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The Public Utilities Board
400-330 Portage Avenue
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Attention: Dr. Darren Christle

Re: Order 53/21 and Manitoba Hydro's June 9, 2021 Response
Our Matter No. 0151269 AFH

The Manitoba Industrial Power Users Group ("MIPUG") is in receipt of the Public Utilities Board's ("PUB") letter of June 18, 2021 requesting written submissions from intervenors of record regarding the application of the Consumer's Coalition ("Coalition") and the Manitoba Hydro ("Hydro") response to Board Order 53/21.

MIPUG has reviewed the record of this proceeding, including the June 9, 2021 response of Manitoba Hydro, and offers this submission to assist the Board in its ongoing deliberations. The Board will note that in MIPUG's view, based on a history of over 25 years with regulation of Manitoba Hydro, the current situation is unprecedented. As a result, recommendations for next steps in this process are difficult, and MIPUG presents several possible scenarios to address the somber situation that has been created.

At the outset, MIPUG notes that the June 9, 2021 submission by Hydro counsel was highly disappointing in that it clearly did not meet even the most rudimentary requirements of the Board in Order 53/12. The Board set out thoughtful, detailed, and prescriptive requirements for Hydro and the response almost universally ignores, obfuscates, challenges, or simply fails to meet any reasonable interpretation of what was ordered by the Board. Under these circumstances, and reflecting the respect due to the powers and role of the Board, it would not be inappropriate for the Board to consider the full range of powers afforded to it under the governing legislation, including penalties and fines as permitted by the *Public Utilities Act*, s. 100.



MIPUG is not attempting to provide evidence with this submission. Fully tested evidence will be required to determine whether Hydro's condition has substantially changed and whether previously approved rates remain just and reasonable. MIPUG recommends the Board move forward with evidence collection as part this review, including transparent and comprehensive testing of the evidence filed by all parties.

The Application, and Events Leading up to Manitoba Hydro's June 9, 2021 Submission

The Coalition brought the current application under subsection 26(3) of the *Crown Corporations Governance and Accountability Act* ("Act"). This section states that the Board may take action where it is "satisfied that the circumstances of a corporation have changed substantially". Making such determination, the Board may "review an order made pursuant to this section and modify the order in any manner that The Public Utilities Board considers reasonable and justified in the circumstances".

While this subsection appears to have been rarely used, critical to its structure is the Board making a finding of "substantial change". In MIPUG's submission, such a finding is a matter of both law and fact, and requires consideration of evidence placed before the Board, and set in context by the testimony of knowledgeable parties. MIPUG also submits that subsection 26(3) of the *Act* is broad in simply citing a change in "circumstances" without further definition, and as a result, multiple comparisons or tests may be applied in looking at whether a change has occurred. These comparisons or tests could extend to both current and projected financial conditions, net income, debt costs and levels, retained earnings, risks, projected revenues, loads, etc. It would appear the breadth permitted by the *Act* extends to all matters relevant to the original determination that rates were just and reasonable in the Board Orders in question.

The Board has already made its first two critical findings in this proceeding.

- First, Order 53/21 notes that "(t)he information before the Board suggests *prima facie* that there have been changes in Manitoba Hydro's circumstances" (page 20). On the basis of this *prima facie* finding, the Board elected to proceed to a further stage of investigation. The Board was then faced with the problem known as 'information asymmetry'. This situation arises when the only party holding the relevant evidence for the Board to make a well-founded finding of substantial change is Manitoba Hydro, the very party adverse to the Board making that finding. For this reason, the Board exercised its power under ss. 27(2), 28(1), 33 and 78(1) of *The Public Utilities Act* to "direct that Manitoba



Hydro provide documents and other evidence" (highlighting added; page 20 of Order 53-21).

- Second, the Board deliberated and expressly set out precisely which documents and matters of evidence were of likely probative value (the Board specifically accepted some of the documents recommended by the Coalition, and rejected others, reflecting a deliberation on this matter). The Board's list focused in part on current conditions, but more substantively on forecasts as is typical for regulation of Hydro's rates. The Board has already found that the specific documents (or equivalent information) as listed in Order 53/21 were required to determine whether there was or was not a substantial change in Hydro's circumstances.

Hydro was given 30 days to comply.

Of note, the Board did not direct Hydro to produce any new documents or analyses – it only directed Hydro to file documents that are notorious and known to exist, or equivalent information that is obviously in use for the competent management of its affairs.

There is no indication, nor reason to believe, that a 30-day timeline was insufficient to produce documents. Indeed, the Board was more accommodative than may have been merited by simply asking Hydro to file routine documents, or any reasonable alternative "*containing substantially the same information as would be provided in general rate application filings before the Board, that are currently in use in the management and operations of Manitoba Hydro*" (Order 53-21 page 22). These documents are typical of the type of information any large, capital-intensive utility (or indeed any industrial operation) must have available to effectively manage and plan its operations and finances. They are also typical of the information utilities are required to share in order to obtain new capital (such as borrowings) and to manage a debt program, measure risks, determine the allocation of resources such as personnel to future capital works, etc.

In MIPUG's view, the Board made a clear and reasonable conclusion that in order to discharge its duties, and make a determination of fact (whether there had been a substantial change) it needed to start with evidence it could only adduce from Hydro, and which should be readily available from Hydro.



The Manitoba Hydro Response of June 9, 2021

In response to the Board's Order, Manitoba Hydro produced a six-page letter from its counsel, along with four brief appendices. The material contained no forecasts beyond the 2021/22 year (which is already underway). None of the documents ordered by the Board were produced, nor were comparable versions provided. No filings were made under the attestation of any official within Hydro with recognized competency or responsibility for the areas of investigation. The only document that the Board requested which was acknowledged as being in existence was the Prospective Cost of Service Study (PCOSS), but it was not provided and no reason for the rejection to provide that document was given. As its existence was admitted, the failure to produce, when that was the precise direction received, is particularly notable. Hydro also notes that it has a document it refers to as its "2021/22 budget" which it does not provide, but only gives limited figures from this referenced document¹.

In respect to the other documents (or equivalent information) that the Order directed to be provided, Hydro expressly rejected the Board's direction, noting "*Manitoba Hydro does not have a current approved*" IFF (Integrated Financial Forecast) and CEF (Capital Expenditure Forecast). Hydro was careful to elaborate that this lack of an "approved" document² was noted in its response on April 12, 2021. MIPUG takes note of the audacity of issuing such reminder to the Board. The Board of course reviewed Hydro's submission of April 12, 2021 indicating that no "approved" version of the document was available, and notwithstanding this designation, directed the underlying information nevertheless be provided (presumably whether such information met Hydro's own internal designation as "approved" or not, whatever approved means in this context, and by whom, and, if not available, should have been brought through the approval stage using the generous 30 day window provided).

In the face of a clear and validly issued Board Order (which was not challenged or sought to be reviewed and varied by Hydro), the submission provided could in many circumstances be considered contemptuous.

Further, the Hydro submission pared back the suite of information that would be available in an IFF and CEF, not only to omit all forecasts beyond April 1, 2022, but also to omit many relevant and highly important variables to rate-setting. Hydro's counsel submitted

¹ Note that the *Crown Corporations Governance and Accountability Act*, in sections 7 to 9, provides that each Crown must prepare and file an annual forecast Business Plan. Hydro did not file even this rudimentary Annual Business Plan for 2020/21 or 2021/22, even though it would contain a portion of the information directed by the Board. It is not clear how Hydro's "budget" referenced above compares to the required Annual Business Plan in terms of content, assumptions and forecasts.



information that focused solely on Net Income. There was no information on any of the three key financial ratio targets that Hydro has adopted – namely, Interest Coverage, Capital Coverage, and Debt-to-Equity. There was also no information on the balance sheet at all – in a capital-intensive utility, the balance sheet (and its evolution over time) is among the most critical pieces of analysis for sufficiency of rates. Hydro provided no information on the level of equity, nor mention of the risks and variability it faces regarding the sufficiency of this equity. As some of the most notable changes asserted by the Coalition relate to reductions in Hydro’s risks, and not necessarily to its immediate net income, information to assess risks is critical to the determination of whether the circumstances have indeed substantially changed. Key examples include the completion of new inter-ties to multiple jurisdictions which help manage export market risk, the signing of export contracts which help manage export price risk, and the locking in of material new borrowings which reduces Hydro’s interest rate risk.

One additional matter of concern is that Hydro focused solely on its net income – an indication that this a high priority to the Corporation internally – yet nothing on the circumstances related to rates paid by consumers. Hydro may be most concerned about its immediate net income, but consumers (and industrials in particular) have consistently held that the most important factor to just and reasonable rates is that they are stable and predictable over the long-term (and are the lowest level reasonably achievable, consistent with stability and predictability). In comparing to the earlier Exhibit MH-93, and asserting that nothing had substantially changed, Hydro ignored that in fact rates are substantially different than would be expected in Exhibit 93.

Note the following comparison:

Fiscal Year	Exhibit 93		Actual Paid by Customer		Cumulative Difference
	Rate Change	Date	Rate Change	Date	
2017/18	3.36%	Aug 1, 2017	3.36%	Aug 1, 2017	0.00%
2018/19	3.57%	April 1, 2018	3.60%	June 1, 2018	0.03%
2019/20	3.57%	April 1, 2019	2.50%	June 1, 2019	-1.04%
2020/21	3.57%	April 1, 2020	-0.10%	Sept 1, 2020	-4.67%
			2.90%	Dec 1, 2020	-1.91%
2021/22	3.57%	April 1, 2021	0%		-5.41%

As shown above, the rates paid by customers today are more than 5% lower than would have been predicted by Exhibit MH-93 (and in each case were approved later yielding less revenue), yet Hydro asserts it is making a comparable net income. Further, a



number of these rate increases are not even included in Hydro's net income, as the revenue was directed to be deferred to the future (e.g., the 2.5% increase for June 1, 2019, per Board Orders 70-19 and 75-19). While Hydro apparently feels comfortable with achieving a target net income, ratepayers can take no comfort that they are paying rates that are likely to be stable, predictable, and at the lowest level consistent with these two primary objectives. It is entirely possible that rates today are failing the key tests of justness and reasonableness – for example:

- It is possible that the positive net income being achieved is fleeting. For example, with Keeyask costs coming online, older more lucrative major export contracts coming to an end, and major new investment in distribution systems being required as loads grow for electrification of heat and transportation, it is possible a considered view of forecasts would indicate Hydro's rates are already fated to increase materially in the next few years. If so, the fact that rates are 5.41% below the level of Exhibit MH-93 is a substantial, adverse and ill-advised change that will harm ratepayers (by holding rates too low and driving future rate increase instability). Nothing in Hydro's filing permits this scenario to be rejected (indeed each of these factors are known to be in effect and are left unaddressed in Hydro's filing).
- In contrast, Hydro's financial situation is known to have yielded material new debt locked-in for long terms at lower than anticipated rates, new export contracts being signed, new transmission links to other jurisdictions, and capital cost escalation risks on major projects like Bipole and Keeyask to have largely passed. Each of these factors is a major feature reducing the financial risks faced by Hydro in the coming years, and would inform whether the same level of net income and equity is indeed required into the future. These features could readily inform a finding that rates are materially too high today, and are no longer just and reasonable.

Achieving stable and predictable rates for Hydro is, colloquially, like steering a supertanker – swift changes in direction are hard and ill-advised (if even possible) so looking into the distance is a necessity. Hydro's submission prevents parties from making this critical assessment about the future. The Board's direction was eminently clear that documents to permit this long view were necessary to draw a conclusion that would permit the Board to reject the initial *prima facie* finding of substantial change. Hydro's response to Order 53/21 entirely fails in this regard.



Status of Proceeding

In MIPUG's view, the appropriate direction forward is not clear. It is however clear that there is no reasonable way for the Board to alter its earlier conclusion that the Coalition made a *prima facie* case that Hydro's circumstances have changed. At present, there is no evidence before the Board that has been brought forward since that finding was made, much less tested evidence adduced from parties knowledgeable about the facts or context. There are only submissions by counsel, relying on public and, in some cases, stale or insufficiently tested information.

Considering the previously recognized issue of information asymmetry, any conclusion by the Board that closes the proceeding on the basis that insufficient evidence was seen of substantial change is irreparably tainted. There is no available evidence to advance the Board's understanding at this time because Hydro, the party that possesses the information identified as being needed by the Board, expressly and defiantly denied the Board's Order to produce the evidence.

As an independent regulator of this public electric utility monopoly, the Board's supervision and review of Hydro's long and short-term financial health and status is critical for protecting the interests of all captive consumers, including the interests of Industrial consumers that rely on this regulatory oversight in making various financial decisions such as short- and long-term capital decisions and investments.

The failure by Hydro to provide all the information which it was directed to provide could in and of itself, be seen as a significant change in circumstances – a multibillion dollar utility which is unable to provide to the regulator relevant regulatory information.

There is no way to make a supportable conclusion to end the proceeding at this time without making a mockery of the Board's independence, powers and jurisdiction, while rewarding Hydro's intransigence and lack of respect for the Board's authority.

MIPUG notes two broad options as to how to proceed:

1. The Board can immediately enforce the spirit and intent of its Order; namely, that evidence is required to make a determination about substantial change. The Board issued the order to direct the production of evidence and this has not occurred. The Board could sharpen the directives provided to Hydro and achieve the outcome intended. For example, the Board may want to direct that knowledgeable Hydro officials attend, with documents in hand, for the purposes



of comprehensive cross-examination. The Board may also elect to direct its experts (for example, an independent expert such as Daymark) to attend at the offices of Hydro to collect, review and opine on Hydro's forecasts, or to prepare forecasts on Hydro's behalf using Hydro's base data if Hydro's competencies do not at this time extend to the ability to prepare a financial forecast. Such measures may be combined with other tools available to the Board for enforcing its orders, such as penalties under section 100 of the *Public Utilities Act*, or the issuance of subpoenas, or findings of contempt. While MIPUG could consider such outcome a sad day for regulation and transparency in Manitoba, these tools were put into the Acts for a reason, and flagrant refusal to comply with a valid Board Order would seem to be the precise operative situation for which they were intended.

2. In the alternative, the Board can draw an adverse inference from the obfuscation on the part of Hydro, and its failure to provide evidence when offered the opportunity, and immediately advance its finding of substantial change to the point necessary to initiate a review of the justness and reasonableness of the findings and rates set out in Order 69/19 and 59/18² (and adjustments since that time). This would presumably start with an evidentiary phase that may not look materially different than the initial stages of a GRA – a requirement on Hydro's part to provide responses to Minimum Filing Requirements, with a stage of appropriate discoveries and the opportunity for all parties to call opinion evidence. Operationally, the first step may be a procedural conference to set out the recommended steps and schedule.

In assessing its options, MIPUG is unfortunately of the view that the Board must be cognizant that it is not apparent whether Hydro will comply with the next set of orders and directives any more than it did with the last. However, the prospective of noncompliance and

² A technical matter of complication in this proceeding is that the rates in place today are not the rates arising from Order 69/19 (as modified slightly by Order 110/20). The provisions of s.26(3) of the *Crown Corporations Governance Act* are written in a manner to test whether the rates that were last approved by the Board remain just and reasonable, where such rates remain in place at the time of application. Hydro is in the unanticipated position where its rates are not, at present, those last found by the Board to be just and reasonable. In fact, Hydro's current rates have never been found by the regulator to be just and reasonable. In other words, oddly, a finding by the Board today that there had been no substantial change in Hydro's circumstances, and that the rates last approved by the Board remain just and reasonable, would in fact be a rejection of current rates and indicate a need for reversion to the rates approved in Order 110/20. At an appropriate time, and certainly before the Board makes any final finding of "no substantial change", submissions should be sought from respective Counsel on the appropriate means to resolve this complication.



the fact of being told by Hydro that the Board will only get the required regulatory information in “*Manitoba Hydro’s winter 2022/23 application*” should not dissuade the Board from exercising its discretion to ensure regulatory oversight when a process under section 26(3) is validly initiated.

Under either option, processes should be established for discovery of evidence and ultimately testing of the evidence. An oral pre-hearing conference to solicit procedural input would be appropriate at that time.

Concluding Comments and Recommendations

To MIPUG, the current circumstances represent an unfortunate chapter for the transparent and comprehensive regulation of Manitoba Hydro. The options highlighted above are unprecedented and contentious, but may be unavoidable if the Board is to have any credible role of regulating in the public interest. The refusal by Hydro to comply with the Board’s directives, by failing to produce forecast information in accordance with the spirit and intent of the Board’s directive, cries out for further regulatory oversight.

MIPUG also notes the obvious interrelationships associated with Bill 35, the *Public Utilities Ratepayer Protection and Regulatory Reform Act*. MIPUG’s comments are not based on Bill 35, and they do not reflect, nor are they influenced by, what might arise if Bill 35 is implemented as proposed. The *Public Utilities Act* and *Crown Corporations Governance Act* remain in force in their current form, and the Public Utilities Board retains its role under these operative guiding pieces of legislation. However, MIPUG also notes that one of the features included in the Bill 35 proposal is a material strengthening of the Board’s powers to impose administrative penalties for non-compliance with Board Orders. The need for a regulator to have, and where necessary wield, tools to implement its duly authorized role is beyond dispute, whether under the current regime or the hypothesized future regime under Bill 35.

The public interest is not served by permitting Hydro’s obfuscation as it attempts to pre-empt a valid investigation by the Board. There is no choice today but to continue the assessment of the justness and reasonableness of Hydro’s rates in light of the Board’s findings in Order 53/21.

MIPUG has expressed concerns for some time that Hydro has not produced a credible long-term forecast since before 2016, sufficient to give comfort about the future conditions ratepayers may face. Not only is this problematic for companies attempting to operate businesses and invest capital in the Province, it is also egregious in that Hydro’s very existence as a Crown public entity is intended to bring the public interest to the forefront. It is



mystifying how Hydro can conclude that more years of concealing key financial forecasts will help give confidence to Manitoba ratepayers and investors. MIPUG is unable to conclude whether Hydro is incapable of producing the directed forecasts, or simply unwilling to disclose those forecasts. Neither inference gives comfort, nor supports the public interest.

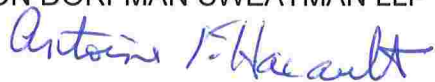
Industry has long identified that the most important outcome of regulation is stable and predictable rates into the future. This outcome can only be assessed with long-term forecasts, and the stability that comes with slow adjustments over time, with an eye to the horizon. That facts have changed since 2016 (or the situation anticipated as part of the projections prepared in 2016) appears beyond any reasonable dispute. Bringing forward a proper forecast for full testing permits essential conclusions to be drawn about whether rates are too high, too low, or on the wrong path for the financial conditions and risks faced by Hydro.

Finally, MIPUG supports the right of the applicant (the Coalition) to have the final right of reply. MIPUG thanks the Board for this opportunity to provide a submission.

Yours truly,

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