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May 19, 2023

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

Attention: Rachel McMillin, Associate Secretary

**Re: Manitoba Hydro 2023/24 & 2024/25 General Rate Application
Rebuttal Evidence prepared by AMCL**

The Public Utilities Board (“PUB”, “Board”) relies in part on the contributions of independent experts to facilitate evidence-based decision-making in the determination of just and reasonable rates. These experts are and must be held to high standards of independence and impartiality to preserve the integrity and efficacy of regulatory processes.

In the Consumers Coalition’s view, Appendix 2 to the May 5, 2023 Rebuttal Evidence of Manitoba Hydro authored by Asset Management Company Ltd. (“AMCL”) is indicative of an expert overstepping their proper bounds. While the contents of Appendix 2 are not substantively prejudicial to the Consumers Coalition’s interests, we write to provide notice that it will be argued on the Coalition’s behalf that Appendix 2 should be afforded no weight when considered as evidence by the Board.

Experts must be Independent, Impartial and Unbiased

The Supreme Court of Canada has confirmed that qualified experts providing opinion evidence to a trier of fact owe a duty “to provide opinion evidence that is fair, objective and non-

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partisan...[which] prevails over any obligation owed by the expert to a party.”¹ The Court confirmed further that in order to comply with this duty,

*The expert’s opinion must be **impartial** in the sense that it reflects an objective assessment of the questions at hand. It must be **independent** in the sense that it is the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be **unbiased** in the sense that it does not unfairly favour one party’s position over another.*²

The Court went on to specify that “an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court.”³ In circumstances where an expert is clearly unwilling or unable to comply with their duty, a trier of fact may exclude the evidence in question. If not excluded, bias or impairment of an expert’s independence or impartiality will go to their evidence’s weight.⁴

Rebuttal Evidence by Consultants Before the PUB

The PUB has recently applied the above legal test in analogous circumstances to justify placing no weight on the evidence of a consultant retained by Centra Gas in its 2021 Cost of Service proceeding.

In Order 109/22, the Board explained that a report by Atrium Economics filed with Centra Gas’ rebuttal evidence in that proceeding constituted argument, which caused the Board to conclude that Atrium had stepped outside the bounds of the proper role of an independent expert.⁵ The Board accordingly placed no weight on the evidence of Atrium based on experts’ well-established duty of independence.

Similarly, and despite being presented as an “independent”⁶ consultant, AMCL’s provision of Appendix 2 to Manitoba Hydro’s Rebuttal Evidence also constitutes argument and likewise demonstrates that AMCL has stepped beyond its proper role as independent expert.

While the PUB’s treatment of the Atrium report in the Centra Gas proceeding was based on Atrium’s defence of its own analysis from criticism of other experts,⁷ AMCL’s Appendix 2 is more egregious.

¹ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para 30.

² *Ibid* at para 32. [emphasis added]

³ *Ibid* at para 49.

⁴ *Ibid*.

⁵ PUB Order 109/22 at 31-32.

⁶ Manitoba Hydro 2023/24 & 2024/24 General Rate Application, Tab 7 at 25.

⁷ PUB Order 109/22 at 32.



Rather than defending its own analysis, AMCL's Appendix 2 is an explicit defense of Manitoba Hydro against the independent evidence of Midgard Consulting Inc. In Appendix 2, AMCL makes only one reference to its own prior evidence⁸ but contests multiple of Midgard's assertions and recommendations. AMCL vociferously defends Manitoba Hydro on matters including the pace of its Asset Management maturation, its budgeting process, and its asset decision-making processes, and in so doing has assumed the role of advocate for Manitoba Hydro.

Conclusion

While it would be open to the Board to deem the evidence of AMCL inadmissible on the basis of its contribution to Manitoba Hydro's Rebuttal Evidence, the Consumers Coalition does not seek exclusion of this evidence as it is substantively immaterial and not substantively prejudicial to the Consumers Coalition. However, the Coalition does raise its concern to the attention of the Board as an invitation to consider the actions of AMCL in determining the weight ascribed to Appendix 2.

The Consumers Coalition thanks the Board for its consideration of these comments.

Thank you,



Chris Klassen
Attorney

*Chris is an independent lawyer retained by the Public Interest Law Centre in this matter.

/ck

cc: Manitoba Hydro
2023/24 & 2024/25 General Rate Application Mailing List

⁸ The sole reference to AMCL prior evidence is on a point of agreement with Midgard, being the suitability and cost-effectiveness of run-to-failure and run-near-to-failure strategies for low-consequence assets.

