

Order No. 120/17

**AN APPLICATION BY MANITOBA HYDRO
TO REVIEW AND VARY ORDER 112/17**

November 2, 2017

**BEFORE: Marilyn Kapitany, B.Sc., (Hon), M.Sc., Vice-Chair
Hugh Grant, PhD., Member**

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1.0 Executive Summary

By this Order, the Manitoba Public Utilities Board (“Board”) grants in part Manitoba Hydro’s Application to Review and Vary Board Order 112/17. The Board grants Manitoba Hydro’s request that, pursuant to Rule 13 of the Board’s Rules of Practice and Procedure, the Board receive in confidence Appendix “A” to its Application.

2.0 Overview

The Board’s Authority to Review and Vary Board Orders and Decisions

The Public Utilities Board Act (“Act”) provides that the Board may review, rescind, change, alter, or vary any decision or order made by it. The Act further provides that proceedings of the Board shall be governed by rules adopted by the Board.

Rule 36 of the Board’s Rules of Practice and Procedure sets out the process for the Board’s exercise of its authority to review, rescind, change, alter, or vary its own decisions and orders, also known as a “review and vary” power. A review and vary may be undertaken on the Board’s own initiative or on written Application by any person.

Where a written Application is filed, Rule 36 establishes a two-step process. At the first step, the Board must determine the preliminary question of whether the matter should be reviewed. This requires consideration of whether there is reason to believe that the order or decision should be rescinded, changed, altered, or varied. At the second step, the Board must decide whether the Application should be dismissed, granted, or the subject of a hearing or proceeding.

An Application may be dismissed:

- Where the Applicant has alleged an error of law or jurisdiction or an error of 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
- Where the Applicant has alleged new facts not available at the time of the original hearing 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 could lead the Board to materially vary or rescind the Board's order or decision.

Procedural History

In Order 112/17, the Board granted in part Manitoba Hydro's Motions seeking confidential treatment of certain responses to Board Minimum Filing Requirements and Information Requests ("CSI Motions"). While confidential treatment was accepted by the Board for many of the responses, the Board directed Manitoba Hydro to file on the public record certain Minimum Filing Requirement and Information Request responses.

On October 30, 2017, Manitoba Hydro applied to the Board to Review and Vary Order 112/17 with respect to the Board's directive that Manitoba Hydro file on the public record the responses or portions of the responses to Board Minimum Filing Requirements 9, 72, and 164 ("Application"). Manitoba Hydro also sought an Order confirming that the Board would receive in confidence Appendix "A" to Manitoba Hydro's Review and Vary Application. Appendix "A" contains further and additional arguments from Manitoba Hydro in support of its Review and Vary Application.

In its Application, Manitoba Hydro also explains that it has not filed responses to certain of the Consumers Coalition and Green Action Centre Information Requests as most of the information requested has been provided in responses filed in confidence with the Board.

Board Minimum Filing Requirement 9

The Board's Minimum Filing Requirement 9 requested filing of Manitoba Hydro's Corporate Risk Management Report ("Report"), which contains information on the major risks facing Manitoba Hydro as it carries out its mandate. In its CSI Motions, Manitoba Hydro sought confidential treatment of redacted portions of the Report. In Order 112/17, the Board confirmed that it would receive in confidence the redacted information pertaining to export prices and security of assets. However, the Board did not accept that certain portions of the response required confidential treatment. The Board held that Manitoba Hydro did not provide sufficient explanation to justify obscuring the information from the public record. In addition, the Board held that, to be held confidential under Board Rule 13(2)(b)(ii), information must have been consistently treated as confidential, and not just "typically not publicly disclosed".

The Board directed Manitoba Hydro to lift redactions and file on the public record information with respect to:

- Redactions made by Manitoba Hydro on the basis of harm to third party relationships and Manitoba Hydro negotiations;
- Redactions made by Manitoba Hydro on the basis that it is information regarding regulatory, licensing and legal risks;
- The "high likelihood, high consequence" risk at section 3.3.3 of page 13 of the Report and at topic "I" of page 21 of the Report; and
- Redactions made by Manitoba Hydro on the basis that the information is "typically not disclosed".

In its current Application, Manitoba Hydro submits that the Board should vary Order 112/17 and receive as confidential all portions of the Report that were initially proposed to be redacted. Manitoba Hydro states that it did not provide more explanation in its CSI Motions as doing so would have served to disclose the confidential information that it was seeking to protect. Therefore, Manitoba Hydro provides further detail regarding its argument for treating the information as confidential in its Appendix "A" submission

(which is also subject of a request by Manitoba Hydro to be received in confidence by the Board).

Manitoba Hydro also notes that the Report does not contain a section 3.3.3 and that it understands the reference in Order 112/17 to be intended to address section 3.4.

Board Minimum Filing Requirement 164

Board Minimum Filing Requirement 164 requested a copy of the Rashwan Consultant report on the Bipole III cost estimate. In its CSI Motions, Manitoba Hydro sought confidential treatment of the appendices to the report, which Manitoba Hydro explained included Rashwan Consultant's base estimate, contingency estimate, escalation estimate, and total estimate, together with recommendations for project delivery strategy and details regarding Budgetary Estimate and Management Reserve for project components.

In Order 112/17, the Board denied Manitoba Hydro's request to keep confidential the appendices to the report. The Board held that the criteria for confidential treatment were not met as Manitoba Hydro had not demonstrated a continuing need for confidentiality in the information and the argument that the appendices do not add context to the report is not valid justification for confidential treatment under the Board's Rules.

In its current Application, Manitoba Hydro states that it had mistakenly described the Appendices as containing Rashwan Consultant's estimates when in fact the estimates are Manitoba Hydro's and are based on information received from project proponents. Manitoba Hydro now proposes to file the Appendices on the public record, with only the identities of proponent industry suppliers and detailed line item cost breakdowns redacted. Manitoba Hydro provides further detail regarding its argument for treating the information as confidential in its Appendix "A" submission (which is also subject of a request by Manitoba Hydro to be received in confidence by the Board).

Board Minimum Filing Requirement 72

This Minimum Filing Requirement required filing of all Boston Consulting Group reports, presentations, scope of work, retainer information, and correspondence to the Manitoba Hydro Electric Board. In its CSI Motions, Manitoba Hydro sought confidential treatment of redacted portions of the publicly filed response.

In Order 112/17, the Board confirmed that it would receive in confidence the response to Minimum Filing Requirement 72, except for certain specified portions of the response. Among others, the Board denied Manitoba Hydro's request with respect to page 58 of 615 of the response. The Board noted that, while Manitoba Hydro submitted that the redaction on this page obscured information subject to statutory or contractual confidentiality provisions, it was not clear how this related to the redacted information and Manitoba Hydro did not provide sufficient explanation. The Board also denied Manitoba Hydro's request with respect to a portion of page 98 of 615 of the response, specifically the content of the "seasonal diversity" information. The Board held that this information has previously been publicly disclosed and Manitoba Hydro had not justified why the information currently requires confidential treatment.

In its current Application, Manitoba Hydro submits that, on review, it now concludes that page 58 of 615 requires confidential treatment because it is sensitive relationship management information. Regarding page 98 of 615, Manitoba Hydro states that it agrees with the Board's findings in part, but is seeking to continue to protect a small portion of the information which, if disclosed, could negatively impact future negotiations. Manitoba Hydro provides further detail regarding its argument for treating the information as confidential in its Appendix "A" submission (which is also subject of a request by Manitoba Hydro to be received in confidence by the Board).

3.0 Board Findings

Board Minimum Filing Requirement 9

The Board denies Manitoba Hydro's Application to review and vary Order 112/17 with respect to the public filing of portions of the response to Board Minimum Filing Requirement 9.

Manitoba Hydro has not established that this aspect of Order 112/17 contains an error of law or jurisdiction, or an error of fact. Even if such errors were present, the Board finds that Manitoba Hydro has not raised a substantial doubt as to the correctness of the Board's decision.

Manitoba Hydro also has not established that there has been a change of circumstances or new facts not available at the time of the original hearing. The Board does not accept Manitoba Hydro's submission that its decision to not provide a detailed explanation to justify its original request for confidential treatment is a basis to review and vary Order 112/17. The Board notes the submission of the Manitoba Industrial Power Users' Group's in response to the CSI Motions that aspects of the GRA hearing will implicitly or explicitly deal with Manitoba Hydro's own portrayal of the risks it faces. It was incumbent on Manitoba Hydro in the hearing of the CSI Motions to meet its burden under Rule 13 to establish that information related to the Utility's assessment of its risks requires confidential treatment. The circumstances and arguments on which Manitoba Hydro now relies to support confidential treatment were well known to Manitoba Hydro at the time of the hearing of the CSI Motions. The Board therefore finds that there are no new facts that were not available at the time of the original hearing, and there has not been a change of circumstances. The Rule 36 criteria for varying the Board's Order are not met.

The Board notes that Manitoba Hydro has raised the Board's reference in Order 112/17 to "section 3.3.3" of the report. Manitoba Hydro explains that the report does not contain a section 3.3.3 and that it believes the reference in the Order is intended to address

section 3.4 of the report. The Manitoba Industrial Power Users Group referenced section 3.3.3 in its response to the CSI Motions. This reference appears to result from the fact that the redactions to the report are such that the heading of the section is obscured. The Board finds that the reference should be to section 3.4 and Order 112/17 is varied accordingly.

Board Minimum Filing Requirement 164

The Board grants Manitoba Hydro's Application to review and vary Order 112/17 with respect to the public filing of the response to Board Minimum Filing Requirement 164. The Board accepts Manitoba Hydro's proposal to file this response on the public record, with the identities of proponent industry suppliers and detailed line cost breakdowns redacted.

Order 112/17 contains an error in fact that raises a substantial doubt as to the correctness of the Order. Order 112/17 relies on the factual finding that the information sought to be treated confidentially was that of Rashwan Consultants, when the information is that of Manitoba Hydro and was derived from information received from project proponents. Manitoba Hydro has obligations to maintain third party pricing information in confidence. It is also necessary for Manitoba Hydro to keep confidential its own cost estimates and contingency amounts to prevent reverse engineering that could cause Manitoba Hydro undue financial harm and significantly harm Manitoba Hydro's competitive position in future negotiations.

The Board notes that the error in fact in Order 112/17 resulted from Manitoba Hydro's own error in explaining the information sought to be protected as Rashwan Consultants' information. While this led to an error in a factual finding in the Order, thereby raising substantial doubt as to the correctness of the Order, the Board cautions that care must be exercised by Manitoba Hydro in presenting facts and evidence to the Board in order to protect the integrity of the process.

Board Minimum Filing Requirement 72

The Board grants Manitoba Hydro's Application to review and vary Order 112/17 with respect to the public filing of pages 58 and 98 of the response to Board Minimum Filing Requirement 72.

Regarding page 58, Manitoba Hydro has alleges the existence of a new fact, namely that the information sought to be protected is sensitive relationship management information. Rule 36 requires the existence of a new fact not available at the time of the hearing that, on the basis of which, there is reasonable possibility that the Board could materially vary or rescind its order. The Board finds that this is consistent with the common law test for fresh evidence, which holds that the evidence should generally not be admitted if, by due diligence, it could have been adduced at the hearing. This test applies in both criminal and civil cases, including proceedings of administrative boards, but the due diligence requirement is generally applied more flexibly in administrative proceedings (*R v Palmer*, [1980 1 SCR 759; *Molberg v British Columbia (Superintendent of Motor Vehicles)*, 2017 BCSC 807; *Tibu v Camrose (Police Service)*, 2015 ABLERB 8).

The Board finds that, in the circumstances of the CSI Motions, the new fact could not have been available at the time of the hearing. Together, the CSI Motions were over 100 pages long and related to voluminous materials, totaling many tens of thousands of pages. The response to Board Minimum Filing Requirement 72 alone was over 600 pages. In these specific circumstances, it is appropriate to flexibly apply the due diligence requirement and conclude that the information was reasonably not available at the time of the original hearing.

The Board further finds that Manitoba Hydro has raised a reasonable possibility the new fact – that the redaction is to sensitive relationship management information – could lead the Board to materially vary or rescind this aspect of Order 112/17. Disclosure of the information could lead to cause undue financial harm to Manitoba Hydro. As such, confidential treatment is justified.

Regarding page 98, Manitoba Hydro has alleged that the Board made a factual error in finding that the information in the “seasonal diversity” bullet had been entirely publicly disclosed elsewhere. This raises a substantial doubt as to the correctness of this aspect of Order 112/17. Therefore, the Board finds that this aspect of Order 112/17 will be varied. The Board accepts Manitoba’s proposal to publicly disclose part of the information, while maintaining in part the redaction. The Board accepts the redaction proposed by Manitoba Hydro and additionally finds that the single word preceding Manitoba Hydro’s proposed redaction should also be received in confidence by the Board in order to fully protect the confidentiality of this information.

Appendix “A” of Manitoba Hydro’s Application

This is a fresh request by Manitoba Hydro under Rule 13 seeking to have the Board receive in confidence Appendix “A” of the Application. Appendix “A” contains Manitoba Hydro’s full submissions with respect to the information that it claimed as confidential in Board Minimum Filing Requirements 9, 164, and 72.

The Board finds that the entirety of Appendix “A” of the Application will be received in confidence by the Board pursuant to Rule 13. Disclosure of the information contained in Appendix “A” could cause undue financial harm to Manitoba Hydro. Disclosure of aspects of the information could also harm significantly Manitoba Hydro’s competitive position.

However, the Board cautions that the established process must be followed for Motions under Rule 13. As outlined in Order 112/17, proceedings before the Board are public and it is only where exceptions to the general rule of public disclosure are established that the Board will receive information in confidence. Any party seeking confidential treatment of information must establish that the test under Rule 13 is met. In exceptional circumstances, where the argument that supports a party’s Rule 13 Motion is itself confidential, that argument should be filed with the Motion with specific relief sought for the confidential treatment of that aspect of the filing.

As such, while the Board confirms that it will receive Appendix “A” of Manitoba Hydro’s Application in confidence, the Board’s reasons for decision in the Application will be placed on the public record. Due to the Board’s acceptance of Manitoba Hydro’s request for confidential treatment of Appendix “A”, these public reasons for decisions do not specifically reference any of the confidential information.

Responses to Information Requests

For the reasons outline above and in Order 112/17, and in light of the Board’s decisions in this Application, no further Information Request responses are required.

4.0 IT IS THEREFORE ORDERED THAT:

1. Manitoba Hydro's Application is granted in part, as detailed above;
2. Manitoba Hydro's Application seeking confidential treatment of Appendix "A" to its Application is granted' and
3. No further responses to Information Requests are required for Manitoba Hydro to comply with the directions in Order 112/17.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at www.pub.gov.mb.ca.

THE PUBLIC UTILITIES BOARD

"Marilyn Kapitany"
Vice-Chair

"Darren Christle"
Secretary

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Secretary