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January 31, 2022

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

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

Re: Manitoba Public Insurance Application to Review and Vary Public Utilities Board Order 134/21 – CAC Manitoba Comments

<u>Overview</u>

The Manitoba Branch of the Consumers' Association of Canada (CAC Manitoba) appreciates the opportunity to comment on Manitoba Public Insurance's (MPI) application to review and vary the Public Utilities Board's (PUB or Board) Order 134/21 relating to the 2022 General Rate Application (GRA).

In four of the areas on which MPI seeks to review and vary the PUB's Order, MPI's arguments are contrary to the long-standing regulatory authority of the PUB over MPI rates for service confirmed through the statutory scheme, case law and established regulatory practice. MPI's application attempts to unduly limit the jurisdiction of the PUB over customer classes, the reasonableness of the corporation's investments and the corporation's overall financial health, including reserves.

First, MPI's application respecting the Driver Safety Rating (DSR) ignores the PUB's statutory authority over customer classifications as an inherent part of rate-setting. This portion of MPI's application should be dismissed as it is not grounded in law and fails to raise doubt as to the correctness of the decision.

Second, MPI's application respecting its Asset Liability Management (ALM) study overlooks the PUB's authority to review MPI's investment decisions, to reflect the reasonableness of these decisions in rates and to issue information-seeking directives related to its mandate. As above, this portion of MPI's application should be dismissed as MPI has not raised a substantial doubt as to the correctness of the decision.

Third, MPI's application respecting the 100% Minimum Capital Test (MCT) target for the Basic Rate Stabilization Reserve should be dismissed as it relies on a misinterpretation of the law and fails to cast doubt on the correctness of the decision. The PUB intends to review the CMP in next year's GRA, including the target level and the use of a single target versus a range, and possesses the authority to do so notwithstanding the *Reserves Regulation*. It is therefore appropriate for the PUB to direct MPI to file analyses to assist with the review of the CMP and MPI's application should be dismissed.

Fourth, MPI has failed to establish that the PUB's findings of fact relating to the transfers from Extension to Driver and Vehicle Administration should be reviewed or varied. These findings represent an important signal to a regulated monopoly that the actions it took were not transparent and lacked accountability. MPI is, in essence, asking the PUB to re-weigh evidence that was already thoroughly canvassed during the hearing without bringing forward new facts or a change in circumstance and its application should be dismissed.

MPI's review and vary application as it relates to Generalized Linear Models and the Fleet Program, however, may meet the test for a review and vary application, in that there are new facts or a change in circumstances that could lead the Board to materially vary its Directives. While it is arguable that those facts or change in circumstances should have been available at the time of the Board's hearing, it would be appropriate to grant MPI's requests in these areas by modifying the timeline within the Directives.

CAC Manitoba does not take a position with respect to MPI's application on the Alternate Rate Indication and Vehicles for Hire.[1]

[1] With the exception of the directive relating to Driver Safety Rating in the Vehicles for Hire section.

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The legal test for a review and vary application

Under s. 44(3) of the *Public Utilities Board Act*, the board may review, rescind or vary its orders.[2]

Rule 36 (4) of the Public Utilities Board Rules of Practice and Procedure indicate that:

> The Board shall determine, with or without a hearing, in respect of an application for review, the preliminary question of whether the matter should be reviewed and whether there is reason to believe the order or decision should be rescinded, changed, altered or varied.

Rule 36 (5) a) of the Rules of Practice and Procedure authorizes the Board to, after its determination of the preliminary question above:

> a) dismiss the application for review if,
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> i) in the case where the applicant has alleged an error of law or jurisdiction or an error in fact, the Board is of the opinion that the applicant has not raised a substantial doubt as to the correctness of the Board's order or decision; or
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> ii) in the case where the applicant has alleged new facts not available at the time of the Board's Hearing that resulted in the order or decision sought to be reviewed or a change of circumstances, the Board is of the opinion that the applicant has not raised a reasonable possibility that the new facts or the change in circumstances as the case may be, could lead the Board to materially vary or rescind the Board's order or decision; or
>
> b) grant the application; or
>
> c) order a hearing or proceeding be held.

In essence and recognizing that the onus lies with the Applicant, the issue is not whether reasonable persons might have come to a different conclusion based on the same evidence but whether:

[2] *Public Utilities Board Act,* CCSM c P280, s 44(3).

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a) there is an error of law, jurisdiction or fact that raises substantial doubt as to the correctness of the decision; or,
b) new facts or a change in circumstances have arisen or been learned that raise a reasonable possibility that the Board's decision might be materially changed.[3]

Directive 11.13 – Driver Safety Rating (DSR) Directives

Overview

MPI's application relating to DSR should be dismissed as there is no reason to believe the order or decision should be rescinded, changed, altered or varied. MPI's allegation of errors of law and jurisdiction are contrary to the PUB's established rate setting authority, which includes customer classification and as such, do not raise a substantial doubt as to the correctness of the Board's decision.

Directive 11.13 required MPI to prepare a file a five-year plan for the implementation of the Primary Driver rating model in the Driver Safety Rating program. MPI asserts that the PUB does not have the jurisdiction to direct MPI to plan and implement a new DSR model, and that such a change is not possible without legislative changes.

MPI's DSR system is a form of customer classification intended to both incentivize safer driving and enable drivers' premiums to better reflect the costs they introduce to the insurance system.

MPI must obtain PUB approval before implementing any changes to the rates charged to its customers. By virtue of section 6.4 of the *Manitoba Public Insurance Act (MPIC Ac)t*, Part 4 of the *Crown Corporations Governance and Accountability Act (CCGAA)*, and sections 77(b) and 82(1)(c) of the *Public Utilities Board Act (PUB Act)*, the rates charged to each customer class and the composition of customer classes are necessarily included in the PUB's review and approval of rates.

The PUB also has the authority to impose rates for services that differ from those sought by MPI. Because customer classifications are an inherent aspect of rate-setting, this includes the authority to impose changes to the composition of customer classes, such as directing MPI to transition from a DSR system classifying vehicle premiums based on the vehicle's registered owner, to a system based on the primary driver.

[3] See also PUB Order 90/18, p 6-7 where the Board discusses its authority regarding review and vary applications.

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CAC Manitoba did not recommend that MPI implement a Primary Driver model. Rather CAC Manitoba recommended that, as a next step toward ensuring that its DSR model is actuarially sound, MPI be directed to begin collecting data on primary drivers in order to produce a pricing study for the primary driver model as soon as possible.[4] However, contrary to MPI's position, CAC Manitoba does not dispute that the PUB has jurisdiction to order MPI to produce a 5-year implementation plan for a Primary Driver model as the DSR is clearly within its rate-setting authority.

The DSR system is a form of customer classification

Case law and established regulatory practice confirms that customer classification is the act of grouping similarly situated customers for the purpose of charging them different rates than other customers on the basis of the value of the service provided to them and/or the cost incurred in providing that service. In automobile insurance, a driver's at-fault claims experience, which is indicative of the costs they introduce to the system, is reflective of that driver's risk. As such, the DSR system is clearly a form of customer classification.

Customer classification is an inherent part of utility regulation

In utility regulation, ensuring the fairness of rates between different classes of ratepayers necessarily involves grouping ratepayers into broad rate groups or classes and considering the principles of horizontal and vertical equity to determine whether any differential treatment is unduly or unjustly discriminatory.[5] As Steven Ferry wrote,

> The principles of horizontal equity that "equals should be treated equally,' and vertical equity that "unequals should be treated unequally' ... [is interpreted to mean] **that equal ... cost causers for the provision of a good or service should pay the same ... prices.**" Horizontal equity among different customer classes, based on cost of service, is a goal: it is illegal for a state to set rates that "grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.[6]

The leading text on utility rate-setting by James Bonbright uses the example of on-peak electricity, which is more expensive to produce than off-peak electricity, as an example of when

[4] Exhibit CAC-11, p 118.
[5] Steven Ferrey, *Solving The Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 Wake Forest L. Rev. 121 at 153-154; James C. Bonbright, *Principles of Public Utility Rates,* 1st ed, (New York: Columbia University Press, 1961), at 174, 383, 384.
[6] Steven Ferrey, *ibid*, citing James C. Bonbright Et Al., *Principles Of Public Utility Rates*, 2nd ed (Public Utility Reports, 1988) at 568.

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the value of service principle appropriately calls for differentiated rates.[7] By analogy, compulsory automobile insurance for a high-risk driver is a higher-value service than insurance for a low-risk driver, which justifies customer classification on the basis of risk and the process of differentiating rates by risk.

In Manitoba, the Court of Appeal has recently explicitly recognized that "the setting of customer classifications is an inherent part of the setting of rates."[8]

The British Columbia Supreme Court 1972 *Chastain* provides further support on this point, when it explained that the regulation of public utilities necessarily involves the prevention of unreasonable price discrimination between those who are similarly situated:

> *The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers.*[9]

Further, the idea that customer classification is inherent in utility rate-setting is consistent with practice in other jurisdictions. For example, the British Columbia Court of Appeal has described the British Columbia Utilities Commission's mandate as including "determining utilities rates for various classes of customers."[10]

The Supreme Court of Canada has also made a similar finding respecting regulation of freight rates, confirming that where "certain rates may operate unfairly, relatively, as between different classes of service or different classes of customers…the Commission has the duty to prevent such discrimination."[11]

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[7] Bonbright, *supra* note 4 at 381.
[8] *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60, para 40.
[9] *Chastain v British Columbia Hydro and Power Authority*, [1972] 32 DLR (3d) 443 at 454.
[10] *British Columbia Old Age Pensioners' Organization v British Columbia Utilities Commission*, 2017 BCCA 400 at para 11.
[11] *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] SCR 837, at p 856-857.

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MPI's DSR System was expressly designed to group MPI ratepayers by relative risk

By expressly designing the DSR system to group drivers by relative risk and by improving, over time, the accuracy with which each DSR level's premiums reflected the group's risk, the PUB and MPI have clearly implemented a system of customer classification.

In Order 89/09, MPI applied to the PUB for "approval of amended compulsory driver insurance premiums and vehicle premium discounts pursuant to a proposed DSR program."[12]

The proposal had three stated goals:

1. To provide higher rewards (via reduced premiums) for the safest drivers;
2. To provide stronger incentives for higher risk drivers to improve their driving behaviour; and
3. To improve drivers' understanding of how their driving behaviour can affect the amount they pay for auto insurance. [13]

From the perspective of the Board, the DSR was intended to incentivize improved driving behaviour by permitting rates to better reflect drivers' risk:

> The Board accepts that DSR is a significant improvement over the current bonus/malus scheme, and represents progress towards establishing a rate structure that more fairly collects premiums from drivers and vehicle owners by better matching the risk they represent to the collective pool of risks.[14]

The Board acknowledged that while offering an improvement by making rates more reflective of risk, it still identified shortcomings in what it called 'relative rate adequacy', meaning that not all rates adequately covered the risk introduced to the system by the drivers to whom they were charged:

> However, the evidence presented and discussed during the hearing suggests that relative rate adequacy is not uniform across the DSR levels. In particular, the relative adequacy of rates increases as one moves to higher merit levels (with lower rates), and conversely, decreases as one moves to higher demerit levels (with higher rates). In other words, a level of cross-subsidization of the highest rated drivers by the lowest

[12] Order 89/09 at 11.
[13] Order 89/09 at 11.
[14] Order 89/09 at 41.

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> rated drivers is implicit in the DSR proposal, particularly at implementation.[15]

The Board did acknowledge that some degree of cross-subsidization between DSR levels may always be present:

> Citing public policy considerations, in particular the issues of access and affordability, the Corporation expressed doubt that it would "ever" be appropriate for a Crown corporation insurer to fully respond to the actuarial indications in this regard.[16]

However, the Board clearly understood that MPI's intent with respect to the DSR program was to continually improve the relative rate adequacy of premiums and discounts in the DSR program:

> To some extent, the proposed evolution of the driver premium surcharges in future years is expected to mitigate this initial cross-subsidization, and **the Corporation committed to monitoring experience as it unfolds by DSR level towards applying "for future rate changes that are consistent with the actuarial evidence on a directional basis".**[17]

This commitment by MPI is consistent with its presentation of the technical basis for the DSR proposal as explained in the proceeding which led to Order 89/09. It was made clear in that proceeding that MPI specifically designed the DSR system so that DSR levels would be reflective of each driver's relative risk.

To do so, MPI first tested the reliability of using recent at-fault claims to predict future at-fault claim frequency. This analysis confirmed that "risk of claims occurring increases with the number of recent at-fault claims and minor convictions."[18] In other words, MPI confirmed that a driver's claims experience can be used to predict driver risk.

Then, it applied its proposed DSR classifications to actual claims experience for a recent 5-year period to confirm that the proposed distinctions or thresholds between DSR levels appropriately separated drivers based on their at-fault claims frequency. In the Board's words, "the review confirmed that at-fault claim frequency consistently rose as drivers moved from

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[15] Order 89/09 at 41-42.
[16] Order 89/09 at 42.
[17] Order 89/09 at 42 (emphasis added).
[18] Order 89/09 at 39.

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the top end of the merit side to the bottom end of the demerit side on the DSR scale."[19] And, based on the first step in the analysis, at-fault claims frequency is predictive of future risk. In other words, MPI confirmed on a retrospective basis that its proposed DSR classifications appropriately reflected driver risk.

Finally, having confirmed that its proposed DSR levels were reasonably reflective of risk, MPI projected future driver and vehicle premiums post-implementation of DSR to identify the proposal's "bottom line impact".[20]

Through this three-step analysis, MPI demonstrated to the Board that its DSR proposal sought to charge different classes of customers different rates on the basis of their risk of at-fault claims.

The PUB has the authority to direct MPI to implement a new DSR model

The Board's Statutory Mandate to Review and Approve MPI Plan Premiums Includes Customer Classification

The PUB is responsible for approving all plan premiums (rates for insurance) charged by MPI for its compulsory auto insurance. A detailed reading of this statutory responsibility makes clear that review and approval of customer classifications, such as those created and imposed by the DSR system, comprise an essential element of what the PUB must review and approve.

Applying a modern approach to statutory interpretation requires that the "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[21] In the present matter, the "entire context" includes all three relevant statutes, the PUB's regulatory history and regulatory best practice found in relevant literature and jurisprudence.

The *MPIC Act*[22] makes clear at section 6.4 that MPI "must apply to The Public Utilities Board for approval before changing an existing plan premium, or establishing a new plan premium, for its plans of universal compulsory automobile insurance."[23] Importantly, the Board is directed here

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[19] Order 89/09 at 39.
[20] Order 89/09 at 41.
[21] *Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, [1998] SCJ No 2 at para 21 [*Rizzo*], citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), p 87 para 36.
[22] CCSM c P215.
[23] *Ibid* at s 6.4(2).

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to “make its decision in accordance with Part 4 of *The Crown Corporations Governance and Accountability Act*."[24]

Following this direction in the *MPIC Act*, the PUB must necessarily look to Part 4 of the *CCGAA* for clarity on its mandate in reviewing and approving MPI’s plan premiums. Part 4 of the *CCGAA* makes clear that all rates for services charged by MPI must be reviewed by the PUB:

> **Hydro and MPIC rates review**
> 25(1)
>
> Despite any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under The Public Utilities Board Act and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.[25]

For the purposes of MPI, “rates for services” are defined as “rate bases and premiums charged with respect to compulsory driver and vehicle insurance…”[26]

Through the *MPIC Act* and the *CCGAA*, MPI is required to obtain PUB approval for all rates and premiums charged with respect to its compulsory (Basic) driver and vehicle insurance. These statutes, together with the *PUB Act*, provide further guidance on how the PUB must fulfill that responsibility.

First, the *CCGAA* provides factors to be considered in hearings concerning the approval of rates for services. The factors listed are broadly related to the various components making up MPI’s and Manitoba Hydro’s revenue requirements, plus “any compelling policy considerations that the board considers relevant to the matter, and […] any other factors that the Board considers relevant to the matter…”[27] Additionally, the next subsection notes that specifically in hearings relating to MPI’s rates for services, the Board can take into account “all elements of insurance coverage affecting insurance rates.”[28]

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[24] *Ibid*.
[25] *Ibid* at s 25(1).
[26] *Ibid* at s 25(2).
[27] *Ibid* at s 25(4)(viii), (ix).
[28] *Ibid* at s 25(5).

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Together, these provisions give the Board broad discretion to consider factors it deems relevant and authority to consider all elements of insurance coverage affecting rates.

Further, Part 4 of the *CCGAA* also makes clear that *"The Public Utilities Board Act* applies with any necessary changes to a review pursuant to this Part of rates for services."[29] The sections of that *Act* which are relevant to the question of the PUB's mandate to review and approve customer classes and which apply to the Board's review of MPI's rates are 77(b) and 82(1)(c):

> **Orders as to utilities**
> 77
>
> The board may, by order in writing after notice to, and hearing of, the parties interested,
>
> […]
>
> (b) fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed thereafter by any such owner;
>
> […]
>
> **Discriminatory rates**
> 82(1)
>
> No owner of a public utility shall
>
> […]
>
> (c) adopt or impose any unjust or unreasonable classification in the making, or as the basis, of any individual or joint rate, toll, fare, charge, or schedule for any product or service rendered by it within the province;
>
> […]

[29] At s 25(3).

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In the *PUB Act*, these sections specifically address public utilities (s 77) and owners of public utilities (s 82). While MPI is not a public utility within the meaning of the *PUB Act*, the relevance of these sections is established through section 25(3) of the *CCGAA*, which confirms that the *PUB Act* applies "with necessary changes" to the PUB's consideration of MPI's rates for services.[30] Reference to Manitoba Court of Appeal jurisprudence, as well as the sources canvassed above confirm that customer classification is an integral element of rate-setting and that sections 77 and 82 apply for purposes of reviewing MPI rates for service.

In *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*[31], the Manitoba Court of Appeal considered the PUB's authority to review and approve Manitoba Hydro's customer classes. The Court reviewed the same sections of the *PUB Act* and the effect of section 25(3) of the *CCGAA* on the PUB's authority to review, approve and order the creation of customer classes.

The Court found that "The PUB is mandated to review rates on the basis of whether they are just and reasonable. Sections 77(b) and 82(1)(c) of the PUB Act clearly contemplate the necessity for just and reasonable rates and classifications."[32] The Court confirmed that the PUB has the authority to "fix just and reasonable rates, charges and classifications."[33] While this decision related specifically to Manitoba Hydro, the Court relied on a decision relating to MPI to support its decision.

In the 1995 MBCA decision of *Coalition of Manitoba Motorcycle Groups Inc. v. Public Utilities Board (Man.) et al*,[34] the Court heard an appeal in which it was asked to clarify whether the PUB had the authority to approve rates higher than those sought by MPI.[35] The Court found that the Board could approve rates that differed from those sought by the corporation, and in the course of its analysis adopted a statement by counsel for the interveners (Manitoba Society of Seniors and CAC Manitoba):

> If the board has discretion to set any rate that is fair and reasonable upon the evidence and in the public interest, then <u>all aspects of the rate are 'in issue'</u> when the Board holds a public hearing on rates.[36]

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[30] *CCGAA* at s 25(3).
[31] 2020 MBCA 60.
[32] *Ibid* at para 39.
[33] *Ibid* at para 41.
[34] 102 Man R (2d) 155.
[35] *Ibid* at para 1.
[36] *Ibid* at para 25 (emphasis added). See also para 26, where the Court adopted this statement.

This statement was relied on and reproduced by the MBCA in the 2020 Manitoba Hydro decision, confirming that "the setting of customer classifications is an inherent part of the setting of rates":

> [40] In my view**, the setting of customer classifications is an inherent part of the setting of rates.** In Coalition of Manitoba Motorcycle Groups, Twaddle JA considered the breadth of section 44(1) of the PUB Act and its application to a decision made by the PUB to increase insurance rates in an amount higher than that requested by the Manitoba Public Insurance Corporation. He agreed that "if the [PUB] has discretion to set any rate that is fair and reasonable upon the evidence and in the public interest, then all aspects of the rates are 'in issue'" (at para 25). In my view, that statement is equally applicable in this case.
> [41] In summary, a purposive approach to the interpretation of the legislation supports the ability of the PUB pursuant to section 82(1)(c) of the PUB Act to review the classifications created by Manitoba Hydro to ensure that they are not unjust or unreasonable. Similarly, it has the authority to fix just and reasonable rates, charges and classifications. (emphasis added)

Another excerpt from the 1995 decision, though not relied on by the Court in 2020, further affirms the PUB's oversight over customer classifications. The Court wrote as follows:

> [23] A power of "review" would make little sense if the Board could only approve or reject an application or fix a rate below that sought. **The Board's function is not only to protect consumers from unreasonable changes, but also to ensure the fiscal health of the Corporation and fairness between different classes of consumer.** Although the Corporation is not a public utility, as that term is defined in the Public Utilities Board Act, it is a Crown Corporation that is made accountable to the Board by the Accountability Act. It is the Corporation's accountability which gives the Board its broad power to approve a different rate than that sought by the Corporation. [37] (emphasis added)

Taken together, the 1995 decision, which confirmed that "all aspects of the rates are 'in issue'", and the 2020 decision, which confirmed that "the setting of customer classifications is an inherent part of the setting of rates", confirm that sections 77(b) and 82(1)(c) of *The PUB Act* apply to the PUB's review of MPI's rates for services. As a result, these decisions confirm that the

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[37] *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board (Man) et al*, [1995] 102 Man R (2d) 155 at para 23. (emphasis added)

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Board has the authority to review and approve all aspects of the DSR rate classification system, including issues of fairness and cross-subsidization between customer classes.

MPI makes reference to section 33(1.1) of the MPIC Act, arguing that any regulation change touching upon the amount of premiums charged for Basic must first be made by the Lieutenant Governor in Council, which change is then subject to the approval of the PUB. With respect, this interpretation is not based on principles of modern statutory interpretation.[38]

Section 33(1.1) reads:

> No regulation changing the amount of an additional driver premium, a base driver premium or a discounted driver premium — together being the premiums charged by the corporation for compulsory driver insurance — may be made under subsection (1) unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board in accordance with Part 4 of *The Crown Corporations Governance and Accountability Act*.[39]

This section read in context and in its grammatical and ordinary sense shows that the PUB must first approve any proposed change, following which the Lieutenant Governor in Council will be satisfied that it has been approved by the PUB and can the proceed to make the change. This reading of the PUB approving the change first also accords with the rest of the statutory scheme, under which the PUB has jurisdiction over "all aspects of the rates." For all aspects of rates, the PUB approves rates first, then the Lieutenant Governor in Council makes the changes in regulation, once it is satisfied it has been approved by the PUB.

MPI itself demonstrated its compliance with section 33(1.1) by bringing to the PUB the changes to the DSR it was proposing in the 2022 GRA. Now that those changes have been approved by the PUB, they can be incorporated in regulation by the Lieutenant Governor in Council.

PUB Past Practice

The PUB has expressly noted that it views determining the appropriate allocation of costs between classes as a key element of its rate-setting role.[40] Specifically with respect to the DSR, MPI's application is inconsistent with the reality that the implementation of the DSR in the first

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[38] *Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, [1998] SCJ No 2 at para 21 [*Rizzo*], citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), p 87 para 36.
[39] CCSM c P215, s 33(1.1).
[40] PUB Order 98/14 at 28.

place required the approval of the PUB, which was provided in Order 89/09. The PUB's authority to review and approve the rates and discounts charged in the DSR system has been exercised consistently since that time. The Board has also regularly addressed and expressed concerns with cross-subsidization in the DSR, which in regulatory terminology amounts to discriminatory rates between customer classes.

Examples of this can be seen in discussions of "relative rate adequacy" in Order 89/09, when the PUB expressed concerns that some DSR levels would be subsidizing others.[41]

The Board again expressed concerns about cross-subsidization in 2017, noting the "lack of actuarial evidence supporting the evaluation of driver risks so that higher risk drivers pay more than safer drivers for both driver and vehicle premiums."[42] The Board expressed similar sentiments in Order 159/18[43] and since Order 176/19 has issued directives related to the rating model and addressing cross-subsidization.

The PUB can direct MPI to implement the primary driver model

The PUB has the authority to direct MPI to initiate change and is not limited to mere approval of changes initiated by MPI or government. This authority flows from the Board's ability to vary applications by MPI and approve rates other than those sought by MPI.

As explained in the *PUB Act*, the Board may grant relief other than what is sought in an application, either in addition to or instead of the relief applied for:

> **Power to order partial or other relief**
> 44(1)
>
> Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief.[44]

This section is made applicable to the Board's review of MPI's rates for services by the operation of section 6.4 of the *MPIC Act* and section 25(3) of the *CCGAA*. Importantly, it is also reflected in

[41] PUB Order 89/09 at 42.
[42] PUB Order 130/17 at 34.
[43] PUB 159/18, p 43-45.
[44] *The PUB Act* at s 44(1).

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section 6.4 of *The MPIC Act*, which confirms that the Board "may either approve or vary the plan premiums applied for by the corporation…"[45]

This, too, has been confirmed by the Manitoba Court of Appeal:

> Although the Corporation is not a public utility, as that term is defined in the Public Utilities Board Act, it is a Crown Corporation that is made accountable to the Board by the Accountability Act. It is the Corporation's accountability which gives the Board its broad power to approve a different rate than that sought by the Corporation.[46]

Recognizing that "all elements of the rate are 'in issue'" before the PUB, including customer classifications, coupled with the reality that the PUB can impose rates other than those sought by MPI, it follows that the PUB can direct structural changes to the DSR program including a transition to the primary driver model.

<u>MPI's Assertion that the PUB has no authority to request long-term plans</u>

MPI's argument that the PUB does not have the authority to request long-term plans is not supported by the case law, does not recognize that the PUB's Directive is geared to remedy ongoing subsidization and is therefore directly related to the rates under review, and does not accord with an orderly annual regulatory process that prioritizes rate stability and predictability for both the corporation and its ratepayers

One of MPI's objections to Directive 11.13 is based in its reliance on a Manitoba Court of Appeal statement that the PUB does not have the authority to request long-term plans:

> 43 As regards the failure to advise the PUB of any plans, plans do not affect the rates that are subject to review in a particular year. While plans, if implemented, may well affect the rates for basic insurance in future years, those rates will be subject to review by the PUB if and when the plans are realized and put into effect. Until then, the mandate to review and comment on long-term plans has been left to the Crown Corporations Council and the government, and the PUB has not demonstrated how they are relevant to, or affect, its ability to carry out its mandate in any particular year. The fact is that the government has the right to change legislation and to require that the MPIC make changes to its business, and neither the government nor the MPIC are

[45] *Ibid* at s 6.4(3).
[46] *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board (Man) et al*, [1995] 102 Man R (2d) 155 at para 23.

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required to give the PUB any advance notice. This is an issue for the government and not the PUB.[47]

First, MPI unfortunately left out of its review and vary application the fact that this assertion from the Court of Appeal concerns matters which were outside the PUB's jurisdiction (non-Basic lines of business). In this way, it is distinguishable from the present matter which concerns customer classifications for Basic customers, a matter that is squarely within the PUB's jurisdiction.

Second, contrary to the statement above upon which MPI relies, DSR and the ongoing issue of cross-subsidization do impact the rates that were subject to review in the 2022 GRA. The PUB has raised concerns regarding cross-subsidization in the DSR system for years and cross-subsidization remains, including in the rates subject to review in the 2022 GRA. This is the first year in which MPI has proposed changes to begin addressing the cross-subsidization. While the PUB has approved those changes proposed by MPI to address the cross-subsidization in the short term, it has also recognized the inherent challenges within the Registered Owner model, which led it to order the five-year plan to implement a Primary Driver model with the goal of addressing the root of the cross-subsidization problem in the long term. Without ordering this plan, which amounts to a variation to what MPI applied for, the inherent challenges in the Registered Owner model, are likely to remain.

Third, interpreting the Court of Appeal's statement in the manner proposed by MPI cannot be consistent with an orderly annual regulatory process that prioritizes rate stability and predictability for both the corporation and its ratepayers. In exercising its rate-setting authority, the Board's role necessarily includes consideration of long-term plans in achieving rate stability and conducting effective annual regulatory processes through the implementation of incremental change.

Conclusion

The Driver Safety Rating system is a form of customer classification, enabling the PUB to more effectively ensure that the amounts MPI charges to its individual customers reflect the costs they introduce to the system or the costs MPI incurs in providing them services.

Customer classifications are specified in the *PUB Act* as being an inherent element of the Board's rate-setting responsibility, and these provisions are applicable to the Board's review of MPI's rates and premiums by virtue of section 6.4 of the *MPIC Act* and Part 4, section 25(3) in particular,

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[47] *Public Utilities Board v Manitoba Public Insurance Corp. et al*., 2011 MBCA 88 at para 43.

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of the *CCGAA*. This means that the review and approval of classifications themselves, as well as issues of fairness between classes, are subject to the Board's review.

Due to its authority to impose rates and plan premiums that differ from those sought by MPI, the PUB can direct the Corporation to alter the composition of its rate classifications based on, for example, primary driver rather than registered owner. Finally, MPI's assertion that its plans are not relevant to the PUB's mandate contradicts fundamental elements of the regulatory process.

MPI's review and vary application relating to the DSR Directive should therefore be dismissed.

<u>Directives 11.19 and 11.20 – Asset and Liability Management (ALM) Study Directives</u>

MPI's application relating to the ALM study should be dismissed as there is no reason to believe the order or decision should be rescinded, changed, altered or varied. While it is not within the PUB's jurisdiction to direct MPI on the particulars of its portfolio management, it is well within its authority and jurisdiction to review the reasonableness of MPI's investments decisions as these decisions have a direct impact on rates through MPI's investment income. The PUB has the jurisdiction to order MPI to produce the information it needs, and if necessary, impose a timeline, in order to assess the reasonableness of MPI's investments.

The PUB does not have jurisdiction to direct the specific investments undertaken by MPI. This was recognized by the Board most recently when it stated that it "recognizes that its role is one of oversight and does not extend to directing the Corporation on the particulars of its portfolio management."[48]

However, investment income serves to lower the overall rate indication for MPI and, as a result, investment decisions have a direct impact on the rate requested by MPI. MPI's rates for service are reviewed and ultimately approved by the PUB. Therefore, in the event that MPI's investments are considered unreasonable by the PUB and are found to have led to higher rates as a result, it would be open to the Board to make a determination that rates for service should be lower than requested to reflect the cost of MPI's unreasonable investment decisions.

The ALM study is a key input into the PUB's determination of whether MPI's investments are reasonable, including identifying the opportunity costs of MPI's self-imposed constraints. An ALM study informs asset allocation decisions, such as the equity bond split, which is a key driver

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[48] PUB Order 134/21, p 114.

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of return and risk. The purpose of an ALM study is to look at the mix of assets with the output being a long-term policy mix that "maximizes the return at the risk level selected."[49]

If the ALM study is based on inappropriate constraints and the results do not show the real cost of MPI's investment decisions, it would be difficult or even impossible for the PUB to determine whether MPI's investment decisions are reasonable, and if not, how to reflect this in rates for service.

By directing what should be included in an ALM study, the PUB is telling MPI what information it needs in order to assess whether its investments are reasonable, which then directly impacts the rates for service for MPI. After the previous ALM study, a number of concerns were raised regarding the constraints included in the study. This led to evidence and argument demonstrating that the constraints were inappropriate and did not adequately show the costs of MPI's investment decisions. As a result, it is well within the jurisdiction of the PUB to direct what is to be included, and not included, in the ALM study.

The Manitoba Court of Appeal has already decided an analogous issue on an application for leave to appeal filed by Manitoba Hydro relating to an Order by the PUB for the corporation to conduct an independent asset management study. In that case, the Court of Appeal found that, while the PUB did not have jurisdiction to intrude on how Hydro conducts its asset management, it was well within its mandate to issue information-seeking directives, which is in essence what the PUB is doing in issuing its directive relating to the ALM study:

> [35] In reply, the PUB argues that Directive 14 does not mean and is not meant for it to infringe on the management functions of Hydro. It takes the position that, in order for it to fix just and reasonable rates, which is clearly part of its mandate, it has to be in a position to understand Hydro's capital expenditures. The PUB acknowledges that it does not have the authority to approve or disapprove of Hydro's capital projects, but maintains that, as capital project expenditures form part of Hydro's revenue requirements, which it seeks to recover from ratepayers, the revenue requirements have to become a focus of its inquiry.
>
> [36] In addition, the PUB points to the fact that, despite orders dating back to 2008, Hydro has not yet fully complied in providing asset condition information. The PUB argues that, if it is unable to direct an independent study, and

[49] See Transcript October 20, 2021, at 1597-1598 (Dilay, Bunston).

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if Hydro does not file a comprehensive study, then it is unable to adequately assess the extent to which rates should recover business operations capital expenditures.

[37] Consumers' takes the position that there is no arguable basis on which Hydro can challenge this directive. It argues that, although Hydro advances its challenge on the basis of its authority to make capital expenditure decisions, the effect of that challenge is to question the PUB's ability in the context of its ratemaking role to investigate whether proposed capital asset management expenditures are prudent and reasonable and that is clearly within the PUB's mandate.

[38] AMC takes no position with respect to this directive.

[39] I accept the arguments put forth by the PUB and Consumers'. This directive is not an intrusion into the manner in which Hydro conducts its affairs. It is an information-seeking directive to help the PUB discharge its mandate and, in my view, the PUB is well within its legislative mandate to do so. Considering that the PUB is interpreting its home statute and considered on a standard of reasonableness, I have not been convinced that Hydro has an arguable case with a reasonable prospect of success.[50] (emphasis added)

It is also appropriate for and within the jurisdiction of the PUB to direct the timing of the ALM study. The GRA process is the only venue in which the PUB reviews rates for service for MPI. If the ALM study is filed after the GRA, the PUB and parties involved in the hearing will not have a meaningful opportunity to examine and ask questions on this essential piece of information prior to MPI implementing investment decisions. The evidence on the record of the proceeding showed that, when it was convenient for MPI to do so, it was able to expedite the ALM study, which further serves to ground the PUB's Directive in the evidence before it.

Directive 11. 4 - Generalized Linear Models (GLMs) Directive

MPI's application relating to GLMs should be reviewed as MPI is raising new facts or a change in circumstances that raises a reasonable possibility that the Board's decision might be materially changed. While it is arguable that the facts underlying MPI's application on GLMs should have been available at the time of the Board's hearing, it would be appropriate to grant MPI's request by varying the timeline in the Board's Directive.

[50] *Manitoba Hydro-Electric Board v Public Utilities Board (Man) et al*, 2019 MBCA 54, paras 35-39,

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MPI is requesting a variance to the timeline in the PUB's Directive on GLMs. Some of the evidence included in MPI's justification appears to be new evidence, including that MPI is not interested in exploring the use of any free internet software and that the adoption of GLMs is more realistically a two-year timeline. Given that the issue of GLMs was raised early during the process, including in intervener evidence by Dion Strategic, it is unclear why MPI did not raise its concerns during the hearing, either in rebuttal evidence or in testimony during the oral public hearing.

In addition, it was demonstrated in evidence that MPI is an industry laggard when it comes to the implementation of GLMs. As a result, it would be inappropriate for the Directive to be rescinded and to the extent that it is varied, it should include a specific timeline to ensure accountability and continued review of this issue before the PUB.

MPI's request, however, does appear to raise new facts or a change in circumstances that would support a change of timeline in the PUB's directive to enable MPI to comply with the Directive and take meaningful steps toward implementing GLMs. As a result, CAC Manitoba recommends that the Directive be varied to state that the Corporation shall submit a plan for the implementation of GLMs in the 2023 GRA.

<u>Appendix A - 100% Minimum Capital Test (MCT) Single Point Target</u>

MPI's application relating to the 100% MCT target does not raise a substantial doubt as to the correctness of the Board's decision and as such, MPI's application should be dismissed. During its upcoming review of the CMP, expected in the 2023 GRA, it is open to the PUB to, once again, find the *Reserves Regulation* to be invalid for rate-setting purposes and to order a different target or range for the Basis Rate Stabilization Reserve. Additionally, MPI would not be contravening the *Reserves Regulation* by providing the analyses requested by the PUB.

The 100% MCT target was approved by the PUB as a component of MPI's CMP in the 2020 GRA for a two-year period. The approval of the CMP was extended in PUB Order 134/21 for a one-year period and the PUB has indicated it will review it in the next GRA. That review is expected to examine all aspects of the CMP, including the level of the target and whether a target is superior to using a range.

While the *Reserves Regulation* also sets a 100% MCT threshold for Basic's Rate Stabilization Reserve (RSR), the PUB found in its 2020 GRA Order that portions of the *Reserves Regulation* were invalid because they conflict with the PUB's rate-setting role. As a result, the 100% MCT target is currently only in place because the PUB approved it as part of the CMP.

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First, MPI would not be violating the *Reserves Regulation* by simply providing the analyses requested by the PUB.

Second, as explained in CAC Manitoba's written brief filed during the hearing of this matter,[51] the PUB may rely on its decision in Order 176/19 to again find sections 2(a) and 3 of the *Reserves Regulation* invalid. Given that a review of the CMP, including the target level approved as part of the CMP, is expected to take place in the 2023 GRA, it would be open to the PUB to once again find that it is not bound by the *Reserves Regulation* in its rate-setting function.

For MPI to comply with the *Reserves Regulation* in contravention of a PUB Order would be to view a regulation, being subordinate legislation, as more authoritative than its enabling statute with which it would be in conflict.

This means that the *Reserves Regulation* will not prevent the PUB from finding the 100% MCT target to be inappropriate for rate-setting purposes, nor will it permit MPI to refuse to comply with a PUB order to this effect.

As a result, it is within the PUB's jurisdiction and appropriate for it to request that MPI provide analyses of the 100% MCT target, as well as the use of a single target versus a range. If MPI does not comply, the PUB could still review the CMP, including the 100% MCT target and the use of a single target versus a range, but without the benefit of the analyses by MPI. It would also be open for the PUB to find that MPI is in contravention of its Directives.

Based on the PUB's rate-setting authority upon which it found portions of the *Reserves Regulation* to be invalid, combined with the upcoming review of the CMP, MPI's review and vary application on this issue should be dismissed.

Directive 11.11 - Vehicle For Hire (VFH) Directives

With the exception of the portion of this directive relating to DSR (Directive 11.11(b)), CAC Manitoba takes no position with MPI's review and vary application as it relates to Vehicles for Hire.

With respect to Directive 11.11, part b), please refer to CAC Manitoba's arguments regarding the PUB's jurisdiction over DSR.

[51] Please see Exhibit CAC-12-1, p 19-24 for the complete legal argument on this point.

Directive 3 – Alternate Rate Indication Directive

CAC Manitoba takes no position with respect to MPI's review and vary application relating to the Alternate Rate Indication Directive.

Directive 5 – Fleet Program Directive

MPI's application relating to the Fleet Program Directive appears to be raising new facts or a change in circumstances that raises a reasonable possibility that the Board's decision might be materially changed. While it is arguable that the facts underlying MPI's application on the Fleet Program should have been available at the time of the Board's hearing, it may be appropriate to grant MPI's request by varying the timeline in the Board's Directive.

In its review and vary application, MPI acknowledges that a review of its fleet program is needed but indicates that the timeline in Directive 5 would not be possible to achieve. While it is unclear whether that evidence was available during the hearing and could have been provided to inform the Board's decision, MPI's request appears to raise new facts or a change in circumstances.

While MPI's proposed remedy is to rescind the Directive, this would be inappropriate given the evidence filed in the hearing and for purposes of ensuring accountability on the issue going forward. CAC Manitoba recommends that Directive 5 be varied to require MPI to file the fleet program analysis in the 2024 GRA, representing a one-year extension.

Pages 56-59 - Comments made by the PUB relating to the transfer of funds to the Driver and Vehicle Administration (DVA) program

MPI's application regarding findings by the PUB relating to the transfer of funds to the DVA program should be dismissed as it does not raise a substantial doubt as to the correctness of the Board's decision and findings.

There is nothing in MPI's review and vary application that was not on the record of the 2022 GRA proceeding. The PUB weighed all the evidence, including the evidence from MPI with respect to how it communicated the transfers to DVA, and came to a finding of fact. While the PUB decided it did not have jurisdiction to order transfers to DVA to be reversed, the findings and comments made by the PUB represent an important signal to a regulated monopoly that the actions it took were not transparent and lacked accountability. MPI is, in essence, asking the PUB to re-weigh

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evidence that was already thoroughly canvassed during the hearing without bringing forward new facts or a change in circumstance.

The PUB's emphasis in its decision on the transfers from Extension to DVA is rooted in the direct impact of the transfers on Basic customers due to the CMP. Pursuant to the CMP, the PUB receives information regarding Extension's capital and reviews transfers from Extension. While the PUB found that it does not have jurisdiction to order a remedy for the transfers made from Extension to DVA, transfers from Extension are an essential part of the CMP and have a direct impact on Basic customers, namely on the amount of the rebate approved in the 2022 GRA.

The CMP was introduced by MPI in the 2020 GRA and approved by the PUB on a temporary basis. The original intent of the CMP can be summarized as follows:

- To regularly review the capital levels of both Extension and Basic;
- Be transparent regarding where excess capital from Extension goes;
- To have a way of automatically transferring excess capital from Extension to Basic;
- To have a way of consistently releasing and re-building capital regardless of the circumstances; and
- To recognize that Extension and Basic have for the most part the same customers.[52]

When it approved the CMP, the PUB recognized that this plan took into account the advantages that Extension receives from Basic's monopoly:

> While the Board recognizes that it does not have jurisdiction over Extension, given the anticipated transfers from Extension to Basic contemplated by the Capital Management Plan, the magnitude of Extension's reserves is of concern to the Board. The evidence is that MPI holds approximately 95% of the market share for non-compulsory insurance products. The transfers from Extension to Basic will be automatic under the Capital Management Plan for any amounts over 200% MCT held by Extension in its reserves.[53]

The PUB's findings of fact with respect to the DVA transfers are important for purposes of public accountability and trust. MPI is a monopoly for Basic insurance and as such, its customers have no choice but to purchase insurance from it. If customers are unhappy with the way that MPI is conducting its business, including transferring funds from Extension to DVA rather than to Basic as contemplated under the CMP and the way this was communicated to the public, they have no

[52] See generally Transcript October 19, 2021 at 1363-1376 (Dilay, Giesbrecht).
[53] PUB Order 176/19, p 62.

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way of showing it by switching to a competitor as they could do in a competitive environment. Basic customers are stuck with MPI.

In this context, the PUB's comments serve as a proxy for customers switching companies when they are unhappy with the way a corporation behaves.

Despite having declined to order that the funds from Extension be transferred to Basic rather than DVA, the PUB remained entitled to comment on the impact of the transfers on customers of Basic. That is what the PUB did, based on the evidence before it.

MPI did not raise any new facts or a change in circumstances that would lead to the Board reviewing and varying its findings regarding the transfers to DVA. The PUB's criticism of MPI's decision and lack of transparency does not amount to prejudice that should result in the Board's order being changed. The Board's findings with respect to a lack of transparency and accountability is in the public interest to encourage MPI to do better in the future. Any possible impacts on MPI's reputation in the eyes of its ratepayers are in the public interest and a product of the proper functioning of the regulatory process.

While CAC Manitoba provides no comment on the correctness of relying on section 44 of the *MPIC Act,* it was appropriate for the PUB to raise that section even though parties did not raise it in the proceeding. As a quasi-judicial tribunal, the PUB is presumed to be familiar with the statutory scheme governing its authority. Even if parties did not raise a specific provision from the act governing MPI, the PUB is entitled to rely on it.

Conclusion

Four of the elements contained within MPI's review and vary application either attempt to inappropriately restrict the rate-setting authority of its independent regulator or, in the case of the findings regarding the DVA transfers, simply disagree with findings by the PUB that are unfavourable to MPI. MPI's application as it relates to the DSR, the ALM study, the 100% MCT analyses and the findings relating to the transfers to DVA should be dismissed.

While it is arguable that the evidence with respect to the Fleet Program analysis and the GLMs was available at the hearing before the PUB, MPI's application appears to raise new facts or a change in circumstances. The PUB's Directives should be varied to allow MPI additional time to comply.

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CAC Manitoba takes no position with respect to MPI's application on VFH[54] and the Alternative Rate Indication.

Sincerely,

Katrine Dilay
Attorney

KD/ck

Cc: PUB counsel
MPIC counsel
Counsel for Interveners

[54] With the exception of the Directive relating to DSR.

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