

**Order No. 82/17**

**AN ORDER IN RESPECT OF MANITOBA HYDRO'S PROCESS MOTION FOR  
CONFIDENTIAL AND COMMERCIALY SENSITIVE DOCUMENTS REQUESTED IN  
MANITOBA HYDRO'S 2017/18 AND 2018/19 GENERAL RATE APPLICATION**

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**July 28, 2017**

BEFORE: Robert Gabor, Q.C., Chair  
Hugh Grant, Ph.D., Member  
Marilyn Kapitany, B.Sc. (Hon), M.Sc., Member  
Shawn McCutcheon, Member  
Sharon McKay, BGS, Member  
Larry Ring, Q.C., Member

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## 1.0 Executive Summary

In this Order, the Public Utilities Board (“Board”) approves Manitoba Hydro’s process requests to provide efficiently confidential and voluminous documentation to the Board’s Independent Expert Consultants reviewing Manitoba Hydro’s capital projects and other matters. The Board also approves a process for Manitoba Hydro to seek to keep certain Third Party documentation confidential without relinquishing the temporary ability to retract such documentation and notify the Third Party of the Board’s intention to grant other Parties and/or the public access to that documentation.

Nothing in this Order prevents any Intervener from making its own request, either when Manitoba Hydro files a Rule 13 Motion or by way of a separate Rule 13 Motion by the Intervener, to gain access to any of the documents that Manitoba Hydro seeks to retain as confidential.

The Board, its Staff and Advisors will have access to all of Manitoba Hydro’s confidential documents when requested.

Manitoba Hydro’s request to preclude counsel for the Independent Expert Consultants from cross-examining witnesses at the General Rate Application hearing is premature and is therefore denied.

## 2.0 Procedural History

On July 11, 2017 Manitoba Hydro filed a Motion with the Public Utilities Board (“Board”) in which Manitoba Hydro sought an Order of the Board:

1. Establishing the process for receipt of third party proprietary, confidential or otherwise commercially sensitive information (“Third Party Information”) in its 2017/18 and 2018/19 General Rate Application before the Board including a preliminary ruling with respect to such documents; and
2. Appointing the Independent Expert Consultant retained by the Board to assist with the review of Manitoba Hydro’s capital expenditures pursuant to Order in Council 00092/2017 as the Party designated to access and hold in confidence Manitoba Hydro commercially sensitive information and Third Party Information related to such capital review.

In addition to Manitoba Hydro’s July 11, 2017 written Motion, the Board convened an oral hearing date on July 18 and 19 to hear submissions from Manitoba Hydro and the approved Interveners in Manitoba Hydro’s current General Rate Application.

As a standard protocol and according to Rule 13 of the Board’s Rules of Practice and Procedure (available on the Board’s website [www.pubmanitoba.ca](http://www.pubmanitoba.ca)), documents filed with the Board will be placed on the public record. However the Board’s Rules also provide that only certain documents may be filed in confidence with the Board on terms the Board considers appropriate in the public interest. It is pursuant to the exceptions to public disclosure in the Board’s Rule 13 that Manitoba Hydro makes this Motion.

Manitoba Hydro indicates it is committed to participating in this General Rate Application before the Board in the most transparent means possible and intends to keep requests for the Board to hold information in confidence to a minimum and only where absolutely necessary. Manitoba Hydro has identified instances where it maintains that keeping information filed with the Board confidential is absolutely necessary due to Manitoba Hydro’s contractual and fiduciary duties to Third Parties.

This Motion by Manitoba Hydro seeks to satisfy the Board's processes as well as to avoid triggering Third Parties making unnecessary motions before this Board and/or pursuing litigation in the courts to protect proprietary and confidential information.

There are two distinct aspects to the relief requested by Manitoba Hydro in this CSI Process Motion that need to be considered separately:

### **1. Confidential Documents to Board Appointed Independent Expert Consultants**

The Board will appoint Independent Expert Consultants ("Consultants") to review and report on aspects of Manitoba Hydro's General Rate Application. These Consultants require access to Manitoba Hydro documents and Third Party documents that Manitoba Hydro claims are both confidential and voluminous such that Manitoba Hydro seeks Board approval to provide all such confidential documents to the Consultants pursuant to a non-disclosure agreement and without Manitoba Hydro having to file a corresponding redacted version of the confidential document on the public record. Copies of these confidential documents are available to the Board, its Staff and Advisors. Examples of the nature of such confidential documents are construction tenders, bids by contractors, and construction contracts. This request by Manitoba Hydro is to facilitate the access of the Consultants to any confidential documentation it requires without delay and without the requirement of additional Rule 13 Motions by Manitoba Hydro to the Board.

Nothing in this first aspect of Manitoba Hydro's CSI Process Motion prevents any Intervener from subsequently making its own request, pursuant to Board Rule 13, to gain access to any of the documents provided to the Consultants. Manitoba Hydro acknowledges that any such Rule 13 Motion by an Intervener would be adjudicated by the Board separately from this Motion by Manitoba Hydro, and only after hearing submissions from the Parties.

## **2. Preliminary Board Ruling in Respect of Confidential Third Party Documents**

This second aspect to Manitoba Hydro's Motion is separate from the above described process that provides confidential Third Party documents to the Board appointed Independent Expert Consultants.

In this aspect, Manitoba Hydro seeks a preliminary ruling from the Board that, when Manitoba Hydro makes its own imminent Rule 13 Motion to keep Third Party documents confidential, the Board will not make such documents available to Interveners with or without terms and conditions on access or put such documents on the public record without first returning those documents to Manitoba Hydro so that Manitoba Hydro can notify the Third Party of the Board's intention. At that point, the Third Party will have to promptly determine what, if any, further steps it will take to prevent disclosure of the documentation because, in order to comply with a written demand from the Board, Manitoba Hydro will refile with the Board the exact same documentation.

Examples of such Third Party documents include export price forecasts, export contracts, and debt rating agency reports.

While this aspect of Manitoba Hydro's Motion may seem redundant, in essence, this preliminary ruling sought by Manitoba Hydro is to gain the assurance that the Board will not deny Manitoba Hydro's request, pursuant to Rule 13(5), to retract the Third Party documents Manitoba Hydro maintains are confidential before such documents could be placed on the public record by the Board if the Board did not agree with Manitoba Hydro's confidentiality requests. By obtaining a favourable preliminary ruling through this Motion, Manitoba Hydro is afforded additional time to notify the Third Party of the Board's intentions such that the Third Party, not Manitoba Hydro, may take such further steps, if any, as that Third Party deems necessary in order to protect the claimed confidentiality of the information.

Nothing in this second aspect of Manitoba Hydro's Motion prevents any Intervener from making its own request, either when Manitoba Hydro files its Rule 13 Motion or by way

of a separate Rule 13 Motion by the Intervener, to gain access to any of the documents that Manitoba Hydro seeks to file in confidence. The Board, its Staff and Advisors will have access to these confidential documents.

Pursuant to this second aspect of Manitoba Hydro's Motion, it intends to file on the public record, redacted copies of documents it claims are confidential. In such redacted copies, the specific information that Manitoba Hydro seeks to preserve as confidential will be obscured and not visible on the public record.

A tangential aspect of Manitoba Hydro's Motion related to its request that legal counsel for the Independent Expert Consultants not be permitted to cross examine witnesses or otherwise attempt to prove or test its conclusions through the evidentiary process.

### 3.0 Submissions by Interveners

All approved Interveners and Manitoba Hydro were given advance notice of the Board's date and time for its hearing oral submissions related to this Motion. Consumers Coalition, Manitoba Keewatinowi Okimakanak, and Manitoba Industrial Power Users Group made oral submissions as did Manitoba Hydro. Other Interveners indicated they would not be taking a position or alternatively were not making submissions as their concerns were adequately addressed by other Interveners.

While Interveners shared the desire to keep as much information on the public record as possible, there was an acknowledgement that some of Manitoba Hydro's information may properly be considered confidential such that it would not be appropriate to place it on the public record without redactions.

Additionally, Interveners did not object to Manitoba Hydro sharing confidential information with the Independent Expert Consultants as proposed in the Motion. Nor did Interveners object to the Board accepting Third Party documents from Manitoba Hydro in confidence during the adjudication process proposed by Manitoba Hydro. Interveners suggested a detailed listing of the documents and the reasons Manitoba Hydro maintains they be treated as confidential would assist in the adjudication process.

However, many of the concerns expressed by Interveners related to their own and their consultants' access to documents that Manitoba Hydro may consider be treated as confidential including documents that previously have been placed on the public record by Manitoba Hydro. Interveners requested confirmation that they would have the opportunity to make submissions for access to documents that Manitoba Hydro considers as confidential when Manitoba Hydro filed its Rule 13 Motion.

Counsel for the Independent Expert Consultants also made oral submissions to the Board to address Manitoba Hydro's request that the Independent Expert Consultants be precluded from cross examination of witnesses.



## 4.0 Board Findings

### Independent Expert Consultants Access to Confidential Information

The Board finds that Manitoba Hydro's proposed methodology related to the Independent Expert Consultants' access to confidential information will efficiently facilitate access to the confidential and voluminous materials that are required to be reviewed.

The Board has provided Manitoba Hydro with an undertaking that the Board will not obtain Manitoba Hydro's confidential documents from the Independent Expert Consultant and make them public without a prior adjudication process that provides Parties with the opportunity to make submissions.

Nothing in Manitoba Hydro's Motion will preclude Board access to such documents. Nothing in Manitoba Hydro's Motion related to the Independent Expert Consultants' access to confidential documentation will preclude any Intervener from subsequently seeking access to any of the documents provided to the Independent Expert Consultants. Those subsequent requests for access will arise in either Manitoba Hydro's Rule 13 Motion or in a separate Rule 13 Motion brought by an Intervener.

### Third Party Documentation

The Board also finds Manitoba Hydro's proposed methodology to obtain the Board's rulings with respect to whether Third Party documentation will be treated as confidential or otherwise as an efficient process. Should the Board disagree with Manitoba Hydro's position respecting any document when Manitoba Hydro makes a Rule 13 Motion, such that the Board determines a document be placed on the public record or be subject to conditions on access, Manitoba Hydro will be afforded the opportunity to retract the document and notify the Third Party of the Board's intention. Thereafter the Board will issue a demand to Manitoba Hydro for the filing of the document, and Manitoba Hydro shall produce the exact same document for the Board to disclose as adjudicated in the Motion.

Nothing in Manitoba Hydro's Motion related to Third Party documentation will preclude Board access to such documents. Nothing in Manitoba Hydro's Motion related to the Third Party documentation will preclude any Intervener from subsequently seeking access to any of the Third Party documents. Those subsequent requests for access will arise in either Manitoba Hydro's Rule 13 Motion or in a separate Rule 13 Motion brought by an Intervener.

### **Cross Examination by Counsel for Independent Expert Consultants**

The Board finds Manitoba Hydro's request to preclude cross examination by counsel for the Independent Expert Consultants to be premature. The Board will not make such a determination in the absence of a specific fact situation. Counsel for Manitoba Hydro and the Independent Expert Consultants are expected to work together to ensure the Independent Expert Consultants are provided with current and accurate information to minimize the requirement for cross examinations and clarifications during the oral General Rate Application hearing.

## 5.0 IT IS THEREFORE ORDERED THAT:

1. Manitoba Hydro's request to provide documentation to the Independent Expert Consultants, including documentation that Manitoba Hydro maintains is confidential, without the requirement that a copy be filed with the Board at this time and without the requirement that a redacted copy be placed on the public record at this time BE AND IS HEREBY APPROVED.
2. Manitoba Hydro's request for a preliminary ruling that it be allowed the opportunity to temporarily retract any Third Party documentation that the Board intends to either publicly disclose or treat as confidential with conditions on access imposed as the Board considers appropriate BE AND IS HEREBY APPROVED.
3. Nothing in this Order prevents any Intervener from making its own request, either when Manitoba Hydro files a Rule 13 Motion or by way of a separate Rule 13 Motion by the Intervener, to gain access to any of the documents that Manitoba Hydro seeks to retain as confidential.
4. Nothing in this Order precludes the Board, its Staff and Advisors from having access to all of Manitoba Hydro's confidential documents when requested.
5. Manitoba Hydro's request to preclude counsel for the Independent Expert Consultants from cross-examining witnesses at the General Rate Application hearing BE AND IS HEREBY DENIED.

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.pubmanitoba.ca](http://www.pubmanitoba.ca).

