

Comments of the Consumers Coalition  
on Manitoba Hydro's Response to  
Order 53/21

June 24, 2021

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## **Overview**

The 9 June 2021 response of Manitoba Hydro to Public Utilities Board (PUB) Order 53/21 (Hydro's response) raises fundamental concerns regarding the transparency and accountability of Manitoba Hydro and its respect for the independent regulatory process. It does not comply with the clear direction or intent of Order 53/21.

Manitoba Hydro failed to provide the substantive, prospective information ordered by the PUB. It provided neither the documents sought by the PUB or "substantially the same information" in a different form.<sup>1</sup>

Manitoba Hydro failed to provide an Integrated Financial Forecast (IFF) or even any of the core components of an IFF such as the Load Forecast, Power Resource Plan, Export Price Forecast and Operating and Administrative Forecast.

The limited historical or current financial results provided are largely stale dated and were mostly publicly available to the PUB and Intervenors before the issuance of Order 53/21. They are of little value for rate-setting which is necessarily focused on Hydro's mid-term to long-term financial outlook as represented by the forecast years in its IFF.

Manitoba Hydro has failed to provide any metrics to assess its financial health. There is no information with respect to Manitoba Hydro's debt ratio, interest coverage ratio or capital coverage ratio - all of which have been used historically to assess Manitoba Hydro's financial health for the purposes of rate setting and would typically be found in Manitoba Hydro's IFF.

Manitoba Hydro also has failed to comply with the PUB Order to provide the Capital Expenditure Forecast (CEF) and Prospective Cost of Service Study "currently in use in the management and operations of Manitoba Hydro". Similarly, it has failed to comply with the PUB Order to provide the 2022/23 forecast of net export revenue and net income for each of the possible water flow conditions.

Ultimately, Manitoba Hydro has refused to provide the type of information uniquely in its possession that the PUB has said it requires for a determination of the Status Update application. It has failed to provide the substantive information that has long been relied upon by the PUB and by Hydro in determining just and reasonable rates. Hydro sits in fundamental non-compliance with Order 53/21.

As our Court of Appeal has recently explained in the context of a different regulatory process, it is open to the PUB to draw an "adverse inference" from Hydro's failure "to produce a document."<sup>2</sup> This is especially the case when Manitoba Hydro has

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<sup>1</sup> Manitoba Public Utilities Board Order No. 53/21 at 22 [Order 53/21].

<sup>2</sup> *The College of Pharmacists of Manitoba v Jorgenson*, 2020 MBCA 80 at para 20 [College v Jorgenson].

essentially refused to provide almost the entire suite of documents and data typically relied upon by it and the PUB in determining just and reasonable rates.

Manitoba Hydro's refusal to substantively comply with the PUB Order and its inability to provide any meaningful explanation to justify this failure, leaves it open for the PUB to conclude that the evidence Hydro is refusing to supply "would be contrary to" Hydro's position.<sup>3</sup> This is especially the case given the prior finding by the PUB in Order 53/21 of a "*prima facie*" change in circumstances.<sup>4</sup>

Given the failure by Manitoba Hydro to provide the information ordered by its independent regulator, it would be appropriate and just for the Board to view Manitoba Hydro's non-compliance with Order 53/21 as an implied admission of a substantial change in circumstances.

Accordingly, the Consumers Coalition asks the PUB to find that:

- 1) Manitoba Hydro has failed to comply with Order 53/21 by refusing to provide the underlying documents, data and prospective information sought by the PUB to determine whether there has been a substantial change in Manitoba Hydro's circumstances;
- 2) Manitoba Hydro's refusal to provide the type of information long relied upon by Hydro and the PUB to determine just and reasonable rates necessarily leads to an adverse inference that the information in question would confirm a finding that there has been a substantial change in circumstances;
- 3) It is reasonable and just to order a review of Order 59/19 and 69/19;
- 4) A Pre-hearing conference should be held to determine an orderly schedule for the Status Update proceeding.

Manitoba Hydro's failure to comply with Order 53/21 also could invite an order by the PUB to compel production of necessary documents including by way of subpoena, to have an oral proceeding to further consider the threshold issue of whether there has been a substantial change in circumstances<sup>5</sup> or to initiate proceedings to consider whether Hydro is in contempt.

However, in the respectful view of the Consumers Coalition, the threshold issue of a substantial change in circumstances already has been met. The four requested findings of the PUB as outlined above are the most direct and efficient path to protect the interests of Manitoba Hydro rate payers.

Given the prior finding of the PUB that the information before it "suggests *prima facie* that there have been changes in Manitoba Hydro's circumstances"<sup>6</sup> and Manitoba

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<sup>3</sup> *College v Jorgenson*, *supra* note 2 at para 20.

<sup>4</sup> Order 53/21 at 3, 20.

<sup>5</sup> Order 53/21 at 18. "The threshold question in this Application is whether the circumstances of Manitoba Hydro have changed substantially."

<sup>6</sup> Order 53/21 at 20.

Hydro's failure to comply with Order 53/21, the Consumers Coalition asks the PUB to find the circumstances of Manitoba Hydro have changed substantially since Orders 69/19 and 59/18 and that it is appropriate to review those orders in a Status Update hearing.

## **Introduction**

For over thirty years, the regulated rates of Manitoba Hydro have been set by the Manitoba Public Utilities Board (PUB) on a forward looking (prospective) basis, considering the immediate, mid-term and long-term interests of ratepayers and the Crown monopoly.

The critical issue in this proceeding is whether the PUB should order a status update hearing to determine whether Manitoba Hydro's rates are just and reasonable in light of the substantial changes in the Crown monopoly's circumstances since Order 59/18 and Order 69/19. Underlying this central question is an "unprecedented lack of confidence"<sup>7</sup> in Manitoba Hydro's rate determination process that has been expressed by industrial and residential consumers.

In Order 53/21, the PUB found "the information before the Board suggests *prima facie* that there have been changes in Manitoba Hydro's circumstances."<sup>8</sup>

However, the PUB recognized that the "current relevant documentation related to rates is held by Manitoba Hydro and is not available to ratepayers or stakeholders".<sup>9</sup> It directed Manitoba Hydro to provide it with additional information so that it could "determine whether there has been a substantial change in Manitoba Hydro's circumstances."<sup>10</sup>

In particular, the PUB ordered the production of the prospective information long relied upon by Manitoba Hydro and the PUB to determine just and reasonable rates. It directed Hydro to produce the Integrated Financial Forecast as well the Capital Expenditure Forecast and Prospective Cost of Service Study "currently in use in the management and operations of Manitoba Hydro."<sup>11</sup> The PUB also ordered Manitoba Hydro to produce the 2021/22 and 2022/23 forecast of net export revenue and net income for a number of possible water flow conditions.<sup>12</sup>

In giving its order, the PUB highlighted the importance of compliance with the substance rather than the form of its Order:

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<sup>7</sup> Order 53/21 at 18 citing the comments of the Manitoba Industrial Power Users Group.

<sup>8</sup> Order 53/21 at 20. See also p. 3, "the Consumers Coalition has provided information from publicly available documents and prior Board Orders to support, on a *prima facie* basis, that there may have been a change in circumstances.

<sup>9</sup> *Ibid.*

<sup>10</sup> Order 53/21 at 3.

<sup>11</sup> Order 53/21 at 22.

<sup>12</sup> Order 53/21 at 21.

*If the versions currently in use in the operations and management of Manitoba Hydro are not in the form typically provided to the Board in General Rate Applications, the substantially the same information that are currently in use in the operations and management of Manitoba Hydro form of documents containing may be provided to satisfy this Directive. The information provided must include the vintage of the documents and underlying data.<sup>13</sup>*

Manitoba Hydro's response to the PUB was filed on June 9, 2021 (Hydro's response). The Consumers Coalition<sup>14</sup> thanks the PUB for this opportunity to comment on Hydro's response.

### **The Application for a Status Update Hearing**

On March 26, 2021, the Consumers Coalition asked the PUB to order a status update hearing for Hydro rates given substantial changes in the circumstances of the Crown monopoly since the last hearing on rates.

On the expenditure side, the Consumers Coalition noted that over the last three years, Manitoba Hydro has effectively doubled the size of its assets and debts. It observed that these new capital assets would have profound impacts on the revenue needs of Manitoba Hydro as well as the allocation of costs between different classes of consumers for many years to come.<sup>15</sup>

In terms of revenue, the Consumers Coalition highlighted the recent (October 2020) confirmation of a 215 MW export sale with SaskPower that is estimated to be worth billions of dollars over the next thirty years.<sup>16</sup>

The effort by the Consumers Coalition to have a public, evidence-based review of Manitoba Hydro's rates was resisted by Manitoba Hydro.<sup>17</sup> The Consumers Coalition application was supported by the Manitoba Industrial Power Users Group, the Assembly of Manitoba Chiefs and the Manitoba Keewatinowi Okimakanak.<sup>18</sup>

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<sup>13</sup> Order 53/21 at 23 (emphasis added).

<sup>14</sup> The Consumers Coalition is comprised of Harvest Manitoba, the Consumers Association of Canada (Manitoba) Inc. and the Aboriginal Council of Winnipeg.

<sup>15</sup> Application of the Consumers Coalition for an Order Requiring a Manitoba Hydro Status Update Hearing (26 March 2021) at 4 [*Consumers Coalition Application*].

<sup>16</sup> *Ibid.*

<sup>17</sup> Manitoba Hydro Submission on the Consumers Coalition Application (12 April 2021).

<sup>18</sup> Manitoba Industrial Power Users Groups Letter to PUB (12 April 2021); Submission of Manitoba Keewatinowi Okimakanak Inc. regarding the Application of the Consumers Coalition filed on March 26, 2021 for an Order requiring a Manitoba Hydro Status Update Hearing (12 April 2021); Assembly of Manitoba Chiefs Letter to PUB (12 April 2021).

## **Order 53/21**

In issuing Order 53/21, the PUB found “the information before the Board suggests *prima facie* that there have been changes in Manitoba Hydro’s circumstances”. However, it determined that “additional information from Manitoba Hydro is required for the Board to determine whether there has been a substantial change in Manitoba Hydro’s circumstances.”<sup>19</sup>

The PUB recognized the challenge of “information asymmetry” with intervenors relying on prior Board Orders and publicly available documents while “current relevant documentation related to rates is held by Manitoba Hydro and is not available to ratepayers or stakeholders.”<sup>20</sup>

The PUB ordered Manitoba Hydro to provide versions of the Integrated Financial Forecast,<sup>21</sup> Capital Expenditure Forecast and Prospective Cost of Service Study currently in use in the operations and management of Manitoba Hydro. It also directed Manitoba Hydro to provide the 2021/22 and 2022/23 forecast of net export revenue and net income for a number of possible water flow conditions.<sup>22</sup>

Importantly, the PUB held that:

*If the versions currently in use in the operations and management of Manitoba Hydro are not in the form typically provided to the Board in General Rate Applications, the form of documents containing substantially the same information that are currently in use in the operations and management of Manitoba Hydro may be provided to satisfy this Directive. The information provided must include the vintage of the documents and underlying data.*<sup>23</sup>

## **Hydro’s Failure to Comply with Order 53/21**

Manitoba Hydro did not appeal or seek to vary Order 53/21. Instead, Manitoba Hydro simply chose not to comply. It did not provide either the requested documents or “substantially the same information” in a different form.

Manitoba Hydro failed to provide an Integrated Financial Forecast or “substantially the same information” in a different form with the underlying data. It chose not to provide

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<sup>19</sup> Order 53/21 at 3.

<sup>20</sup> Order 53/21 at 20. See also p. 3, “the Consumers Coalition has provided information from publicly available documents and prior Board Orders to support, on a *prima facie* basis, that there may have been a change in circumstances.

<sup>21</sup> For the past 30 years up to 2016, a long term Integrated Financial Forecast (IFF) spanning 10 – 20 years was an integral element of the rate setting, financial planning and management of Manitoba Hydro.

<sup>22</sup> Order 53/21 at 21.

<sup>23</sup> Order 53/21 at 23 (emphasis added).

any of the core components of an IFF such as the Load Forecast, Power Resource Plan, Export Price Forecast and Operating and Administrative Forecast.

Hydro failed to provide any metrics to assess its financial health. There is no information with respect to Manitoba Hydro's debt ratio, interest coverage ratio or capital coverage ratio, all of which have been used in the past to assess Manitoba Hydro's financial health and would typically be found in Manitoba Hydro's IFF.

Manitoba Hydro also failed to provide a current version of its Capital Expenditure Forecast and its Prospective Cost of Service Study. It chose not to provide "substantially the same information" in a different form with the underlying data.

Similarly, and without even the semblance of an explanation, Hydro chose not to provide the 2022/23 forecast of net export revenue and net income for each of the possible water flow conditions.

### The Purpose and Role of the IFF

To understand more fully what Hydro did not provide, it is critical to recall the role of an Integrated Financial Forecast and its constituent components in terms of rate setting and the management and planning of Hydro operations.

Based upon its more than thirty years of experience in evaluating IFFs for the purposes of determining just and reasonable rates, the PUB can take notice of the purpose and role of an IFF and its constituent components.

As a capital-intensive monopoly with long lived assets, the rate setting, planning and management of Manitoba Hydro requires consideration of short-term (current year plus year one), mid-term (years two to five) and long-term (years six to twenty) forecasts in an integrated fashion with a view to Manitoba Hydro's financial targets.

For over thirty years, an IFF has been central to the determination of just and reasonable rates for Manitoba Hydro by the PUB.

An IFF is a compilation of numerous forecasts from different divisions of Hydro. Once these component forecasts are loaded in the IFF model, the IFF is used to determine financial ratios, borrowing requirements, financing costs, taxes and depreciation as well as required rate increases.

Of particular importance to the long-term health of the Corporation are a Load Forecast and Power Resource Plan. These forecasts are critical for an electric utility like Manitoba Hydro for the purposes of long-term system planning, balancing supply and demand and determining potential energy available for exports sales.

It defies credibility to suggest that Manitoba Hydro can competently manage its operations without a current Load Forecast and Power Resource Plan.



The periodic production of a Debt Management Strategy and the annual development of a Loan Act submission to Treasury Board to obtain borrowing authority for the next fiscal year and bridge authority for the first nine months of the subsequent fiscal year also has been associated with an IFF over the past thirty years.

In the alleged absence of a current IFF, the Debt Management Strategy and Loan Act submission to Treasury Board would provide some information regarding the debt costs of Manitoba Hydro in the short term.

Historically, the IFF also was used for Manitoba Hydro and provincial consolidated reporting in the first year of the forecast and for internal and provincial consolidated budgeting purposes for the first year of the forecast.

The IFF also would produce forecasts and financial ratios that are of interest to periodic credit rating agency reviews. In the alleged absence of a current IFF, the forecasts and financial ratios provided in support of credit agency reviews might offer a partial, albeit insufficient, substitute for the type of information that could be garnered from an IFF.

#### The Constituent Components of an IFF

Historically, the front-end of the IFF process was to develop the Load Forecast, Domestic Revenue Forecast and Power Resource Plan taking into account the economic outlook, energy price outlook, export price forecast, demand side management plan and new major generation and transmission resources.

The middle part of the IFF process was to develop the generation costs and interchange revenue forecasts (sometimes referred to as Net Export Revenue Forecast, the Capital Expenditure Forecast and Operating and Administrative Expenditure Forecast). The Net Export Revenue Forecast included a short-term forecast for the first two to three years that would be based on known water storage conditions and median water flows and a longer-term forecast for the rest of the IFF period that would revert to the assumption of one hundred years of average water flows.

Over the past three decades up to 2016, the end stage of the process was the production of the IFF. In the alleged absence of an IFF, it is not credible to suggest that the core components that fed into an IFF are not available or being used to manage current Hydro operations or to provide information to government and to the credit markets.

#### Manitoba Hydro Failed to Provide an IFF or a Suitable Substitute as Directed by the PUB

Manitoba Hydro failed to provide an Integrated Financial Forecast or “substantially the same information” in a different form with the underlying data.

Manitoba Hydro claimed that it has not undertaken an IFF since 2016. It did not provide an IFF or any of the constituent components of an IFF, such as the Load Forecast, Power Resource Plan, Export Price Forecast, Capital Expenditure Forecast and Operating and Administrative Expenditure Forecast. Similarly, it did not provide its Debt Management Strategy or Loan Act submission to Treasury Board or any forecasts and financial ratios provided in support of credit agency reviews.

Contrary to long-standing rate determination practices of Hydro and the PUB, Manitoba Hydro failed to provide any metrics in terms of its short-term, medium term or long-term financial health. It chose not to provide information with respect to its debt ratio, interest coverage ratio or capital coverage ratio, all of which have been used in the past to assess Manitoba Hydro's financial health and would typically be found in Manitoba Hydro's IFF.

Manitoba Hydro was aware the PUB required information that was exclusively in its possession for the purposes of its Status Update determination. Despite a direct order by the PUB, it refused to provide the requested IFF or "substantially the same information" in a different form with the underlying data.

#### The Limited Information Provided by Manitoba Hydro is of Little Relevance to Prospective Ratemaking

In lieu of the critical prospective information that underlies an IFF and accepted rate determination practices, Hydro provided actual financial results for 2018/19 and 2019/20 and the budgeted net income for 2020/21 "(last fiscal year) and 2021/22 (current fiscal year).

The actual financial results provided for 2018/19 and 2019/20 are limited to strictly the operating statements for the Electric segment and do not include either the balance sheets or the cash flow statements for those years.

With respect to the forecast years 2020/21 and 2021/22, all Manitoba Hydro has provided is the budget and current forecast net income for 2020/21 and the budget net income for 2021/22.

The operating statements supporting the net income forecasts have not been provided nor have the forecast balance sheets or cash flow statements for these years. No information has been provided as to the assumed rate increase (if any) for 2021/22. Similarly, no information has been provided regarding the forecasted values for the financial metrics typically used to assess Manitoba Hydro's financial health.

Ultimately, the 2018/19 and 2019/20 actual information provided by Manitoba Hydro is stale-dated and is a summary of financial information that was already publicly available to the PUB and Intervenors in Manitoba Hydro's published annual reports in advance of Order 53/21.

The budgeted net income for the recently completed fiscal year (2020/21) was previously disclosed in Manitoba Hydro's quarterly financial reports and actual results for 2020/21 should be available in the next month or two (July or August of 2021). The budgeted net income for the current fiscal year (2021/22) would presumably be disclosed when Manitoba Hydro's first quarter report to June of 2021 is made available in July or August of 2021.

More importantly, rates for Manitoba Hydro have been historically set on a prospective basis using the mid-term to long-term forecast years of the IFF beyond the current fiscal year (and using underlying data that has been specified by the PUB in past minimum filing requirements) and not high-level information specified in financial reporting standards.

Financial information of the type provided by Manitoba Hydro in its reply to Order 53/21 is of little relevance to rate-setting, in general, and determining the adequacy of current rates, in particular.

### Capital Expenditure Forecast

Manitoba Hydro failed to provide its standard Capital Expenditure Forecast or "substantially the same information" in a different form with the underlying data.

Contrary to well accepted rate determination practices for a capital-intensive monopoly with long lived assets, it provided no forward-looking insight into its capital expenditure over the five, ten and twenty year period beyond its current year.

In lieu of a Capital Expenditure Forecast, Manitoba Hydro has provided actual capital expenditures for 2018/19 and 2019/20, and the capital budget for 2020/21 and 2021/22 compared to the forecast of capital expenditures for these years as provided in the 2019/20 rate application.

The historic actuals or current year capital expenditure forecasts provided are mostly stale dated. In the context of prospective rate setting, they are of limited value to determining whether there has been a substantial change in circumstances.

### Prospective Cost of Service Study

Manitoba Hydro failed to provide Prospective Cost of Service despite the fact it clearly has one. All it provided was a one-page summary of the Revenue to Cost Ratios for each of the customer classes for the 2020/21 fiscal year.

This is a far cry from providing the Prospective Cost of Service Study or the underlying data.

Moreover, while the Prospective Cost of Service Study 2020/21 includes costs related to Bipole III and other major Generation and Transmission projects, it does not reflect

the full impact of these projects on the allocation of Manitoba Hydro's cost to customer classes:

- The Birtle Transmission project came into service in March 2021<sup>24</sup> and, as a result, the 2020/21 costs will not reflect the impact of project being in-service for the full year.
- The MMTP came into service in June 2020<sup>25</sup> and, as result, the 2020/21 costs will also not reflect the impact of the project being in-service for a full year.
- While the first unit of Keeyask came into service in October 2020 the last unit will not be in-service until the Fall of 2021.<sup>26</sup> As result, the Prospective Cost of Service Study 2020/21 does not reflect the full impact of Keeyask.

Despite having clearly relevant information immediately at hand to comply with the PUB Order, Manitoba Hydro has refused to provide it.

### Water Conditions and Hydraulic Generation Forecast

Manitoba Hydro failed to provide the 2022/23 forecast of net export revenue and net income for each of the possible water flow conditions.<sup>27</sup>

The information provided by Manitoba Hydro is just for the year 2021/22. No information has been provided for 2022/23 and no explanation of why Hydro has refused to comply with the PUB Order has been provided.

The information provided for 2021/22 is just with respect to net export revenues. No information is provided regarding the resulting net income range. Manitoba Hydro has not provided the information sought by the PUB regarding the probability of drought (i.e., probability that hydraulic generation will be below average hydraulic generation).

Despite the clear and express language of Order 53/21, Manitoba Hydro chose not to comply with the Order of its statutory regulator.

### **The PUB has a Broad Suite of Tools to Respond to Hydro's Failure to Comply with its Order**

The PUB has a broad suite of powers under the *Public Utilities Board Act* [PUB Act] and the *Court of Queen's Bench Act* to address Hydro's failure to comply with its Order. The

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<sup>24</sup> Manitoba Hydro, "Birtle Transmission Project", online: <<https://www.hydro.mb.ca/projects/expansion/birtle/>>.

<sup>25</sup> Manitoba Hydro, "Manitoba-Minnesota Transmission Project", online: <[https://www.hydro.mb.ca/projects/mb\\_mn\\_transmission/](https://www.hydro.mb.ca/projects/mb_mn_transmission/)>.

<sup>26</sup> Manitoba Hydro, "Keeyask Generating Station Nearly 60% Complete", online <<https://www.manitobahydropower.com/news/keeyask-generating-station-nearly-60-per-cent-complete/>>.

<sup>27</sup> Order 53/21 at 22.

PUB has authority over the rates for service charged by Manitoba Hydro and the PUB Act applies to the review of Manitoba Hydro rates.<sup>28</sup>

The PUB has the authority to require the production of documents<sup>29</sup> and to require a public utility to do any act that it is ordered to do.<sup>30</sup> It can order the production of any document relating to a proceeding, and a party that fails to comply with the order will be in breach of the order.<sup>31</sup>

Failing to comply with a Board Order can lead to monetary penalties.<sup>32</sup> Any party to a matter may enforce compliance with an Order by obtaining a written direction to a sheriff.<sup>33</sup>

In addition to these powers explicitly granted in the PUB Act, the Board is granted all powers of a judge of the Court of Queen's Bench in matters including the production and inspection of documents, the enforcement of its orders, and "all other matters necessary for the exercise of its powers, or otherwise for carrying any of its powers into effect."<sup>34</sup>

Queen's Bench Rule 30.08(1) empowers the Court to "make any such order as is just" in the event that a party fails to produce a document for inspection in compliance with a Court Order. Rule 30.08(2) notes that this can include a Contempt Order.<sup>35</sup>

The Court of Queen's Bench is also empowered to issue subpoenas to require attendance at a hearing or a cross examination.<sup>36</sup> The subpoena may specify that the person whose attendance is required must bring with them documents listed in the subpoena.<sup>37</sup>

Similarly, the PUB rules confirm the Board's authority to issue subpoenas for the attendance of witnesses.<sup>38</sup> Rule 20(3) confirms the Board can issue subpoenas both for attendance and for documents.

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<sup>28</sup> *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60 at paras 13-14.

<sup>29</sup> *The Public Utilities Board Act*, CCSM c P280, s 27(2) [*PUB Act*].

<sup>30</sup> *Ibid* at s 28(1).

<sup>31</sup> The Public Utilities Board Rules of Practice and Procedure at r 12.

<sup>32</sup> *PUB Act*, *supra* note 29 at s 100. A person not in compliance with a Board Order is subject to a \$100 penalty per day for each day the default continues.

<sup>33</sup> *Ibid* at ss 52(1), 52(4).

<sup>34</sup> *PUB Act*, *supra* note 29 at s 24(4).

<sup>35</sup> Court of Queen's Bench Rules, Man Reg 553/88 at r 30.08.

<sup>36</sup> *Ibid*. See, for example, r 34.04(3), (4), (7).

<sup>37</sup> *Ibid* at r 34.10(3).

<sup>38</sup> The Public Utilities Board Rules of Practice and Procedure at r 20.

## **Manitoba Hydro's Failure to Comply with Order 53/21 Necessarily Gives Rise to an Adverse Inference**

In addition to these tools for enforcing compliance, it is also open to the Board to draw an adverse inference from Manitoba Hydro's failure to comply with Order 53/21. As explained by the Manitoba Court of Appeal, "in the absence of a satisfactory explanation, an adverse inference may be drawn from the failure of a party to produce a document or to call a witness. **This failure amounts to an implied admission that the evidence would be contrary to the party's case or at least would not support it.**"<sup>39</sup>

The drawing of an adverse inference is "more a matter of logic than law",<sup>40</sup> meaning that the Board is not required to draw such an inference. However, in the circumstances of this case, it would be appropriate and just for the Board to view Manitoba Hydro's non-compliance with Order 53/21 as an implied admission of a substantial change in circumstances.

Drawing an adverse inference is a discretionary decision left to a trier of fact, who may, depending on the circumstances, be inclined to respect a party's free choice to not call or rely on certain evidence.<sup>41</sup> However, the circumstances in which such deference might be appropriate can be clearly differentiated from the present matter, in which Manitoba Hydro was expressly and clearly ordered by its independent regulator to produce specific documents or "substantially the same information" in a different form, and failed to do so.

Further, while adverse inferences may be rebutted by "satisfactory explanation[s]"<sup>42</sup> of a party's choice to not produce or rely on evidence, Order 53/21 expressly required the production of specific documents or "substantially the same information" in a different form. Manitoba Hydro was not granted a unilateral right to refuse to comply with a lawful PUB Order.

Whether or not an IFF beyond IFF2016 exists, the underlying components of an IFF are clearly readily at hand for Manitoba Hydro. It simply has refused to provide "substantially the same information" in a different form.

It is not clear whether Manitoba Hydro is alleging that a Capital Expenditure Forecast does not exist. Even if Manitoba Hydro were to make that stunning assertion, it is clear the underlying components of a Capital Expenditure Forecast are in Hydro's possession. It has simply refused to provide "substantially the same information" in a different form.

In the case of a Prospective Cost of Service Study, Manitoba Hydro does not deny that a 2020/21 study exists. It simply refused to comply with the PUB Order.

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<sup>39</sup> *College v Jorgenson*, *supra* note 2 at para 20 (*emphasis added*).

<sup>40</sup> *L. (F.A.) v. B. (A.B.)*, [1995] 102 Man R (2d) 251, 125 DLR (4th) 640 at para 18.

<sup>41</sup> See, for example, *R. v. Jolivet*, 2000 SCC 29 at para 28.

<sup>42</sup> *College v Jorgenson*, *supra* note 2 at para 20.

Manitoba Hydro has not even ventured an explanation of why it has failed to provide the 2022/23 forecast of net export revenue and net income for each of the possible water flow conditions.

The Consumers Coalition urges the PUB to draw an adverse inference from Manitoba Hydro's non-compliance with Order 53/21. It is appropriate to infer that the documents, data and information sought in Order 53/21 would undermine Manitoba Hydro's assertion that it has not undergone a substantial change in circumstances. This is especially the case when the Board has made a *prima facie* finding of a change in circumstances and Manitoba Hydro has essentially refused to provide almost the entire suite of documents and data typically relied upon by it and the PUB in determining just and reasonable rates.

### **Requested Findings of the Consumers Coalition**

Given the failure by Manitoba Hydro to provide the information ordered by its independent regulator, it would be appropriate and just for the Board to view Manitoba Hydro's non-compliance with Order 53/21 as an implied admission of a substantial change in circumstances.

Accordingly, the Consumers Coalition asks the PUB to find that:

- 1) Manitoba Hydro has failed to comply with Order 53/21 by refusing to provide the underlying documents, data and prospective information sought by the PUB to determine whether there has been a substantial change in Manitoba Hydro's circumstances;
- 2) Manitoba Hydro's refusal to provide the type of information long relied upon by Hydro and the PUB to determine just and reasonable rates necessarily leads to an adverse inference that the information in question would confirm a finding that there has been a substantial change in circumstances;
- 3) It is reasonable and just to order a review of Order 59/18 and 69/19; and,
- 4) A Pre-hearing conference should be held to determine an orderly schedule for the Status Update proceeding.

Manitoba Hydro's failure to comply with the PUB Order also would leave it open to the PUB to compel production of necessary documents including by way of subpoena, to have an oral proceeding to further consider the threshold issue of whether there has been a substantial change in circumstances<sup>43</sup> or to initiate proceedings to consider whether Hydro is in contempt of Order 53/21.

However, in the respectful view of the Consumers Coalition, the threshold issue of a substantial change in circumstances already has been met. The four requested findings

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<sup>43</sup> Order 53/21 at 18. "The threshold question in this Application is whether the circumstances of Manitoba Hydro have changed substantially."

of the PUB as outlined above are the most direct and efficient path to protect the interests of Manitoba Hydro rate payers.

Given the prior finding of the PUB that the information before it “suggests *prima facie* that there have been changes in Manitoba Hydro’s circumstances”<sup>44</sup> and Manitoba Hydro’s failure to comply with Order 53/21, the Consumers Coalition asks the PUB to find the circumstances of Manitoba Hydro have changed substantially since Orders 69/19 and 59/18 and that it is appropriate to review those orders in a status update hearing.

### **Conclusion**

The Consumers Coalition appreciates the opportunity to comment on Hydro’s response.



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Byron Williams, Katrine Dilay, and Christopher Klassen

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<sup>44</sup> Order 53/21 at 20.