IN THE PUBLIC UTILITIES BOARD OF MANITOBA

	)	THE MANITOBA HYDRO
	)	
IN THE MATTER OF:	)	2023/24 AND 2024/25
	)	
	)	GENERAL RATE APPLICATION.

SUBMISSION OF MANITOBA KEEWATINOWI OKIMAKANAK INC.

(June 22, 2023)

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(File no. 10146-10)

SUBMISSION OF MANITOBA KEEWATINOWI OKIMAKANAK INC.

Good afternoon, Mr. Chair Gabor, Madam Vice-Chair Kapitany, and panel members Bass, Bellringer, and Sy:

1. I have the honour and privilege today of delivering the submission of Manitoba Keewatinowi Okimakanak Inc. In MKO's opening statement on May 15, 2023, I said that MKO sought to achieve three objectives in this hearing. I shall address these in turn.

Board authority to make recommendations

2. MKO's first objective in its intervention is to make the legal argument that the Board still has authority for this last general rate application under the former version of *The Manitoba Hydro Act* to make recommendations to the Government of Manitoba under its repealed section 39(11). Specifically, MKO respectfully disagrees with the Board's interpretation, expressed in Board Order 130/22 at page 18, that the old section 39(11) does not give the Board jurisdiction to make recommendations to the Government.

3. Repealed section 39(11) of *The Manitoba Hydro Act* reads:

> **Recommendations by P. U. Board**
> 39(11) After hearing evidence and submissions in respect of <u>any application</u> made to it under this Act, The Public Utilities Board shall make a report to the minister which shall include its recommendations as to the prices that should be charged for power supplied by the corporation or paid for power requisitioned by the corporation, as the case may be, and the reasons for its recommendations.

4. The relevant transitional provision is contained in *The Manitoba Hydro Amendment and Public Utilities Board Amendment Act*, SM 2022, c 42, s 65:

> *Transitional*
> *65 Despite Part 1 and sections 23 and 64 of this Act, the following Acts or provisions, as they read immediately before the enactment of this Act, continue to apply to the determination of rates for the retail*

> *supply of power under* ***The Manitoba Hydro Act*** *for any period ending before April 1, 2025:*
>
> *(a) Part 4 of* ***The Crown Corporations Governance and Accountability Act****;*
>
> *(b)* ***The Manitoba Hydro Act****;*
>
> *(c) section 2 of* ***The Public Utilities Board Act****.*

5. Indeed, this entire application is being heard under the authority of the former repealed section 39 of *The Manitoba Hydro Act*, not the new section 39. Section 39(11) on which MKO relies is just one of the 13 subsections of the old section 39. Section 39 is not yet technically repealed by operation of transitional section 65 of the enacting statute. And therefore neither is section 39(11).

6. There is no problem with a statute incorporating by reference a repealed statute. A statute can even turn into law a document which is not a statute. We provide just two examples:

(a) *The Court of King's Bench Act*, CCSM c C280, s 78 (Definitions) incorporates a central bank interest rate into Manitoba law:

> "**bank rate**" means the minimum rate at which the Bank of Canada makes short-term advances to the banks; (« taux d'escompte »)

(b) The *Manitoba Building Code*, MR 31/2011, s 1, incorporates by reference a federal government commission publication:

> Adoption of *National Building Code of Canada 2010*
>
> 1 Subject to the amendments set out in the Schedule to this regulation, and to sections 1.1 and 2.1, the *National Building Code of Canada 2010*, issued by the Canadian Commission on Building and Fire Codes, National Research Council Canada, is adopted as the building code in Manitoba.

7. So, when the section 65 transitional provision of the amending statute says that all of section 39 continues in force and effect though repealed, there is no magic and it applies equally to section 39(11), the power to make recommendations.

8. But Board Order 130/22 (at page 18) went even further and suggested that the old section 39(11) was no longer operative even before:

> Subsection 39(11) of *The Manitoba Hydro Act*, which was relied on by MKO as an authority for the Board to make recommendations to the provincial government, no longer exists and does not provide the Board with any authority. The provision was a remnant of the time when the Board did not fix rates under *The Crown Corporations Governance and Accountability Act* or it predecessor statute, *The Crown Corporations Public Review and Accountability Act*, but rather made non-binding rate recommendations to the government. For many years, the provision has not been operational and, effective November 3, 2022, the provision has been repealed. This does not prevent the Board from, as part of an order in a general rate application, making recommendations to the government related to the application. [*Underlining added*.]

9. With respect, MKO also disagrees with the Board's interpretation that the former section 39(11) was obsolete and ineffective even before its amendment. Justice La Forest of the Supreme Court of Canada wrote in *R. v Mercure*, [1988] 1 SCR 234 at 255:

> … [S]tatutes do not, of course, cease to be law from mere disuse. As Driedger puts it, "A statute is not effaced by lapse of time, even if it is obsolete or has ceased to have practical application"; see E. A. Driedger, *The Composition of Legislation* (2nd ed. rev. 1976), at p. 110.
> …

10. Whatever other jurisdiction that the Board may have to make recommendations to the Government, MKO submits that it also has jurisdiction from section 39(11) of the former version of *The Manitoba Hydro Act*.

First Nation on Reserve Residential rate class

11. MKO's second objective in its intervention is to persuade the Board to recommend to the Government of Manitoba that it amend *The Manitoba Hydro Act* to restore, or to permit this Board to restore, the former First Nation On-Reserve Residential (FNORR) customer class.

12. First, some history. In Board Order 59/18 (at page 28), all but one panel member endorsed the creation of the FNORR:

> An appropriate starting point for bill affordability in Manitoba is a program targeted at on-reserve ratepayers, specifically through the creation of a First Nations On-Reserve Residential customer class with a differentiated rate to address energy poverty.
>
> The creation of this new customer class is justified by the need to address energy poverty on-reserve, supported by evidence that 96% of First Nations people on-reserve live in poverty and that reserves in Manitoba have the highest rates of child poverty in Canada. In addition, the poor housing stock on reserves in Manitoba and the fact that the vast majority of on-reserve First Nations residential customers (61 out of 63 First Nations communities) have no access to the more economical option of natural gas for heating exacerbate the issue of energy poverty.
>
> The new customer class and related affordability measure of a 0% rate increase are also consistent with the principle of reconciliation. As defined in *The Path to Reconciliation Act*, reconciliation is the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing, and create a more equitable and inclusive society.

13. Unfortunately for First Nation residents, Manitoba Hydro appealed the creation of the FNORR customer class. On June 9, 2020, the Court of Appeal ruled that the Board exceeded its jurisdiction under *The Manitoba Hydro Act* when it created the FNORR customer class. The citation for that decision is *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60. The Supreme Court of Canada refused leave to appeal that decision on March 18, 2021, in *Assembly of Manitoba Chiefs v Manitoba Hydro-Electric Board*, 2021 CanLII 20317.

14. The main objective of MKO's intervention has been to persuade the Board to recommend to the Government of Manitoba, as it is presently still able to do by *The Manitoba Hydro Act*, section 39(11), under the transitional provision referred to earlier, to amend the Act to restore, or to permit this Board to restore, the FNORR. That would make the FNORR *intra vires*, not *ultra vires*.

15. Well, the Board may ask, what about the new section 39, and especially the section 39(5) "Rules for approving or varying rates", the section 39.1(1) "Electricity and rates policies", and the section 39.1(2)(c) "Classification of grid customers"? Those provisions would of necessity also need to be harmonized and amended if the FNORR customer class were introduced into *The Manitoba Hydro Act*.

16. And how likely would it be that the Government would adopt a Board recommendation to amend the Act to permit a FNORR customer class? MKO submits that that question is irrelevant. The Board is mandated to make recommendations that are in the public interest, not only those that are likely to be adopted now. The Government of today may not be open to the recommendation, but a Government of tomorrow may be. The Board should take judicial notice of the truisms that Governments come and go, that they sometimes change their minds, and that Governments regularly repeal or amend statutory provisions. The Board cannot and should not second-guess what may or may not happen in the Legislative Assembly. If energy poverty and bill affordability truly are problems for a vulnerable group of electricity customers as the Board has already found they are for First Nation customers, then that is a sufficient basis to recommend to Government restoration of the FNORR. The Board cannot and should not second-guess what may or may not happen in the Legislative Assembly or to its composition.

17. Regarding evidence, in this application MKO decided to elicit evidence through focused information requests and cross-examination of the Manitoba Hydro Rates and Cost of Service Panel witnesses. MKO's 16 information requests are contained in MKO exhibits MKO-2 and MKO-3. The cross-examination of the Manitoba Hydro panel is in the transcript for June 6, 2023, from pages 3476 to 3531.

18. Basically, MKO broke down the Manitoba residential customer class into 9 subgroups:

(a) All-Manitoba Residential Customers;

(b) Winnipeg Residential Customers;

(c) All-Manitoba Non-Reserve Residential Customers;

(d) All-Manitoba Non-Reserve Rural Residential Customers;

(e) Manitoba First Nation Residential Customers (all 63 Manitoba First Nations);
(f) Manitoba First Nation Non-Diesel Customers (59 First Nations);
(g) MKO Nations Residential Customers (all 25 MKO First Nations);
(h) MKO Non-Diesel Zone Residential Customers (21 First Nations); and
(i) MKO Diesel Zone Residential Customers (4 First Nations which are not permitted to heat with electricity).

19. Then MKO obtained Manitoba Hydro's data for each of the 9 subgroups regarding aggregate *billed* amounts, aggregate *collected* amounts, arrears amounts, number of disconnections, and number of uncollectible accounts. MKO submits that these data tell the Board much about the relative energy poverty of the 9 subgroups. Here are some of the results:

(a) MKO customers comprise 40% of all First Nation customers;
(b) First Nations customers:
    (i) comprise 3.67% of all residential customers;
    (ii) are billed 7.1% of the total for all residential customers, an average of $2,924.38 per customer; and
    (iii) are responsible for 52.9% of the arrears for all residential customers, or an average of $1,471.11;
(c) MKO Nations customers:
    (i) comprise 1.45% of all residential customers;
    (ii) are billed 3.0% of the total for all residential customers, an average of $3,133.27 per customer; and
    (iii) are responsible for 37.5% of the arrears for all residential customers, or an average of $2,638.67;
(d) MKO Diesel Nations customers (no electric heating permitted):
    (i) are billed an average of $1,562.54 per customer; and
    (ii) are responsible average arrears of $571.06;
(e) all residential customers:
    (i) are billed an average of $1,516.17 per customer; and
    (ii) are responsible average arrears of $101.99.

20. From the above data, it seems that electric heating is a major cause of First Nations' residential customers' large bills and arrears. Electric heating affects MKO non-Diesel Nations even more than First Nations generally, probably because they are all located in the far north.

21. The Board has asked Manitoba Hydro on many occasions to suggest solutions to First Nation people's energy poverty. For example, in Order 137/21 [at page 14, para. 1], the Board wrote that it "expects Manitoba Hydro and interveners to bring meaningful solutions to these concerns." MKO asked Manitoba Hydro what it had done towards this end. [MKO-2: MKO/MH I 9a–b] The best Manitoba Hydro could do was to refer to three programs *which all pre-date* the Board's request for meaningful solutions. (The three programs were created in 2002, 2008, and 2018 respectively.)

22. MKO's has brought a meaningful solution to First Nations' energy poverty: a Board recommendation to the Government to amend *The Manitoba Hydro Act* to restore the FNORR customer class. And what was Manitoba Hydro's response to that suggestion? MKO asked Manitoba Hydro [Transcript page 3516–3518]:

> "Now in answer to the Board's Order where it asked for meaningful solutions to deal with energy poverty, would Manitoba Hydro agree that the now defunct FNORR rate class was a meaningful solution?"
>
> and
>
> "... if we could convince the board to recommend that the FNORR class — that the statute — the Manitoba Hydro Act be amended to permit the FNORR, my question is: Would that be a meaningful solution to energy poverty?"

23. And how did Manitoba Hydro respond? With an objection by counsel:

> "Mr. Buchart, I think that matter's been settled by the Court of Appeal."
>
> "Mr. Chair, I don't think the panel's in a position to respond to that, considering it was ordered — directed by this Board and, ultimately, overturned by the Court of Appeal."

24. Manitoba Hydro's objection is a textbook example of the 'straw man fallacy'. A straw man argument is one in which a person sets up and then attacks a position that is not actually being asserted. A straw man argument is, by definition, disingenuous. Manitoba Hydro knows full well that the Court of Appeal ruling did not consider Board recommendations for the Government to amend *The Manitoba Hydro Act*. But apart from the fallacious logic underlying the objection, MKO gave Manitoba Hydro an opportunity to express its position regarding the efficacy of a FNORR rate class and it refused to answer. So, it is safe to say that Manitoba Hydro *did not take a position* on a FNORR statutory amendment — it neither opposed or supported it. Finally, MKO suggests that the path to reconciliation involves crown corporations *actually answering* questions of Indigenous organizations like MKO and not evading them.

25. MKO submits that it has demonstrated again what has been shown in this Board many times before, that Indigenous people disproportionately suffer from electricity rates. Manitoba Hydro has not offered any meaningful solutions to the long-standing and worsening problem. MKO and AMC have. The Board should recommend that the Government create by statute a FNORR customer class.

26. MKO submits further that the Board should recommend that the Government enact by statute a Northern First Nation on Reserve Residential Rate (NFNORR) in recognition of the high electricity heating costs in the far north.

27. A definition of "northern Manitoba" already exists in *The Northern Affairs Act*, CCSM c N100, s 1 (definitions) that could be used to apply to NFNORR First Nations:

> "**northern Manitoba**" means all that part of Manitoba north of the northern boundary of Township 21 that is not included in
>
> (a) a wildlife management area or refuge designated as such under *The Wildlife Act*;
> (b) a provincial forest designated as such under *The Forest Act*;
> (c) a provincial park designated as such under *The Provincial Parks Act*;
> (d) a municipality or local government district; or
> (e) any area prescribed by the Lieutenant Governor in Council as not being within northern Manitoba for the purposes of this Act.\
> (« Nord »)

27. In the alternative, NFNORR could be defined geographically such as all First Nations located north of, say, 52 degrees of latitude.

Diesel Agreement

28. MKO's third objective in its intervention is to satisfy the Board that the Diesel Agreement between MKO, its four member First Nations that comprise the so-called "Diesel zone", Manitoba Hydro, and the Government of Canada, has been fully executed.

29. Board Order 59/18 (at page 272) issued on May 1, 2018, made an order with respect to the Diesel Agreement:

> 36. Manitoba Hydro provide confirmation to the Board that the executed diesel zone Settlement Agreement documents have been received by the Utility and that the documents are in proper form. With this confirmation, Manitoba Hydro is to advise the Board of its intention regarding finalization of the interim diesel zone rates.

30. Manitoba Hydro filed counterpart copies of the Diesel Agreement dated 2010/11 in its present application filing [MH-1, Appendix 9.13]. MKO asked Manitoba Hydro two information requests regarding the Diesel Agreement. [MKO-2: MKO/MH I-10a-b; and MKO-3: MKO/MH II-1a-d]. Manitoba Hydro confirmed that the signed counterparts of the Diesel Settlement Agreement that it filed in this proceeding had been provided to the corporation by MKO's counsel on February 7, 2018, that they together comprise the fully executed Diesel Settlement Agreement, that the filed counterpart copies were executed by all seven parties, and that Manitoba Hydro's position is that the Agreement is valid and enforceable.

31. MKO submits that the Board's 2018 order referred to has been satisfied and Manitoba Hydro has been in a position since 2018 to advise the Board of its intentions regarding diesel zone rates.

Endorsement of AMC's recommendations

32. MKO has had the benefit of the Assembly of Manitoba Chiefs (AMC) counsel advising us of the positions it would be taking today on Manitoba Hydro's rate applications. MKO is satisfied that AMC has convincingly argued that Manitoba Hydro has not proven any revenue requirement that would justify confirmation of the 3.6% interim rate increase on January 1, 2022, and the two new 2.0% rate increases applications for 2023/24 and 2024/25. MKO would agree with AMC's first position that the Board should not confirm the interim rate increase and not grant the two new rate increases.

33. MKO endorses, albeit with less enthusiasm, AMC's alternative position of permitting a rate increase of not more than 1.4%. If it were procedurally possible for the Board to *reduce* rates, MKO would have taken that position in this proceeding in light of the real hardship that present electricity rates already impose on Indigenous including MKO citizens. If the Board is not prepared to freeze rates, then AMC's alternative should be the outer limit of any rate increase.

Conclusion

34. In conclusion, MKO thanks the Board for its consideration of MKO's submission and indeed for its attention, patience, and courtesy throughout this hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

June 22, 2023

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