

PUBLIC UTILITIES BOARD

Manitoba Hydro 2019/20 General Rate Application

Final Written Submissions of the Assembly of Manitoba Chiefs

COUNSEL FOR THE ASSEMBLY OF MANITOBA CHIEFS

Senwung Luk, Corey Shefman and Julia Brown

Olthuis Kleer Townshend LLP

250 University Avenue, 8th Floor

Toronto, ON M5H 3E5

INTRODUCTION

1. Manitoba Hydro has failed to justify its request for a 3.5% rate increase for the First Nation On-Reserve Residential Class (“FNORC”) and as a result, no rate increase should be ordered for the FNORC.
2. In Public Utilities Board (“PUB”) Order 59/18,¹ this Board ordered the creation of the FNORC, and ordered that the FNORC “receive a 0% rate increase for the 2018/19 Test Year”.²
3. The PUB was clear in Order 59/18 that the disproportionate impact of the proposed rate increase on First Nation members living on Reserve was one of its reasons for ordering the rate freeze.
4. In creating the FNORC and ordering the rate freeze, the PUB left open the question of what was to happen to the new class in future rate applications. The proper spread between the FNORC rate and the Residential rate ought to be addressed at a full General Rate Application hearing, with a proper evidentiary record before the PUB.
5. The record before the Board in this truncated proceeding does not include any evidence which speaks to the appropriate differential between the two residential rates. Manitoba Hydro has simply assumed, without evidence and without turning its mind to the issue, that the FNORC should be subject to the same increase as the other residential classes.
6. In this proceeding, the onus is on Manitoba Hydro to demonstrate that a 3.5% rate increase on the FNORC is justified in the circumstances, and balances the interests of the utility with those of its customers.
7. Instead, the evidence in the record shows that the differences in energy consumption characteristics of the FNORC that motivated this Board to issue Directive 6 in Order 59/18 remain true. There is nothing in the record in this proceeding to show that the

¹ Public Utilities Board, Order No 59/18: Final Order with Respect to Manitoba Hydro’s 2017/18 and 2018/19 General Rate Application, May 1, 2018 [“PUB 59/18”].

² PUB 59/18, p. 266. Throughout these submissions, the “0% rate increase” will be referred to as the “rate freeze”.

infrastructure and poverty conditions that justified the establishment of the FNORC have improved. Manitoba Hydro has not met its onus to justify the 3.5% increase on the FNORC, and the PUB ought therefore to maintain the status quo and order a further 0% increase for the FNORC in the 2019/2020 Test Year.

THE POSITION OF THE ASSEMBLY OF MANITOBA CHIEFS

8. AMC submits that on the evidence before the PUB, no increase ought to be ordered for the FNORC rate, since:
 - (a) The evidence which led the Board to create the FNORC, and order the initial freeze of the rate has not changed and, in some cases, is even more thorough and comprehensive today than it was last year, while showing similar systemic energy consumption differences that distinguish the FNORC from other residential classes;
 - (b) Manitoba Hydro has not introduced any evidence which would rationalize or justify a rate increase for the FNORC, and simply relies on assertions and assumptions, thus failing to meet its burden; and
 - (c) In making its decision, the Board must consider Charter values, including that of substantive equality, to ensure that “Charter protections are upheld to the fullest extent possible given the statutory objectives” of the Board.³

9. AMC further submits that the Board should direct Manitoba Hydro to prepare evidence for the upcoming GRA on the question of the appropriate rate differential between the FNORC and the Residential class, and direct that issue to be within the scope of the next GRA hearing.

³ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para. 57.

The Evidence before the PUB does not support an increase to the FNORC Rate

10. In Order 59/18, the PUB created the FNORC and ordered the rate freeze as a result of evidence that FNOR ratepayers faced different, more significant challenges than residential ratepayers generally, and that the impact of the proposed increase would disproportionately harm members of the FNORC, as a result of their distinct patterns of energy usage and their much higher rates of energy poverty.
11. The evidence on the record in this GRA is that the circumstances which set FNOR ratepayers apart from other residential ratepayers in 2017-2019 continue to be relevant for the 2019-2020 application, and have not materially improved.
12. The evidence that the Board relied on to create the FNORC in Order 59/18 and apply a rate freeze to it remains relevant to this application. That evidence has not been challenged or undermined by the evidence put forward by Manitoba Hydro in the current proceeding. In AMC/MH I-4, AMC posed an Information Request to Manitoba Hydro asking whether the evidence relied on by AMC in its final submissions in the 2017/18 and 2018/19 GRA leading to Order 59/18 was still valid. In the limited instances where Hydro did not adopt the evidence, it stated that this was due to the existence of more up to date information, for example in the 2017 REUS, or because the evidence was out of scope for the present proceeding. None of the updated information provided by Manitoba Hydro challenges or detracts from the validity of the evidence relied on to support the creation of the FNORC in the 2017 GRA.
13. We include AMC's submissions in the 2017/18 and 2018/19 GRA as an appendix to these submissions for the Board's convenient reference. We draw the Board's attention to paragraph 50 of those submissions, which showed that:
 - (a) there are much higher rates of poverty in First Nation on-reserve communities than in the general population;
 - (b) the condition of much of the housing on reserves is "abysmal" and that this infrastructure deficit is longstanding and endemic;

- (c) building codes did not apply to much of the housing on-reserve when it was constructed and low building quality means that more energy is required to heat homes;
 - (d) average on-reserve electrically-heated, detached homes consume more electricity than their off-reserve counterparts; and
 - (e) almost no FNOR ratepayers have the alternative of switching from electric space heating to lower-cost natural gas.⁴
14. Except for where the evidence has been superseded by newer or better evidence (in which case that newer evidence has been addressed here directly), AMC adopts and relies on those sections of AMC's Final Submissions in the 2017/18 -2018/19 GRA as attached here as Appendix 1.
15. In fact, the more up to date and thorough information disclosed in the current proceeding contained in the 2017 REUS has confirmed what the evidence in the 2017 GRA suggested: that energy poverty appears to be substantially higher on First Nation reserves than among the general population.⁵
16. This evidence includes, *inter alia*, that:
- (a) First Nations ratepayers on-reserve generally do not have the option of heating their homes with natural gas, and are instead forced to use electricity, which is much more expensive;⁶
 - (b) on-reserve homes will on average consume about 40% more electricity per square foot than similar off-reserve homes;⁷
 - (c) poverty is significantly more prevalent on reserve, with more than half of households reporting incomes under \$25,000 per year;⁸

⁴ See Appendix I: Final submissions of AMC for the 2017 GRA at pp. 7-8, with references to the evidentiary record adopted by Hydro into this proceeding.

⁵ AMC-3, Philip Raphals, Energy Poverty on First Nation Reserves in Manitoba, March 29, 2019 at p. 13 [Raphals].

⁶ Raphals at p. 6.

⁷ Raphals at pp. 7-8.

- (d) energy poverty presents a particular challenge for FNOR ratepayers, with 72% of on-Reserve First Nation customers spending 6% or more of their total income on energy, compared to 16.6% of off-Reserve Customers, and 48% of on-Reserve First Nation customers spending 10% or more of their total income on energy, compared to a mere 5.8% of off-Reserve customers;⁹
 - (e) First Nations on Reserve ratepayers are three times more likely to have had to reduce spending on food in order to pay their energy bills;¹⁰ and
 - (f) First Nations on Reserve face bills that are 82% higher than the average bill for City of Winnipeg households.¹¹
17. In the case of each of these facts, the reality of the disproportionate energy burden faced by the FNORC has either stayed the same, or gotten worse, between 2014 and 2017. The 2017 data is the most recent that is available in this application's evidentiary record.
18. **That the FNORC would be disproportionately impacted by a rate increase ought to be taken by the PUB as uncontroverted, and should be given significant weight.**
19. The Board's reasoning in Order 59/18 that "rate increases should not widen the existing gap between First Nations living on reserve and other Manitobans"¹² remains a sound principle. It speaks in favour of extending the freeze for another year. Failing to maintain the rate freeze is likely to lead to the widening of that gap.

Manitoba Hydro has not justified its request for a rate increase

20. Manitoba Hydro has explained that it seeks an "across-the-board" increase of 3.5%.¹³ But Manitoba Hydro has provided the PUB with no evidence to support their request to have the 3.5% increase applied to the FNORC in particular. They have simply included the FNORC in their "across-the-board" rate increase request.

⁸ Raphals at p. 8.

⁹ Raphals at p. 10; AMC/MH I-10a; AMC/MH I-7 Attachment 1, at p. 184.

¹⁰ Raphals at p. 11.

¹¹ Raphals at p. 12.

¹² PUB 59/18, p. 233.

¹³ Manitoba Hydro 2019/20 Electric Rate Application at pp. 34-35.

21. In spite of the evidence regarding the factors affecting the FNORC canvassed above, Manitoba Hydro has failed to recognize that First Nation on Reserve ratepayers are uniquely situated and require consideration independent from the other classes.
22. Manitoba Hydro has admitted that it did not engage in any consultations with First Nations regarding the 3.5% requested rate increase, or about the impact that increase would have on First Nations.¹⁴
23. The rate freeze for the FNORC does not impact Manitoba Hydro's bottom line, because the revenue is made up by additional small increases to the other classes. Manitoba Hydro acknowledged that its net income would be the same, whether or not the FNORC rate was frozen.¹⁵
24. When questioned regarding the unique factors affecting FNORC ratepayers that differentiate that class from the Residential Class – areas where the classes are not alike, and so should not be treated alike – Manitoba Hydro admitted that they failed to give those issues any consideration. In the words of one of Manitoba Hydro's witnesses: "The application was made on the basis of an across-the-board rate increase, so we didn't look at any differentiation between any of the customer classes."¹⁶
25. The Manitoba Hydro Electric Board did not turn its mind to differences between the different residential classes, and did not account for those differences in its application. Among other things, it:
 - (a) failed to consider that on-reserve homes consume an average of 40% more electricity on a per square foot basis, than off-reserve homes;
 - (b) failed to consider "consumption patterns" at all; and¹⁷

¹⁴ AMC/MH I-13.

¹⁵ Transcript of the Cross-Examination of Manitoba Hydro Panel conducted April 25, 2019 at p. 530, l. 3-18 [April 25 Transcript].

¹⁶ April 25 Transcript at p. 536, ll. 21-23.

¹⁷ April 25 Transcript at p. 537, ll. 22-25.

- (c) failed to consider bill impacts, including that 72% of on-Reserve First Nation customers spend 6% or more of their total annual income on electricity bills.¹⁸
26. In order for Manitoba Hydro's request for a 3.5% increase on the FNORC to be reasonable, it must be justified, transparent, and intelligible.¹⁹ It is none of those things.
27. Rather, Manitoba Hydro failed to take into account relevant considerations, and made its decision to apply for a 3.5% increase across the board, including on the FNORC, without regard for the facts and evidence available to it. In so doing, Manitoba Hydro has made an arbitrary decision which ought not to be endorsed by this Board.
28. Even if it were the case that the \$59 million by which Hydro seeks to increase its net revenue were legitimate and necessary, it nevertheless would not follow that this additional revenue would need to come in equal proportions from each class. It is not sufficient for Manitoba Hydro to assume that a rate increase should apply across the board, particularly since the evidence available speaks to the reasons for which the FNORC ought to be treated differently.
29. Put simply, what Manitoba Hydro has done here is to treat dissimilar groups similarly. The requirement that 'likes be treated alike', includes the opposite – that differently situated classes ought to be treated differently.

Charter protections require that the FNORC not be subjected to the increase.

30. The decisions of all administrative decision makers, including the PUB, must be consistent with the values that underpin the Charter of Rights and Freedoms.²⁰
31. From a practical perspective, the Supreme Court of Canada has explained that administrative decision makers are required to ensure their decisions **reflect a**

¹⁸ April 25 Transcript at p. 538, ll. 20-24.

¹⁹ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.

²⁰ *Doré v Barreau du Québec*, 2012 SCC 12, at paras. 24 [*Doré*], 35; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 81 at para. 65.

proportionate balance between the decision maker’s statutory objectives and the Charter values engaged by their decision.²¹

32. A proportional balancing is one where the Charter values at stake are protected as fully as possible in light of the statutory objectives.²²
33. The PUB’s statutory objectives are found, *inter alia* in section 25(4) of the *Crown Corporations Governance and Accountability Act*.²³ That section sets out the factors that guide the Board when making a rate decision. Those factors make it clear that in addition to the purely financial objectives normally associated with ratemaking, namely ensuring that Hydro has sufficient funds to cover its expenses, that it has reserves, that its obligations to its employees can be fulfilled, the Board is also to consider “any compelling policy considerations” and “any other factors”.²⁴
34. In order to comply with the Supreme Court’s decision in *Doré*, the PUB must balance those objectives against the Charter value at issue here, such that the Charter value is protected as fully as possible.
35. **Manitoba Hydro’s own evidence is that the Manitoba Hydro-Electric Board did not consider Charter values or reconciliation in making the application for the rate increase to the FNORC.**²⁵ This leaves the PUB as the sole decision-maker who can consider Charter values, and further emphasizes the importance of the PUB’s role in doing so.
36. In this GRA, as in the last GRA, the Charter value engaged by the Board’s decision is substantive equality, which arises out of the right to equality found at section 15(1) of the Charter.²⁶

²¹ *Doré*, *supra*, at paras. 55-56; *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613 at para. 39.

²² *Ibid.*

²³ SM 2017, c19.

²⁴ *Ibid.*, s. 25(4)(viii) and (ix).

²⁵ April 25 Transcript at p. 550-551.

²⁶ *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

37. It is uncontroversial that First Nation people living on Reserve in Manitoba are protected by section 15 of the Charter. First Nations people living on Reserve are a historically disadvantaged group, as set out in the evidence, and particularly so when it comes to electricity services.
38. As outlined in the AMC's submissions at the last GRA, 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."²⁷ Policies, practices and procedures will run afoul of *Charter* protection of equality if they serve to "freeze" a discriminatory status quo or to widen "the gap between a historically disadvantaged group and the rest of society."²⁸
39. In the last GRA, the PUB found that "rate increases should not widen the existing gap between First Nations living on Reserve and other Manitobans".²⁹ This is the right conclusion to be drawn from Charter values. Recognizing that First Nations on Reserve are protected by Charter values, and in light of the evidence presented on the disproportionate impact on FNOR of rate increases, protecting the Charter value of substantive equality as fully as possible means the Board has to consider how the proposed increase will widen that gap.
40. Because we know that First Nations on Reserve have an infrastructure deficit and use significantly more energy than other residential ratepayers and face significantly higher rates of poverty and energy poverty, it follows that ordering a 3.5% increase to the rates faced by First Nations on Reserve will do exactly what the proportionate balancing is meant to avoid – it will widen the gap.
41. That the *Doré/Loyola* framework, when applied to this case, requires the Board to keep the FNORC rate frozen becomes even clearer when the PUB's "statutory objectives" are considered.

²⁷ *Quebec v. A*, 2013 SCC 5 at para. 332, per Abella J (for the majority on s.15).

²⁸ *Ibid.*, at para. 332.

²⁹ 59/18 at p. 233.

42. Whether Manitoba Hydro requires the additional \$59 million it has requested is not clear. Assuming that it does, the Board's objective of ensuring that Manitoba Hydro remains on sound financial footing can be met fully met while also providing full protection to the equality values which are impugned here. As in Order 59/18, the Board can issue an Order offsetting the impact of the FNORC rate freeze with adaptive increases for the other classes, if the Board determines that such a measure is warranted. In such a scenario, Manitoba Hydro will receive the desired revenue, and the Board will meet its objectives while protecting the Charter value of substantive equality.
43. If the Board were to adopt such a measure while approving a revenue requirement for Hydro that leads to a 3.5% rate increase, the impact on other ratepayers will be minimal: 22 cents per month on a 1000kWh bill.³⁰ It is a low cost for a measure of equality.
44. In light of:
- (a) the Board's obligation to protect the Charter value of equality to the greatest possible extent;
 - (b) what is known regarding the historical disadvantage faced by FNOR ratepayers and the disproportionate impact this proposed rate increase will have on FNOR; and
 - (c) the absence of an impact on Manitoba Hydro from an ongoing FNORC rate freeze and the negligible impact on the other ratepayers who will make up the revenue differential,

AMC submits that the Board should refuse to apply any rate increase on the FNORC.

³⁰ April 23 Transcript at p. 295.

CONCLUSION

45. This GRA application is about balance:
- (a) balancing the lack of evidence tendered by Manitoba Hydro to support a rate increase applied to the FNORC against the evidence in the record demonstrating the ongoing energy poverty existing on First Nation reserves;
 - (b) balancing the impact of any increase to FNOR ratepayers against the effects to other residential consumers of having to make up the 22 cent/month difference if a rate freeze is ordered; and
 - (c) balancing the Board's statutory objectives with its obligation to ensure that Charter values are protected to the greatest possible extent.
46. In simply including the FNORC in the 'blanket' increase to be applied to all customer classes, Manitoba Hydro ignores the reasons for which the Board created the FNORC, and is requesting that the Board do the same.
47. The FNORC was created, according to the PUB, "in response to the degree of poverty on reserves"³¹. The freeze ordered in 59/18 was an extension of that logic – the Board adopted AMC's argument that "rate increases should not widen the existing gap between First Nations living on Reserve and other Manitobans."³² These reasons continue to apply in the present application, and must be taken into account in the Board's decision.
48. The Board also ought to consider the impact on other ratepayers of maintaining the rate freeze for the FNORC in light of the pressing and substantial objectives which are the basis of the rate. According to Manitoba Hydro itself,³³ the impact on other Residential Class ratepayers of maintaining a freeze on the FNORC rate would be an additional 0.1% arising out of the current application – 0.23% cumulatively. Manitoba Hydro has produced no evidence to suggest that that 0.23%, or the 22 cents/month it represents on a

³¹ 59/18 at p. 233.

³² 59/18 at pg 233.

³³ PUB/MH I-63c.

1000kWh bill, would be an unreasonable burden, or a burden at all, to the Residential Class ratepayers to whom that additional 0.23% would apply.

49. In the absence of such evidence, it is reasonable for the PUB to conclude that 22 cents/month is, as it appears on its face, a minimal burden, if any, on the Residential Class ratepayers. Such a minimal amount is not a factor which ought to tip the scale against the goal of minimizing the gap between FNORC and other Manitobans.
50. Finally, AMC submits that Manitoba Hydro should not be permitted to come to this Board and expect to be granted a rate increase for a particular class when it has provided no evidence to justify that increase. The PUB created the FNORC in order to prevent the gulf between FNORC and other Manitobans from widening. That goal remains laudable, necessary and legitimate. We submit that maintaining the rate freeze in the present circumstances is a reasonable way of making progress towards achieving that goal.