

**Order No. 64/17**

**An Order in Respect of the Complaint by  
Husky Oil Limited against  
the Town of Minnedosa's Water and Wastewater Rates**

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**June 16, 2017**

**BEFORE: Robert Gabor, Q.C., Chair  
Marilyn Kapitany, B.Sc., (Hon), M.Sc., Member**

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## 1.0 Executive Summary

Husky Oil Limited (Husky) filed a complaint that the rates charged to it by the Town of Minnedosa (Minnedosa) were not just and reasonable and did not reflect the terms of the agreement between the parties. It also alleged that the level of unaccounted for water was excessive.

The Board ordered that:

1. The rates currently being charged by Minnedosa to Husky are unjust and unreasonable and Husky is entitled to a retroactive rate adjustment ;
2. On or before, June 30, 2017, which is the filing deadline for the Minnedosa rate application (the "Filing Deadline"), Minnedosa must provide the Board and Husky a complete reconciliation of the debenture for Water Treatment Plant #2 (WTP#2), failing which Minnedosa shall be subject to a penalty of \$100 per day, retroactive to the date of this Order, until this directive is fulfilled to the Board's satisfaction;
3. On or before the Filing Deadline Minnedosa must provide the Board and Husky a proposal for a retroactive rate adjustment for Husky in consideration of the Board's interpretation of the Agreement and subsequent overpayment by Husky; and
4. Minnedosa's forthcoming rate application to the Board include a study that explains and supports the following: that the study include: (i) quantification of UFW; (ii) derivation of UFW costs; and (iii) allocation of UFW costs amongst the customer classes of the utility;

Rationale for the PUB's decision may be found under "Board Findings".

## 2.0 Husky Complaint

In its January 30, 2017 letter to the Public Utilities Board (PUB or Board), Husky Oil Limited (Husky), through its lawyers, Bennett Jones LLP represented its concern over the rates being changed by the Town of Minnedosa (Minnedosa) for water and wastewater (“the Husky Complaint”). Husky complained that:

1. the water and wastewater rates were well above industry standard;
2. it has been charged the entire amount of the debenture recovery surcharge for Water Treatment Plant #2 (WTP#2) upgrade infrastructure;
3. the debenture charge has not been properly calculated as the initial interest rate of 5% has been renegotiated to a lower rate but Husky has been allocated an amount higher than the refinanced cost of the debenture; and
4. the level of unaccounted for water (UFW) was far beyond the level accepted within the industry, citing the PUB’s Order 146/15

It requested further information from Minnedosa on how the debenture cost was calculated, the basis of the allocation to Husky and how the UFW costs were determined and allocated. Husky stated that the above concerns were raised with Minnedosa but were told to take the concerns to the PUB.

Husky’s position was that the tolls it is being charged are not just and reasonable and it requested an interim rate order or the equivalent thereof such that any changes in rates can be applied back to the time of Husky originally raising these issues with the Board. Husky stated its intention was to have the effect of preserving the Board’s ability to adjust the tolls going forward after it received evidence on Minnedosa’s rate application which is required to be filed by June 30, 2017.

It sought a further Board order to direct Minnedosa to file debenture information and include a UFW study in its rate application that would explain how the UFW costs are determined and allocated.

The Board sent Husky a letter on February 1, 2017 and asked for clarification on specific points in Husky’s original letter. Husky responded on February 2, 2017 and again reiterated that Minnedosa advised Husky to take its concerns to the Board.

## 2.1. Board Order 23/17

The Board considered the request of Husky. In Order 23/17, dated February 15, 2017, the Board stated that it routinely took the position that any concerns or complaints by a ratepayer are best handled directly with the utility. In light of the allegation by Husky that Minnedosa was not responding to its concerns, the Board directed Minnedosa to:

1. provide a detailed response to the letter dated January 30, 2017 from Bennett Jones LLP, on behalf of Husky Oil Limited (Husky) to the Public Utilities Board;
2. provide the Board with a copy of the agreement between Husky and the Town with respect to WTP #2 Upgrade Infrastructure;
3. advise the Board of its position in respect of how the total debenture cost is calculated and the amount of the total cost allocated to Husky;
4. provide evidence of any agreement of Husky to pay the full cost of allocation; and
5. document the interest rate charged from the outset of the debenture, any changes in the interest rate (including the date of such change) and the rate.

## 2.2. Minnedosa Response

Minnedosa, through its legal counsel, DD West LLP, provided a letter dated March 31, 2017 which purports to provide a requested response to Husky's letters (the "Minnedosa Response"). The letter challenged the allegations that Minnedosa ignored communication requests from Husky.

It then provided background information, starting with PUB Order 93/07 when Minnedosa contemplated the upgrade/expansion of two existing water treatment plants. Minnedosa and Husky entered into an agreement dated April 18, 2006 that set out the terms for the use of WTP #2 (the "Agreement"). The Minnedosa Response states: "The Agreement **suggests** that Husky would consume 3,300,000 litres of water per day or 1,204,000cu.m. per year." *Please note that any word that has been highlighted will be discussed more fully later in the Findings section of this Order.*

The Minnedosa Response includes the following reference to the Board's Order:

"In the agreement, Husky commits to meeting **a portion** of the Town's costs in upgrading one of its treatment plants, provides assurances, both with respect to the volumes of water expected to be drawn by Husky upon the expansion being completed and to future utility revenue expectations. Husky also agrees to abide by such water and sewer rates as may be applied for by the Town and approved by the Board."

PUB Order 93/07 directed Minnedosa to undertake a further utility study which was carried out by Genivar (the "Genivar Rate Study"). In reference to the Genivar Rate Study, the Minnedosa Response states, in part: "Thirdly, it was noted that Husky had not utilized the consumption and purchased the water as **contemplated** under the Agreement."

The Minnedosa Response then stated the Genivar Rate Study set out the actual yearly consumption was much lower than **promised/anticipated** which caused a serious shortfall and two years of deficits. The Minnedosa Response stated these deficits were reported to the Board, as is required, producing two interim rates under Orders 33/08 and 65/09. Minnedosa states Board Order 36/10 addressed the deficits but did not address the cause of the deficits.

A further rate study was undertaken by Genivar in 2011 and the Minnedosa Response states: "It was once again recognized that Husky was not consuming/purchasing the water as was **contemplated** under the Agreement." As a result the debenture on WTP#2 was established as a rate rider. Under PUB Order 41/11 the Board ordered: "That all water sold to Husky at the wholesale range will have an additional charge of \$0.33 per cubic meter to reflect the debt payment agreed to by Husky for Water Treatment Plan #2."

The Minnedosa Response states that the rate rider "was introduced on the **notion** that the debenture cost #2496 for WTP#2 was to be paid by Husky..." It then reiterates that the deficits were caused by Husky not using the amount of water **first contemplated**.

It states that its rate application to be filed by June 30, 2017 will include a rate rider to be applied to Husky.

### 2.3. Husky Reply

Bennett Jones, legal counsel for Husky filed a letter dated April 7, 2017 as a reply to the position of Minnedosa (the “Reply or Husky Reply”). In it Husky reiterated its concern that water and sewer rates were not just and reasonable, in part, as Husky was covering the full cost of upgrades to WTP#2 (net of government subsidies) although the upgrades were used by other customers. Husky also expressed concern about the unusually high UFW.

Husky submits that Minnedosa has been non-responsive to its request as to whether there are any other contractual agreements it is relying upon and to its question about the change in the interest rate charged under the debenture.

Husky further contends in its Reply that Minnedosa has mischaracterized the terms of the Agreement, that the terms of the Agreement do not commit Husky to take any minimum level of water purchase. It notes that Minnedosa did not comment on the second paragraph of Section 3.2 which contains a minimum financial purchase commitment. In terms of a wholesale discount Husky maintains that its rates are well above industry standard and twice the costs of median rates of 25 other plants in Canada and the US. It submits that Minnedosa should have set its rates based on the minimum annual financial commitment rather than on a higher number.

Husky’s maximum capital commitment for WTP#2 was \$800,000 but it agreed to increase the capital contribution to a maximum of \$1,134,750 to meet cost overruns.

In terms of the debenture for WTP#2, Husky states that it has never seen a full accounting and believes the debenture costs in the last rate study were inaccurate.

Husky disputes the way the debenture payments were to be paid by Husky and characterized as a rate rider. In its Reply Husky included references from the submission by Minnedosa that refer to the rate rider as the cost of the debenture that would be paid by Husky, and it would consist of \$0.33 per cu.m. to reflect the debt payment that would have been covered by the water consumption charge. Husky assumes that the rate rider incorporates 100% of the costs of the debenture and is allocated entirely to Husky. It makes such assumption as Minnedosa has not provided details on how the debenture payments were calculated or allocated.

Husky states:

“When the Town says that the “debt payment...should have been covered by the water consumption charge,” Husky assumes the Town believes that Husky should have been paying the full costs of Plant 2 from the outset. This is inconsistent with the representations made by the Town to the Board at the time the Agreement was placed before the Board, to the effect that Plant 2 was needed by customers beyond Husky.

In summary, it appears that the Town felt (wrongly) that Husky was not honouring its water purchase commitments and as a result, a rate rider was applied on the “notion” that Husky should be responsible for the full Debenture costs.”

Husky submits that it is now shouldering all of the costs of the debenture (net of government subsidies) which contradicts a statement from the Minnedosa Response that Husky “would agree to commit meeting a *portion* of the Town’s cost in upgrading one of the treatment plants...” On this basis Husky submits that its rates are not just and reasonable because Minnedosa has strayed from the principles of cost causation in assessing the costs to Husky.

In relation to the UFW, Husky has suggested a study that would explain and support: (i) quantification of UFW; (ii) derivation of UFW costs; and (iii) allocation of UFW costs amongst Minnedosa’s customer classes.

The remedy sought by Husky is effectively a declaration from the Board that the rates charged to Husky are not just and reasonable and an adjustment of those rates back to February 2, 2017, the date the PUB received the Husky Complaint. Husky has suggested an interim rate but, in fact, it has requested a means to preserve the ability for such an adjustment of rates and would accept another remedy to achieve the same result.



### 3.0 BOARD FINDINGS:

#### 3.1. The Agreement

The basis of the complaint is Husky's allegation that it has been charged costs that are not just and reasonable, in part as it is paying the full amount of the debenture rather than its appropriate share. Minnedosa's position is that Husky committed in the Agreement to consume a minimum volume of water each day and that its failure to do so created an annual deficit which was addressed, in part, by creating a rate rider that was assessed entirely against Husky based on the difference between the volume it states was contemplated in the agreement and the amount actually consumed.

Instead of referring to the specified terms set out in the Agreement the Minnedosa Response contains certain words, highlighted below, and asks the Board to make certain assumptions of what was intended by the parties.

- "Husky had not utilized the consumption and purchased the water as **contemplated** under the Agreement."
- It "was once again recognized that Husky was not consuming/purchasing the water as was **contemplated** under the Agreement."
- The rate rider "was introduced on the **notion** that the debenture cost #2496 for WTP#2 was to be paid by Husky."
- The Agreement **suggests** that Husky would consume 3,300,000 litres of water per day or 1,204,000cu.m. per year."

Effectively, the Board is being asked by Minnedosa to interpret the Agreement by construing the intention of the parties rather than the actual terms set out in the Agreement. The Board believes the more appropriate approach is to consider the actual terms in the Agreement within the context of the entire document rather than the subjective intentions of the parties.

In Order 23/17 the Board directed Minnedosa to “[P]rovide the Board with a copy of the agreement between Husky and the Town with respect to Water Treatment Plant #2 Upgrade Infrastructure.” Instead of doing so, Minnedosa provided a single page with the numbers redacted. It provided no reason for ignoring that portion of the Board Order.

The Board was able to review the entire document because Husky filed it with its Reply. Section 3.2 of the Agreement states as follows:

### 3.2 Purchase of Water

Subject to the Town being able to provide sufficient volumes of Water to the Site, Husky shall purchase the first 3,300,000 litres of Water per day consumed at the Site from the Town and shall not draw or consume more than 3,300,000 litres of Water per day from the Town without the prior written consent from the Town, Subject to the Town being able to provide 3,300,000 litres of Water per day. Husky shall not acquire Water from any other source in respect of the aforesaid amount without the express written consent of the Town.

Notwithstanding anything to the contrary herein contained or otherwise, for each year during the Initial Term from and after the Commencement Date and each year during any subsequent renewal of this Agreement by Husky, Oil Limited to a maximum period of twenty (20) years from the Commencement Date (the "Minimum Purchase Commitment Term"), Husky agrees to pay a minimum amount of \$190,000.00 per year to the Town for Water, whether or not Husky shall consume or use \$190,000.00 of Water In any such year (the "Minimum Purchase Commitment"). For greater certainty, after the Minimum

Purchase Commitment Term, there shall be no Minimum Purchase Commitment for Water from Husky, and Husky shall only be required to pay the Town for Water actually consumed by Husky.

The Town shall invoice Husky quarterly on a calendar year basis for all Water consumed by Husky. In the event that during the Minimum Purchase Commitment Term the value of Husky's quarterly consumption of Water from the Town is less than \$47,500.00 (\$190,000.00/4), prorated for the first quarter of the Initial Term if the Commencement Date occurs other than on the first day of a calendar year quarter 1 and prorated for the last quarter of the Initial Term or any renewal term if the last day of the term of this Agreement occurs other than on the last day of a calendar year quarter, the Town shall be entitled to invoice Husky for the difference between the value of Husky's quarterly consumption of Water and the said sum of \$47,500.00 (plus applicable taxes) or the prorated portion thereof, as the case may be. Husky agrees to pay such invoices in accordance with the Town's normal payment terms for invoices of this type, including interest and penalties thereon for late payment. In the further event that during the Minimum Purchase Commitment Term the value of Husky's annual actual consumption of Water exceeds the Minimum Purchase Commitment in any such year but Husky has been invoiced and has paid for more Water than was actually consumed by Husky, the Town shall credit Husky with the difference which shall be applied against the final quarterly invoice in such calendar year.

If Husky does not renew his Agreement or if Husky shall decommission the Minnedosa Ethanol Plant during the Initial Term or any renewal thereof or In an Event of Default where Husky is the defaulting party, Husky shall forthwith pay off and discharge the Debenture Debt; provided that if for any reason, the Debenture Debt cannot be paid off or discharged, Husky shall make such payments to the Town as the Town shall require to pay the instalments of the Debenture as they become due from time to time until such time as the Debenture has been repaid, In fun. The Town shall not refinance the Debenture without the prior written approval of Husky, such approval not to be unreasonably withheld or unduly delayed.

Minnedosa asks this Board to interpret paragraph 1 of Section 3.2 to mean that Husky was required to purchase the first 3,300,000 litres of water per day and that Minnedosa is entitled to charge Husky a rate rider if it does not consume at least that volume. What Minnedosa fails to address is the importance of the rest of the paragraphs in Section 3.2.

Paragraph 2 sets out a Minimum Purchase Commitment of \$190,000 per year to Minnedosa for the water "whether or not Husky shall consume or use \$190,000 of Water is any such year" during the Initial term of three years or any subsequent renewal for a maximum of 20 years. After that period there would be no Minimum Purchase Commitment and Husky would be obligated to pay Minnedosa only for the actual amount it consumed. [emphasis added]

Paragraph 3 of Section 3.2 refers to the manner by which Husky would be invoiced by Minnedosa, again based on quarterly payments of \$47,500 (representing the annual Minimum Purchase Commitment of \$190,000/4).

Paragraph 2 of Section 3.2 contains the opening words: "Notwithstanding anything to the contrary herein contained or otherwise...". This language means that if there is a difference between the reference to the volume of water to be consumed, as set out in paragraph 1 of Section 3.2, and the Minimum Purchase Commitment in paragraph 2 of Section 3.2, the terms set out in paragraph 2 shall prevail.

The Board finds the interpretation of Section 3.2 suggested by Husky to be more persuasive. Paragraph 2 specifically sets out the amount owed by Husky as a minimum amount and contains qualifying words that contradicts the position of Minnedosa that it could unilaterally introduce a charge applicable to Husky alone beyond the Minimum Purchase Commitment if it did not consume a specific volume of water.

Minnedosa may have intended Husky to be responsible for a higher amount based upon volumes discussed prior to the execution of the Agreement but that is not what was set out in the Agreement.

### 3.2. Debenture

As Husky did not consume the minimum volume, Minnedosa experienced lower than expected revenue, which resulted in a deficit for the Utility. Minnedosa chose to implement an additional surcharge of \$0.33 per cu. m. charged to Husky, by way of a rate rider “to reflect the debt repayment which should have been covered by the water consumption charge.” [Minnedosa Response, page 5, paragraph 2]

Under paragraph 4 of Section 3.2 of the Agreement Husky is required to pay and discharge the amount outstanding under the debenture if Husky does not renew the Agreement, decommissions the Minnedosa Ethanol Plant during the Initial term or is the defaulting party in the Event of Default under Section 8.1 of the Agreement. None of those issues were raised by Minnedosa but the Town has treated Husky as if this provision was triggered and Husky should be responsible for the entire cost of the debenture.

In 2007 Minnedosa sought approval from the PUB for revised water and sewer rates in advance of Husky’s major expansion of its ethanol plant and the concurrent completion of a major upgrade to WTP#2.

“The Town advised that the major upgrade to one of its two water treatment plants, currently expected to cost in the range of \$4.25 million, was necessitated not only to meet the requirements of an expanded Husky plant but also to ensure adequate water supply to serve all of the Town’s customers.”

The Town reported that the existing plant has been constructed forty years ago, with a then-expected service life of 20-25 years, and being well beyond its service life expectancy, was in “dire if not emergency need to upgrading or replacement.”

In short, the Town advised the Board that “...regardless of Husky’s (expansion), the plant required upgrading.”

(Emphasis added)

From the record it is clear the upgrade of WTP# 2 was required and Husky agreed to pay for a portion of the upgrade. What is unclear is how much it would pay. Husky represents that its portion should be based on the volume of water it uses in proportion to the total amount used. Husky has requested information from Minnedosa as to the calculation and allocation of the costs under the debenture but Minnedosa has refused to provide it to Husky. Husky also requested information on the interest rate being charge under the debenture as it understood the rate being charged was reduced and again Minnedosa has refused to provide Husky with that information. The Board does not understand on what basis Minnedosa would not provide the requested information to Husky.

### **3.3. Unaccounted for Water (“UFW”)**

Minnedosa has stated that a study of the very high rates of UFW will be included in its next rate application. Husky has suggested that the study include: (i) quantification of UFW; (ii) derivation of UFW costs; and (iii) allocation of UFW costs amongst the customer classes of the utility.

### **3.4. Compliance with Board Order 23/17**

Under Order 23/17 the Board ordered Minnedosa to:

1. provide a detailed response to the letter dated January 30, 2017 from Bennett Jones LLP, on behalf of Husky Oil Limited (Husky) to the Public Utilities Board;
2. provide the Board with a copy of the agreement between Husky and the Town with respect to WTP #2 Upgrade Infrastructure;
3. advise the Board of its position in respect of how the total debenture cost is calculated and the amount of the total cost allocated to Husky;
4. provide evidence of any agreement of Husky to pay the full cost of allocation; and
5. document the interest rate charged from the outset of the debenture, any changes in the interest rate (including the date of such change) and the rate.

Minnedosa has failed to comply with the aforesaid sections of Order 23/17. It did not provide a detailed response to the Bennett Jones letter and instead focused largely on whether there were communications between the parties and provided justifications for Minnedosa's actions rather than responding to the points raised in the letter. Instead of providing the Board with a copy of the Agreement, it provided one section that had specific portions redacted. Its position on the

total debenture cost did not set out the terms of the debenture but simply the position that Husky was responsible for the entire cost it because it did not use the volume of water that Minnedosa contends was contemplated. Minnedosa did not address directive 4 or directive 5 including Husky's allegation of a change in the interest rate. The failure to comply with such clear directive appears, on its face, to reflect a complete disregard for the jurisdiction of the Board. This is especially disconcerting given the February 28, 2017 letter from Minnedosa's legal counsel in which they asked for an extension to respond to the Board Order as the input from Minnedosa's engineer and CAO were required in order to provide a "fulsome and complete" response. Its response to the Board Order was neither fulsome nor complete.

It must be noted that, pursuant to Section 24(4) of the Public Utilities Board Act, Board has the same powers, rights and privileges as the Court of Queen's Bench in terms of the enforcement of its orders and" all other matters necessary or proper for the due exercise of its powers or otherwise for carrying its powers into effect...".

### **3.5. Remedies Sought**

Husky seeks an Order that the rates it is currently being charged are not just and reasonable. It requests the following:

- (a) An interim order or such other remedy that provides for an adjustment of rates back to the date of the complaint, as set out in the Minnedosa Response;
- (b) A direction to Minnedosa for a UFW study in its rate application to be filed by the Filing Deadline that explains and supports the following: that the study include: (i) quantification of UFW; (ii) derivation of UFW costs; and (iii) allocation of UFW costs amongst the customer classes of the utility;
- (c) A direction to Minnedosa that it document the interest rate charged from the outset of the debenture, any changes in the interest rate (including the date of such change) and the rate; and
- (d) Such other relief as the Board may deem appropriate.

The Board notes that both Husky and Minnedosa acknowledge in their submissions that the Board has the authority to grant the retroactive rate adjustment sought by Husky.

In this instance the Board is prepared to retroactively adjust the rate being charged to Husky. The Board finds that the assessment of the entire amount for the debenture charged to Husky as a rate rider was improper and constitutes an unjust and unreasonable charge. The Board is unable to determine the valuation of the retroactive rate adjustment with the information provided by Minnedosa. If Husky is correct and the debenture is accruing interest at a lower rate than originally calculated, it is possible that Husky has paid in excess of 100% of the debenture. The Board's review of the forthcoming rate application could be exhaustive, and include reviewing the Minnedosa file going back to 2007 or earlier.

In light of the Board's decision to accept Husky's interpretation of the Agreement and retroactively adjust Husky's rate, the Board will direct Minnedosa to include in its forthcoming rate application a proposal for same. The Board will allow Husky the opportunity to respond to this proposal once received.

The Board directs Minnedosa to provide the details of calculations used, and all information relating to the debenture referred to as #2496, including a reconciliation of all amounts dating back to the issuance of the debt, with its forthcoming rate application. The Board expects that going forward Minnedosa's submissions to the Board will be complete, concise and transparent.

Minnedosa has until the Filing Deadline to comply fully with all directives, failing which the Board will assess a penalty for failure to comply with a Board Order pursuant to Section 100 of the Public Utilities Board Act.

At page 7 of its Reply Husky states that it "stands ready to consult with the Town as it prepares the Rate Application in the interests of exploring common ground and streamlining the regulatory process." The Board encourages a collaborative process, and recommends that Minnedosa engage Husky in negotiating a fair proposal for the retroactive rate adjustment prior to submitting it to the Board.

**4.0 IT IS THEREFORE ORDERED THAT:**

1. The rates currently being charged by Minnedosa to Husky are unjust and unreasonable and Husky is entitled to a retroactive rate adjustment ;
2. On or before the Filing Deadline Minnedosa must provide the Board and Husky a complete reconciliation of the debenture for Water Treatment Plant #2 (WTP #2), failing which Minnedosa shall be subject to a penalty of \$100 per day, retroactive to the date of this Order, until this directive is fulfilled to the Board's satisfaction;
3. On or before the Filing Deadline Minnedosa must provide the Board and Husky a proposal for a retroactive rate adjustment for Husky in consideration of the Board's interpretation of the Agreement and subsequent overpayment by Husky;
4. Minnedosa's forthcoming rate application to the Board include a study that explains and supports the following: that the study include: (i) quantification of UFW; (ii) derivation of UFW costs; and (iii) allocation of UFW costs amongst the customer classes of the utility;

Fees payable by the Town of Minnedosa upon this Order - \$1,500.00

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](http://www.pub.gov.mb.ca).

THE PUBLIC UTILITIES BOARD

"Robert Gabor, Q.C."

Chair

"Jennifer Dubois, CPA, CMA"

Acting Secretary

Certified a true copy of Order No. 64/17  
issued by The Public Utilities Board

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Acting Secretary