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August 30, 2021

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

Attn: Dr. Darren Christle, Executive Director and Board Secretary

Sent via email: Darren.Christle@gov.mb.ca

Dear Dr. Christle:

Re: Board Order 89/21 – Consumers Coalition Comments re Manitoba Hydro's Request for Clarification

Overview

It would be premature for the Public Utilities Board (PUB or Board) to make a determination, at this early stage, based on the requests made by Manitoba Hydro in its August 24, 2021 letter. Rather, these questions should be determined by the PUB in the normal course of the public process, as they routinely are in other proceedings before the Board.

Specifically, it would be premature for the Board to make detailed findings on the scope of the proceeding. The scope of the proceeding should instead be established through a pre-hearing conference and procedural order, as is regularly the case in previous proceedings before the Board. As it has done for decades, the PUB confirmed its intention in Order 89/21 to determine "whether Manitoba Hydro's rates are just and reasonable and its costs are fairly allocated among the various customer classes."¹ The factors to be examined by the Board in such a review are outlined in the *Crown Corporations Governance and Accountability Act* and

¹ PUB Order 89/21, p 3. See also p 46.

have been refined by the Board through years of public processes and establishment of detailed list of issues. These represent helpful precedents to assist in the determination of a detailed issue list in this proceeding, which should be done through a pre-hearing conference and procedural order.

While this process was not initiated by Manitoba Hydro, the materials examined and the process followed should be like other Manitoba Hydro rate reviews that have taken place over many decades, including a Manitoba Hydro Status Update proceeding which led to Order 7/03. The PUB has flexibility to modify its Rules of Practice and Procedure as the circumstances require, and this is an appropriate case in which to do so. Directing Manitoba Hydro to file the necessary materials for the Board to determine whether rates are just and reasonable falls within the legislated authority of the PUB.

Finally, it would be premature for the Board to make any findings regarding costs. The Board has a detailed Intervenor Cost Policy and a process in place for public proceedings before it. The established process contemplate granting Intervenor status and asks for submission of budget estimates at the start of a proceeding and a costs application at the end, in which Interveners are asked to explain why they meet the costs award criteria set out by the Board. The Board then provides an opportunity for submissions from the utility and adjudicates whether it will grant costs awards. It is unclear why the same process would not be used here. It is of note that costs were granted to interveners in the 2002 Manitoba Hydro status update hearing and no maximum funding level was established in that case.

As a result, the Consumers Coalition recommends that the Board respond to Manitoba Hydro's letter of August 24, 2021, by clarifying that:

- The intended scope of the public process is to determine whether Manitoba Hydro's rates are just and reasonable and its costs are fairly allocated among the various customer classes. It is premature to establish a detailed list of issues, which will be done through a pre-hearing conference and resulting procedural order;
- With respect to the process to be followed, the PUB retains the ability to modify its rules where necessary. In this case, Rule 23 should apply and Minimum Filing Requirements should be developed by the Board, with consideration of comments from prospective Interveners and Manitoba Hydro, to determine whether rates are just and reasonable; and
- It is premature for the PUB to make any determination with respect to Intervener costs. The PUB already has a detailed Intervenor Cost Policy and a process in place for granting costs to Interveners where the criteria established by the Board to ensure reasonable participation are met. Establishing arbitrary maximum funding amounts has the potential to impair the Interveners' ability to meaningfully participate in the proceeding.

Given that Manitoba Hydro's requests for clarification are premature, the Consumers Coalition recommends that the time limit to file a Review and Vary application should not be extended.

Background

On August 17, 2021, the Board issued Order 89/21 granting the Consumers Coalition application and directing a “public process be held through which Manitoba Hydro is to provide additional evidence to assist the Board in its determination of whether Manitoba Hydro’s rates are just and reasonable and its costs are fairly allocated among the various customer classes.”²

On August 24, 2021, Manitoba Hydro filed a letter with the Board, seeking clarification of:

1. the intended scope of the public process and identification of the specific issues which shall be considered by the Board in this proceeding;
2. the process to be followed by Manitoba Hydro as non-applicant; and
3. the treatment of costs in this proceeding.

By letter dated August 25, 2021, the Board provided past Interveners of record the opportunity to provide comments in response to Manitoba Hydro’s letter.

Scope of the Public Process

Based on the legislative framework and in light of the material changes in circumstances since its last review, it is the responsibility of the Board to examine whether Manitoba Hydro rates are just and reasonable. It is, however, premature to establish a detailed list of issues at this time.

As per the *Crown Corporations Governance and Accountability Act* [CCGAA], it is the Board’s responsibility to set rates for service for Manitoba Hydro.³ The CCGAA also sets out factors that are to be considered in a hearing on rates.⁴ As per the *Public Utilities Board Act*, rates for service are to be “just and reasonable”.⁵

The Consumers Coalition set out the applicable legislative framework in its application for a Manitoba Hydro Status Update. It is reproduced below for reference:

The PUB may direct a review of prior orders if it finds a substantial change in circumstances. The PUB is mandated by the Manitoba Legislative Assembly to review whether the rates for service of Manitoba Hydro “are just and reasonable”.

A PUB process to consider the rates for service of Manitoba Hydro can be triggered when the Crown monopoly seeks a rate change and applies for regulatory approval. Alternatively, under s. 26(3) of the CCGAA and s. 44 of the *PUB Act*, the PUB may on its own motion or on the application of Manitoba Hydro or an interested person, review and modify one of its prior orders as it deems

² PUB Order 90/21, p 3.

³ *Crown Corporation Governance and Accountability Act*, CCSM c C336, s 25(1) [CCGAA].

⁴ *Ibid*, s 25(4).

⁵ *Public Utilities Board Act*, CCSM c P280, s 77 [PUB Act].

“reasonable and justified” if it is “satisfied” that the circumstances of Manitoba Hydro “have changed substantially.”

The last status update hearing for Manitoba Hydro took place in 2002. While Hydro did not apply for a rate change, the evidence considered included Manitoba Hydro’s “financial results, forecasts, methodologies, processes” as well as events that had “transformed the electricity industry”.

The *PUB Act* applies to any review of Manitoba Hydro’s rates. In determining whether to amend a prior order, the PUB has the authority to set just and reasonable rates and classifications as well as to order Manitoba Hydro to provide a detailed report of its finances and operations.

In reviewing just and reasonable rates and classifications, the PUB may consider any of the factors outlined in s. 25(4) of the *CCGAA*. It also “must take into consideration”, the costs to be incurred by Manitoba Hydro in respect of Efficiency Manitoba.⁶

The Board has already confirmed its role in setting just and reasonable rates in Order 89/21 when it stated that it is requiring a public process through which additional evidence would be provided to “assist the Board in its determination of whether Manitoba Hydro’s rates are just and reasonable and its costs are fairly allocated among the various customer classes.”⁷ This examination is prospective and should include a determination of whether rates are too low or too high.

An examination of whether Manitoba Hydro’s rates are just and reasonable will necessarily involve an examination of issues from Order 59/18 and 69/19, such as the deferral account set aside to protect future Hydro ratepayers from rate shock. Many of the issues that were examined in Orders 59/18 and 69/19 are still ongoing and relevant in that they relate to revenue requirement, forecasts and expenses that directly impact rates.

Even where the Board reviews past Orders if there is unfinished business, the Board’s responsibility remains determining whether Hydro’s rates are just and reasonable given the totality of material change in circumstances. In this case, this will necessarily include recent developments in 2021, including but not limited to this summer’s drought.

The issues to be examined in a rate application are not novel and should not come as a surprise to any party. The factors outlined in *CCGAA* section 25(4) provide the categories of issues that are to be considered during a rate hearing. In the last three Hydro rate hearings,

⁶ See Application of the Consumers Coalition Application for an Order Requiring a Manitoba Hydro Status Update Hearing, March 26, 2021, p 7-8. Please note that footnotes have been removed from this excerpt and can be found in the original document.

⁷ PUB Order 89/21, p 3. See also p 46.

the Board has used a similar list of MFRs.⁸ Additionally, the list of issues examined in past rate hearings provide precedents for which issues are likely to be in scope.⁹

While section 25(4) of the CCGAA and prior rate hearings are helpful for predicting which specific issues may be in scope, it would be premature at this time for the Board to make any detailed findings on the scope of the proceeding and the issues to be examined. Rather, the list of issues and the detailed scope of the proceeding should be established through a pre-hearing conference process, as has been the case in previous proceedings relating to Manitoba Hydro rates and in other proceedings before the Board.

In this process to date, both the Board and intervenors have been working with limited and largely publicly available information. Once Manitoba Hydro files its Minimum Filing Requirements (MFR), it is likely that additional issues will arise. Establishing a list of issues now, as suggested by Manitoba Hydro, would entail going through the same exercise once again when the MFR materials are filed. Going through the exercise of setting out scope and issues twice would not be consistent with regulatory efficiency

Prior to the pre-hearing conference, it would be helpful if the Board were to prepare a preliminary list of issues, which could be based upon previous Hydro rate hearings but should also consider any new issues raised as a result of Manitoba Hydro's current business operations. Once the preliminary list of issues is provided by the Board, counsel for Interveners and Manitoba Hydro would have an opportunity to make comments either in writing or orally at the pre-hearing conference or both. If there is no agreement on the list of issues, the Board would then consider the comments of all parties and issue an Order establishing the process and the list of issues to be examined.

Process to be Followed

From the Consumers Coalition's perspective, the process to be followed to determine Minimum Filing Requirements has already been established in Board Order 89/21. The subsequent details of the public process should be determined by way of pre-hearing conference and resulting procedural order from the Board.

While this is not a rate application initiated by Manitoba Hydro, the materials examined and the process followed should be similar to other Manitoba Hydro rate hearings that have occurred for many decades, including a Manitoba Hydro Status Update proceeding, which led to Order 7/03, where Manitoba Hydro was not seeking any general rate changes.¹⁰

⁸ See the MFRs provided by the PUB prior to the 2017/18 and 2018/2019 GRA, where the Board also indicated that the majority of the MFRs "are intended as a restatement of the MFRs that have been asked in Manitoba Hydro's prior two rate applications.": <http://www.pubmanitoba.ca/v1/proceedings-decisions/appl-current/pubs/2017%20mh%20gra/pub%20exhibits/pub-3.pdf>.

⁹ See for example, PUB Order 70/17, Appendix A, starting at page 32:

<http://www.pubmanitoba.ca/v1/proceedings-decisions/orders/pubs/2017%20orders/70-17.pdf>.

¹⁰ PUB Order 7/03, p (i) where the Board stated that: "In light of the long passage of time since Hydro's sales rates were last reviewed in a public forum, the Board determined that one of the purposes of this hearing would be to determine whether the existing sales rates continue to be just and reasonable and whether any changes to existing sales rates may be required."

The Board can, of its own motion, “inquire into, hear, and determine any matter or thing within its jurisdiction” and may require the production of documents.¹¹ As a result, given that the Board has determined there has been a substantial change in circumstances and has determined the need for a public process, it has the power to request documents to be filed by Manitoba Hydro in order to determine whether rates are just and reasonable.

While Rule 23 of the PUB Rules of Practice and Procedure contemplate that an application shall contain Minimum Filing Requirements, the Board retains flexibility regarding the application of the Rules in that “[i]n any proceeding, the Board may dispense with, vary or supplement any of the provisions of these Rules.”¹² Given the finding by the Board that there has been a material change in circumstances and the direction for a public process, it would be appropriate for the Board to apply Rule 23, despite there being no application by Hydro.

As a result, with respect to process, the Consumers Coalition recommends that Manitoba Hydro should be directed by the Board to file the materials it will require to determine whether rates are just and reasonable. The PUB had already initiated the first step in this process by requesting comments on the Minimum Filing Requirements (MFRs) from Interveners, which has now been postponed due to Manitoba Hydro’s request.

Once the present request by Manitoba Hydro has been dealt with, for efficiency purposes, it would be helpful if the Board issued a preliminary list of Minimum Filing Requirements. This preliminary list of MFRs could be based on the MFRs from the process resulting in Order 59/18, which itself was a restatement of MFRs from the two prior rate applications.¹³

Given that Manitoba Hydro has not made a rate request, the MFRs should specify that Manitoba Hydro should file its position on whether or not current rates are just and reasonable, with supporting rationale.

Interveners would then have an opportunity to provide comments on this list of MFRs and Manitoba Hydro would respond, as contemplated by the Board in Order 89/21.

As the Board has stated in Order 89/21, once Hydro has responded to the suggested MFRs, the Board would “convene a pre-hearing conference to further consider and adjudicate the minimum filing requirement requests and to establish a process for the review of that additional information.”¹⁴

¹¹ *PUB Act*, s 27(1) and 27(2). See also PUB Rules of Practice and Procedure, s 12(2): “The Board, on its own initiative or upon motion by any party may order any person or party in a proceeding to produce any document relating to the proceeding.”

¹² PUB Rules of Practice and Procedure, s 3(2).

¹³ See the MFRs provided by the PUB prior to the 2017/18 and 2018/2019 GRA, where the Board also indicated that the majority of the MFRs “are intended as a restatement of the MFRs that have been asked in Manitoba Hydro’s prior two rate applications.”: <http://www.pubmanitoba.ca/v1/proceedings-decisions/appl-current/pubs/2017%20mh%20gra/pub%20exhibits/pub-3.pdf>.

¹⁴ PUB Order 89/21, p 10.

Costs

It would be premature for the Board to make any findings regarding costs at this early stage. The Board has a detailed Intervenor Cost Policy and a process in place, which is used in other public proceedings before it. Under that process, Interveners submit a budget estimate at the start of a proceeding using the Board's templates and are asked to submit budget updates where there are increases that occur during a proceeding. The process requires Interveners to submit a costs application upon completion of a hearing, including supporting materials regarding why they meet the criteria set out by the Board in its Rules of Practice and Procedure. The Board provides an opportunity for submissions from the utility and adjudicates whether it will grant costs awards. It is unclear why this established process, which already provides checks and balances regarding the reasonableness of Intervenor costs, would not be used here.

Interveners, including the Consumers Coalition, rely on intervener funding to meaningfully participate in public proceedings before the Board. As the Board noted, there exists "information asymmetry" between Interveners and Manitoba Hydro and this is also the case for resources. Setting an arbitrary maximum funding amount would be contrary to regular practice and would unfairly prejudice Interveners.

It is of note that costs were granted to Interveners in the 2002 Manitoba Hydro status update hearing and no maximum funding amounts were set.¹⁵

Even if the Board wished to review budget estimates from Interveners to have a better idea of costs, this would be impracticable at this early stage when no materials have been filed, no pre-hearing conference has been held to scope the process and no procedural order has been issued. The process that the Board typically follows should be followed in this case, where Interveners will file budget estimates following the pre-hearing conference and the issuance of the Board's procedural order, which will confirm the list of issues to be examined. Only then will Interveners be able to reliably estimate their costs.

It is unclear why a maximum amount of Intervenor funding would be implemented in this case when the PUB already has a process in place to ensure that Interveners participate reasonably and bring value to the process.

Please let us know if you have any questions.

Yours truly,



Katrine Dilay
Attorney
Public Interest Law Centre

¹⁵ See for example, PUB Order 46/03.

KD/vs

cc: Board Counsel
Manitoba Hydro
Manitoba Industrial Power Users Group
Manitoba Keewatinowi Okimakanak Inc.
Assembly of Manitoba Chiefs