board noted that "there may well be better solutions that have not been

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<sup>92</sup> Order 73/15, p27 of 108.

proposed to date. Furthermore, the optimal solution may well involve a portfolio of measures rather than a single measure.”<sup>93</sup>

This current proceeding will be at least the third GRA in which a bill affordability program has been brought before the Board. Additionally, the rate increase contemplated in this proceeding is significantly more serious than those contemplated in the proceedings that gave rise to Orders 116/08 and 73/15. As Mr Raphals pointed out in his presentation:

the solution of asking Manitoba Hydro to create another working group, to -- to do more studies, and we'll talk about it in two (2) years at the next GRA, I think is not the right answer. I'm afraid that that's essentially the formula for continuing to talk about it and -- and not implement it.<sup>94</sup>

In AMC's submission, the impact of proposed and projected rate increases on low-income customers is serious enough for the Board to take more proactive measures toward the implementation of a bill affordability program. As Mr Shepherd noted with respect to bill affordability programming, “I don't have a solution today, but I believe we do need to find one.”<sup>95</sup>

In considering what those more proactive measures might be, it is important to recall what issues are in dispute. There is no dispute that the proposed and projected

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<sup>93</sup> Order 73/15, p28 of 108.

<sup>94</sup> Transcript, Jan 25, p6631, lines 13-19.

<sup>95</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p586.

rate increases will have serious consequences for low-income people.<sup>96</sup> Additionally, there is no dispute that the proposed and projected rate increases will have a particular and disproportionate impact on First Nations communities.<sup>97</sup>

The cautions that the various witnesses have identified as hurdles to the immediate implementation of an affordability program are mainly administrative. For instance, there are concerns about properly setting the parameters of eligibility, eg by using income level, and concerns about how to administer the process by which a ratepayer would apply for the benefit.<sup>98</sup> There may be challenges with re-qualifying beneficiaries each year. Some concerns were expressed about the level of participation that one might be able to expect in the program, if ratepayers are expected to proactively make an application for it.<sup>99</sup>

None of those concerns apply to a benefit directed at on-reserve residential ratepayers. As a class, they are readily identifiable, and indeed already identified in Hydro's billing system. No application process would be required to implement the program.

In AMC's submission, the rate design proposed by Mr Chernick, witness for the Green Action Centre, with appropriate modifications to account for on-reserve

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<sup>96</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p515, p571.

<sup>97</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p572-573.

<sup>98</sup> See, eg, Hydro final submissions, p187 of 221; Direct examination of Dr Simpson, Transcript, Jan 15, p4683-4684; Evidence of the Cost of Service Panel, Transcript, Dec 19, p2335.

<sup>99</sup> Direct evidence of Mr Harper, Transcript, Jan 17, p5260.



consumption patterns, can be implemented for on-reserve customers immediately, and the Board should so order.

### Based on interim rates (PUB-GAC 1-4a)

	MH Interim	LICO- 125 All	Non-LICO ESH	LICO-125 ESH	Non-LICO IBR
<b>Basic Charge</b>	\$8.08	\$0	\$8.08	\$0	\$7.82
<b>First Block</b> c/kWh	8.196	4.196	4.196	4.196	7.930
<b>Remainder</b> c/kWh	8.196	8.196	8.196	8.196	8.352
<b>First Block kWh</b>					
<b>Summer</b>	—	500	—	500	500
<b>Spring</b>	—	500	150	650	500
<b>Fall</b>	—	500	250	750	500
<b>Winter</b>	—	500	500	1,000	500
<b>Recovery rate from:</b>					
Non-LICO residential (NLR)		\$0.00966			
All non-LICO, non-SEP		\$0.00246			
Non-discounted NLR kWh			\$0.00407		
Non-discounted non-LICO			\$0.00096		

Figure 1: Rate Design from Mr Chernick's presentation, GAC-17, p7

Specifically, AMC urges the Board to adopt, for on-reserve residential customers, the LICO-125 ESH rate that he proposes,<sup>100</sup> with two important modifications: first, that residential consumers in First Nations would automatically qualify, and second, that the discounted blocks be increased to take into account the higher consumption levels on reserve. It may be that how to implement the rate for LICO-125 customers off-reserve requires further study, but implementing it for all on-reserve residents poses no administrative hurdles. Thus, in AMC's submission, on-

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<sup>100</sup> GAC-17, p7.

reserve residential customers should be immediately eligible for a 4¢/kWh discount on the first block of consumption.

We note, parenthetically, that this is how the Indigenous Power Smart program operates already: unlike Hydro's DSM programs off-reserve, for which there is an application process in which one must prove one is low-income and has deficient insulation, an on-reserve customer is automatically qualified.<sup>101</sup>

In our submission, the most significant drawback of a rate targeted at LICO-125 customers is the difficulty of administration: it would depend on an application process that may require the submission of tax returns, which many low-income people do not file. The difficulties of administering this process should be considered in a subsequent engagement process for bill affordability, about which we will make further submissions below. However, there is no administrative difficulty with simply granting on-reserve ratepayers the discounted blocks for electric space heating right away.

As Mr Chernick indicated, the design of the first block is meant to capture basic levels of consumption for a household that is using electric space heating, where energy decisions are not being made.<sup>102</sup> Efficiency of the system is maintained as the customer still receives price signals on her marginal levels of consumption. As Mr Chernick conceded in cross-examination, because of the lower housing quality in First Nations reserves, it may require more energy to keep the residence reasonably

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<sup>101</sup> PUB/MH I-126a – Attachment.

<sup>102</sup> Cross-examination of Mr Chernick, Transcript, Jan 9, p3668.

heated.<sup>103</sup> For these customers, a larger set of discounted blocks could be justified.<sup>104</sup> According to Mr Chernick's calculations, a first block that takes this difference into account would yield 255 kWh in the spring, 425 kWh in the fall, and 845 kWh in the winter.<sup>105</sup> In AMC's submission, on-reserve residential customers should automatically qualify for the 500 kWh per month discount that Mr Chernick proposes for low-income customers. Therefore, AMC proposes that on-reserve customers be eligible for a discount of 4¢/kWh on 500 kWh per month in the summer, 755 kWh in the spring, 925 kWh in the fall, and 1345 kWh in the winter.

Based on those block sizes, the revenue lost as a result of this discount can be quantified as follows:

16344 on reserve residential customers

	Discounted kWh by season	3 months of discounted kWh	(first block with 4 cent discount)
Summer	500	1,500	
Spring	755	2,265	
Fall	925	2,775	
Winter	1,345	4,035	
		10,575	annual discounted kWh/customer
		172,837,800	annual discounted kWh for all on-reserve residential customers
		\$6,913,512	/yr of lost revenues

<sup>103</sup> Cross-examination of Mr Chernick, Transcript, Jan 9, p3675.

<sup>104</sup> Cross-examination of Mr Chernick, Transcript, Jan 9, p3677-3678.

<sup>105</sup> GAC Undertaking #39.

If the \$6,913,512 of lost revenue were borne by other customers, the impact on their rates can be roughly estimated as follows (with one scenario in which only the non-reserve residential customers bear the burden, and another in which all-non reserve customers bear the burden):

<b>Residential customers</b>	<b>All domestic customers</b>		<b>Source</b>
7181	21654	GWh total	Appendix 7.1, Table 3
431	431	GWh reserves	AMC/MH II-2
6750	21223	GWh excluding reserves	
\$1,024.22	\$325.76	\$/GWh	Lost revenue derived above= \$6,913,512
\$0.001024	\$0.000326	\$/kWh	
0.102	0.033	cents/kWh	

Thus, if the cost were borne by residential customers alone, the impact would be 0.102¢/kWh, or a 1.2% increase over the 8.196¢/kWh rate proposed for residential customers, or 76.5¢ on a monthly 750 kWh bill. If the cost were borne by all rate classes, it would only result in a 0.033¢/kWh impact, or a 0.4% increase over the 8.196¢/kWh rate, or 24.8¢ on a monthly 750 kWh bill. In our submission, the impact on other customers is small and is justified by the effect that the discount will have in lessening the impact of high hydro rates on the already high levels of poverty and the poor quality of housing on reserve.

Some concerns were raised about whether a bill discount targeted at on-reserve residential customers would be duplicative of the benefit that social assistance recipients on reserve receive. There is some evidence that Indigenous and Northern Affairs Canada (“INAC”) pays the Hydro bills of social assistance recipients living on reserve, and that some 32% of residential customers on First Nations benefitted from such an arrangement.<sup>106</sup> However, it was unclear whether social assistance actually covers people’s bills on top of the amount they receive for social assistance, or whether the amount used to pay Hydro is clawed back from the amount issued for social assistance.<sup>107</sup> **Hydro also did not have information on whether INAC would continue to fund this arrangement at the rates for which Hydro is seeking approval in this proceeding.**<sup>108</sup>

The arrangements for social assistance on reserve can be complex and different conditions may prevail in different communities. In our submission, such issues can be dealt with in the future engagement process for bill affordability. If the issue is of concern to the Board, social assistance recipients can simply be excluded for now from the discounted rate that is ordered, pending study by the engagement process for bill affordability. Whether an on-reserve residential customer has their bill paid by social assistance is data that is “readily available” to Hydro.<sup>109</sup> As well, Hydro’s Cost of Service panel gave evidence that Hydro works with band administrators to apply social

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<sup>106</sup> MH-97.

<sup>107</sup> Cross-examination of Cost of Service Panel, Dec 20, p2736-2737.

<sup>108</sup> Cross-examination of Cost of Service Panel, Dec 20, p2737.

<sup>109</sup> MH-97.

assistance payments to Hydro bills.<sup>110</sup> Identifying on-reserve customers receiving social assistance should pose no barrier.

If the bill is for a household in which some members receive social assistance and some do not, the discount can be applied only to the amounts that are not covered by social assistance. Again, such households, and the proportion of the bill that is funded by social assistance, seems readily available to Hydro.<sup>111</sup>

If social assistance recipients are excluded from the immediate benefit of the discount, the cost impact to other ratepayers will be even less significant than has been estimated.

With respect to social assistance, it is also important to recall the perverse consequences that arise as a result of the way the benefit is structured. Where a person's Hydro bill is paid for by social assistance, it will mean that should the recipient become employed, her Hydro bills will no longer be paid for. It can become unaffordable for a social recipient to take a job for this reason, and a social assistance recipient who takes a job may need to quit her job to go back in social assistance because she cannot afford to heat her home otherwise.<sup>112</sup> It is evident that the higher Hydro rates become, the greater the number of employed persons on reserve would find themselves in a situation where they must quit their jobs in order to make ends

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<sup>110</sup> Evidence of Cost of Service Panel, Dec 19, p2290-2291.

<sup>111</sup> MH-97.

<sup>112</sup> Opening Statement of MKO, Transcript Dec 4, p121-122; Cross-examination of Cost of Service Panel, Transcript, Dec 20, 2794-2795.

meet. This is a form of the energy poverty trap that Dr Simpson identified,<sup>113</sup> and one that will be made deeper and more intractable if Hydro's proposed rates are permitted to prevail on reserve.

The discounted block for on-reserve residents that AMC urges upon this Board would lessen the seriousness of this problem. By making Hydro rates lower, fewer people would be caught by this perverse incentive. Until more fundamental reforms to social assistance can be undertaken to avoid this incentive, the discounted block for Hydro rates, if implemented immediately, could avoid its ill effects.

## **FUTURE ENGAGEMENT PROCESSES FOR BILL AFFORDABILITY**

AMC submits that on-reserve residential customers are a readily identified class of customers who should benefit from an immediate bill affordability program. However, the bill affordability program should not stop there. The process should go on to deal with off-reserve First Nations people, the role of social assistance, and low-income people who do not live on reserve, among other issues.

AMC would be pleased to lend its assistance to this process. However, as AMC's capacity is limited, it will need capacity assistance funding to be able to productively assist with this process.

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<sup>113</sup> CC-21, p7.

In our submission, the Board should order Hydro to immediately begin a further engagement process with the goal of a workable bill affordability program that is submitted with Hydro's next rate application. We submit that the Board should indicate that it would not be willing to consider further rate increases until Hydro has conformed with the direction to present a workable bill affordability program.

## **NON-RESIDENTIAL RATEPAYERS SHOULD FUND BILL AFFORDABILITY AS WELL**

The large rate increases proposed by Hydro stem from the large energy export projects that Hydro has constructed.<sup>114</sup> These export projects, in the long run, lower rates for all ratepayers, including non-residential ratepayers. In our submission, this justifies the requirement that non-residential ratepayers should also contribute to bill affordability programming, alongside residential ratepayers.

Moreover, it is undisputed that export revenues reduce costs for every ratepayer in Manitoba.<sup>115</sup> As Hydro acknowledged, while the cost of service methodology was considered on a non-ideological basis and approved in Order 164/16, fairness in ratemaking is to be decided in the present proceeding.<sup>116</sup> In AMC's submission, it is open to the Board to take into account the benefit of Hydro's infrastructure in

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<sup>114</sup> Raphals, presentation, AMC-14, p15.

<sup>115</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p554; cross-examination of Cost of Service Panel, Transcript, Dec 19, p2359.

<sup>116</sup> Cross-examination of Cost of Service Panel, Dec 19, p2384-2385.



generating export revenue for all ratepayers, and balance it against the impact that Hydro's infrastructure has had on the exercise of Treaty rights by Manitoba First Nations, as well as the disproportionate impact of Hydro's rate increases on First Nations communities, given their poverty and infrastructure deficit. In AMC's submission, there is ample justification for financing a discount for on-reserve customers by recovery the lost revenue from all other customers.

## **BETTER INFORMATION ON ON-RESERVE CONSUMPTION**

Throughout the proceeding, we have heard a great deal about the lack of accurate basic information in Hydro's possession about on-reserve customers. In AMC's submission, the Board should order Hydro to improve its data collection practices so that Hydro's operations and programming have the benefit of accurate information.

First, while Hydro keeps track of which customers are using electric space heating, it does not seem to have accurate information about this important characteristic of its on-reserve customers. In cross-examination, Ms Morrison of Hydro's Cost of Service panel conceded that "in our investigation, we have a large percentage of customers in First Nations communities that may not be properly coded as heating with electric heat"<sup>117</sup>. As a result, Hydro's consumption data for on-reserve customers may be inaccurate in some ways. For instance, Mr Raphals observed that in

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<sup>117</sup> Transcript, Dec 20, p2691.

Hydro's response to AMC/MH II-1, the consumption patterns of on-reserve customers classified as electric space heating and those customers classified as using some other kind of heating source are virtually identical.<sup>118</sup> Such a result defies common sense, and seems attributable to the improper coding of on-reserve customers as electric space heating customers.

It is notable that the alternative rate design proposed by Hydro,<sup>119</sup> and the rate design proposal put forward by Mr Chernick,<sup>120</sup> each propose a different rate treatment for customers using electric space heat. If the misclassification of on-reserve customers persists, they may be deprived of a benefit targeted toward electric space heating customers. The Board should order Hydro to accurately keep records of its on-reserve customers, and to properly classify them, as soon as possible.

Second, there were some questions raised in the proceeding about the accuracy of Hydro's classification of certain on-reserve consumers as general service customers. According to Hydro's billing data, the average percentage of general service accounts is higher on-reserve than it is off-reserve.<sup>121</sup> For some communities, like Fox Lake First Nation, the percent of general service customers is 30.4%, or 28.6% for Marcel Colomb First Nation.<sup>122</sup> Moreover, Hydro's billing data shows that these general service customers are predominantly classified as commercial entities. Hydro's witnesses were asked to explain how such figures could be compatible with

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<sup>118</sup> Presentation of Mr Raphals, Jan 25, p6618.

<sup>119</sup> Appendix 9.14.

<sup>120</sup> GAC-17, page 7.

<sup>121</sup> AMC/MH II-2b; Application Appendix 7.1, p3.

<sup>122</sup> AMC/MH II-2b, page 3-5 of 5.

the fact that many of these communities do not have good transportation links, and can be expected to have lower levels of commercial development. Mr Shepherd suggested that this may be because general service includes administrative offices, police buildings, and health buildings,<sup>123</sup> but this is inadequate to explain why Hydro classifies these accounts as predominantly commercial. Ms Morrison suggested that these numbers may be caused by the number of non-building accounts, such as heat tape accounts for the water infrastructure on reserves.<sup>124</sup>

In AMC's submission, the Board should order Hydro to investigate the classification of accounts on reserve, to determine whether these accounts have been properly classified, and to report back to the Board with the results of the investigation.

The classification of accounts has a number of consequences. For instance, eligibility for DSM programming is based on whether a customer is classified as residential or general service.<sup>125</sup> As well, if the unexpectedly high number of accounts is due to a number of accounts being dormant, it may also lead to the underestimation of the average consumption figures for on-reserve consumers. As Hydro has already expressed a desire to correct the issue if the classification of these customers is inadequate,<sup>126</sup> asking Hydro to report back to the Board with the results would ensure that the results of the inquiry are available to the public and to First Nations.

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<sup>123</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p578.

<sup>124</sup> Cross-examination of Ms Morrison, Transcript, Dec 20, p2675-2683.

<sup>125</sup> PUB/MH I-126a – Attachment 1.

<sup>126</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p579; cross-examination of the Cost of Service panel, Dec 20, p2682.

Finally, Hydro has expressed concerns about the accuracy of its Residential Energy Use Survey as applied to First Nations communities, because only 35 respondents to the survey identified as First Nations.<sup>127</sup> Similarly, Dr Mason, who performed the bill affordability research for Hydro, opined that Hydro does not know enough about how social assistance payments work on reserve.<sup>128</sup> The lack of information may be an impediment to the effective implementation of bill affordability programming on reserve. AMC has expressed its willingness to assist Hydro to work more closely with First Nations communities to collect data about energy consumption.<sup>129</sup> AMC has limited financial capacity with which to do this work and capacity assistance funding will be a prerequisite for its effective participation in these processes.

## **CONCLUSIONS**

In Hydro's final submission, it noted that affordability and poverty are complex issues that should be left to government.<sup>130</sup> No one would deny that there is a role for government in dealing with poverty, but that does not mean there is no role left for this Board. It cannot be seriously suggested that the Board can fix all that is ill in the relationship between First Nations and other communities in Manitoba, but that does

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<sup>127</sup> Cross-examination of the Cost of Service panel, Dec 20, p2730.

<sup>128</sup> Cross-examination of the Cost of Service panel, Jan 4, p3338.

<sup>129</sup> AMC Undertaking #69.

<sup>130</sup> Hydro Final Submissions, p165 of 221.

not mean there is no role left for this Board in moving closer toward the goal of reconciliation.

Over the course of the hearing, the Board heard a great deal of evidence about energy use in First Nations communities, and how energy consumption differs for on-reserve communities versus off-reserve communities. The lack of a building code, the lack of funding for housing and infrastructure, the lack of gas heat as an alternative – these factors all go to why First Nations as a class are higher consumers of electrical energy, and why they are more vulnerable to the rate increases proposed by Hydro. The higher rates of poverty in these communities simply exacerbates this vulnerability. Tailoring a Hydro rate to the characteristics that First Nations communities share, as a class, is entirely within this Board’s mandate, and will make a big difference to these communities. On the contrary, maintaining undifferentiated rates between on-reserve and off-reserve communities will make things disproportionately worse for on-reserve ratepayers. Doing something will make things better, even if it doesn’t fix everything. As Mr Shepherd said of a differentiated on-reserve rate, “I don't know if that's the total solution; maybe it's part of a solution”<sup>131</sup>.

We recognize that beyond First Nations communities, there are other energy poverty issues that need to be resolved, including those that implicate First Nations people who live off reserve. We urge the Board to begin an engagement process that provides a bill affordability program for this user group and to make future Hydro rate

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<sup>131</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p563.

increases conditional on a workable bill affordability program being part of the application, or already having been implemented. AMC would be pleased to participate in this engagement process but will need capacity funding in order to do so.

Finally, we urge the Board to order Hydro to improve its data collection regarding on reserve customers. No other customer group suffers from such a shortage of data, which is essential for effective service delivery and program design. Once again, AMC would be pleased to assist Hydro in collecting this data, but will need capacity funding in order to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

on February 8, 2018

Senwung Luk and Corey Shefman

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