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August 30, 2021

VIA E-MAIL:
publicutilities@gov.mb.ca

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

Attention: Rachel McMillin, Associate Secretary

Re: Subsection 44(3) request for review of Order No. 89/21
Our Matter No. 0186495 AFH

We acknowledge receipt of the letter dated August 25, 2021 from the PUB to past Intervenor of Record requesting comments on Manitoba Hydro's August 24, 2021 requests for clarification.

Manitoba Hydro had based its request on s. 44(3) of *The Public Utilities Board Act* and on PUB rules 10 and 36 which are reproduced as an attachment to this letter. We have also attached to this letter the relevant portions of other statutes.

As major customers of this Crown Monopoly, MIPUG expected a collaborative and cooperative approach by Manitoba Hydro. Manitobans are entitled to expect transparency and a forthcoming and respectful attitude towards PUB processes and directives from their electric utility. As noted at page 37 of PUB Order No. 89/21, Manitoba Hydro had represented to the PUB "that it would file its long-range financial forecast and full GRA with the board in the fall of 2019". Instead of honouring its representations, Manitoba Hydro is being adversarial and non-cooperative. Its premature requests reference jurisdictional and procedural issues that are normally dealt with during and after a hearing. Its letter of August 24, 2021 does not propose any solutions or ways of achieving a cost effective and efficient proceeding. Manitoba Hydro could have chosen to honour its promise to file a full GRA. However, it is choosing obstructive conduct and is engaging in unnecessary procedural requests that unnecessarily increase the costs of customers who participate in the regulatory process.

Summary

For the reasons which follow, we submit that the Manitoba Hydro request made pursuant to s. 44(3) ought to be dismissed.

The Requests are not proper s. 44(3) requests

The purported requests for “clarification” have not met any of the usual requirements for a vary and review application under s. 44(3), such as an error in jurisdiction, an error of law, or the existence of new facts not available when the PUB was considering this matter. Manitoba Hydro has not identified any typographical errors or similar errors. Rather Manitoba Hydro appears to be trying to elicit determinations which normally get decided at prehearings or after a hearing. See for example: [2017 CanLII 39845 \(ON LPAT\) | Oulahen v Toronto \(City\) | CanLII](#) at paras. 20 to 25 for the “convincing and compelling case” required on review and vary cases which are only granted in “the most rare and extraordinary of circumstances.”

The Requests are premature

Each of the 3 requests for “clarification” are premature.

1. The scope and identification of specific issues should follow the normal process. Manitoba Hydro should comply with the Minimum Filing Requirements (“MFRs”) sent to it. The usual course after receipt of Manitoba Hydro filings is for all counsel to meet, discuss scope and issues, and make recommendations to the PUB for its consideration. Where agreement on scope and issues cannot be reached the PUB considers submissions at a prehearing conference. The PUB, after considering recommendations and submissions issues an Order.
2. There is no immediate need to fully set out the process as a “clarification”. The usual course is for all counsel to meet, discuss process issues, and make recommendations to the PUB. On any issues where guidance is needed from the PUB, that guidance is sought and the PUB issues a procedural order after considering recommendations and prehearing submissions.
3. There is no immediate need for the PUB to rule on the treatment of costs. Pursuant to ss. 24(4) and 56 of *The Public Utilities Board Act*, the PUB has broad procedural powers including with respect to the payment of costs. It would be unusual for the PUB to rule on costs in advance of a hearing. The usual course is for Intervenor to advise whether they will seek a cost award. If they will seek a cost award, they are invited to submit budgets. The PUB Orders on costs are made after the hearing and after considering the submissions of the

Intervenors seeking costs and the submissions of Manitoba Hydro in response those requests made by Intervenors.

Broad and flexible procedural powers

We note that both s. 24(4) of *The Public Utilities Board Act* and the PUB Rules provide the PUB with broad procedural powers that apply to various types of proceedings and not only those brought by Manitoba Hydro by way of its Applications. The PUB Rules do not limit those broad powers. To the contrary, s. 4(1) of the PUB Rules specifically contemplates the issuance of directives which are needed for the PUB to carry out its statutory duties. Some of the relevant portions of the PUB Rules read as follows:

"PROCEEDING" means a process to decide a matter brought before the Board, including a matter commenced by application;

Application of Rules

3. (1) These Rules apply to all proceedings of the Board.

(2) In any proceeding, the Board may dispense with, vary or supplement any of the provisions of these Rules.

(3) The Board has all the powers of a Court of Queen's Bench or a Judge thereof in respect of the attendance and examination of witnesses, the amendment of proceedings, the production and inspection of documents, the enforcements of its Orders and all other matters necessary or proper for the due exercise of its powers, except as otherwise provided in *The Public Utilities Board Act* [Section 24(4), *The Public Utilities Board Act*].

Direction on Procedure

4. (1) In any proceeding, the Board may issue directions on procedure which will govern the conduct of that proceeding and will prevail over any provision of these Rules that is inconsistent with those directions.

Alleged Procedural unfairness

On page 2 of its letter Manitoba Hydro alleges that failing to provide clarity on the specific issues "is a procedural error and results in procedural unfairness to Manitoba Hydro". Manitoba Hydro is fully aware of the statutory duties and tests which the PUB is required to apply. In Order 89/21, the PUB has restated its mandate of setting "just and

reasonable rates” – a well known and judicially considered statutory test. Given the test is well known and Manitoba Hydro has in its possession all of the information which it knows is needed by the PUB to carry out its statutory duties, it is hard to fathom how this proceeding is unfair to this Crown Monopoly, which should be transparent and provide information that informs the PUB and Manitobans on the issue of whether customers are paying just and reasonable rates.

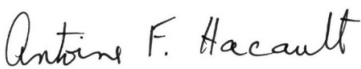
It is not credible for Manitoba Hydro to submit through its counsel that Manitoba Hydro does not know the information which the PUB needs to exercise its statutory mandate to decide just and reasonable rates. For decades, Manitoba Hydro has compiled and filed the required information. No compelling reasons have been provided by Manitoba Hydro as to why compiling and filing the same type of information and answering MFRs, as it is usually required to do, is somehow now procedurally unfair to Manitoba Hydro.

If Manitoba Hydro wishes to be adversarial instead of cooperative and has positions or views on what can and cannot be considered by the PUB in this proceeding, or it believes that the PUB is exceeding its jurisdiction during proceeding, it can raise those objections at the appropriate time. Intervenors will have the opportunity to respond to Manitoba Hydro submissions.

On behalf of MIPUG we thank the PUB for allowing us to provide comments in respect to Manitoba Hydro’s August 24, 2021 letter to the PUB.

Yours truly,

THOMPSON DORFMAN SWEATMAN LLP

Per: 

Antoine F. Hacault*

AFH
Cc: Board Counsel
Manitoba Hydro
CAC
Manitoba Keewatinowi Okimakanak Inc.
Assembly of Manitoba Chiefs

*Services provided through A. F. Hacault Law Corporation