



LETTER DECISION

File OF-FAC-IPL-M180-2015-01 04
11 August 2020

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Dear Mr. Shangreux and Mr. Chartrand:

**Manitoba Minnesota Transmission Project (MMTP or Project) Certificate EC-059,
Condition 3 – Implementation of Commitments, and Condition 15
Commitments Tracking Table.**

On 18 June 2019, the National Energy Board (NEB) issued Certificate of Public Convenience and Necessity EC-059 pursuant to which Manitoba Hydro was permitted to construct and operate the Project (the Certificate), subject to 28 conditions. Condition 3 requires Manitoba Hydro to fulfil certain commitments and Condition 15 requires Manitoba Hydro to track progress in fulfilling commitments in a commitment tracking table periodically filed with the NEB.

On 23 July 2019, the NEB received a letter from the Manitoba Metis Federation (the MMF) ([C00653-1](#)) asserting that Manitoba Hydro had made commitments to the MMF captured by Conditions 3 and 15 and that Manitoba Hydro was neither implementing those commitments as required by Condition 3, nor tracking its commitments to the MMF as required by Condition 15. On 4 June 2020, the MMF subsequently filed a Notice of Application ([C06687-1](#)) with the Canada Energy Regulator¹ re-asserting that Manitoba Hydro was not complying with Conditions 3 and 15 of the Certificate, and further asserting that Manitoba Hydro is in breach of section 247 of the *Canadian Energy Regulator Act* (CER Act).² For the reasons that follow, the Commission finds that Manitoba Hydro is in compliance with Conditions 3 and 15 of the Certificate. Since Manitoba Hydro has demonstrated its

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¹ On 28 August, 2019, pursuant to the *Canadian Energy Regulator Act*, the NEB was replaced with the Canada Energy Regulator. Under section 34(1) of the transitional provisions associated with the *Canadian Energy Regulator Act*, every certificate issued by the NEB is considered to have been issued under the *Canadian Energy Regulator Act*, remains in force for the remainder of the period during which it would have been in force had the *Canadian Energy Regulator Act* not come into force.

² S.C. 2019, c. 28.

compliance with the Certificate, there is no basis to grant the relief sought by the MMF either in its initial comment letter or in its 4 June 2020 Notice of Application.

1. Submissions of the MMF and Manitoba Hydro

In its 23 July 2019 letter, the MMF provides substantial background regarding the commitments it asserts were made by Manitoba Hydro in respect of the Project. In particular, the MMF submits that it and Manitoba Hydro negotiated a series of documents, including:

- Kwaysh-kin-na-mihk la paazh Agreement/Turning the Page Agreement (TPA);
- A contract, consisting of a workplan and contribution agreement and leading to a Métis Traditional Knowledge and Land Use Study (the Contract); and
- The July 2017 Agreement/Major Agreed Points (MAP), based on the TPA, and the Contract, as well as addressing documented impacts of the Project on Aboriginal Rights of Métis.

(collectively referred to in this decision as the MAP Documents).

Specifically, the MMF asserted that Manitoba Hydro:

- is breaching Condition 3 by refusing to acknowledge, honour and implement the MAP, as a clear commitment to the MMF that falls within the scope of Condition 3;³
- failed to perform Step 6 mitigation measures in the Contract, including meeting to find alternative ways to address impacts if the Contract is not implemented;⁴
- failed to include the MAP Documents, specifically the MAP and the Contract, as commitments in the Commitment Tracking Table it is required to be filed pursuant to Condition 15;⁵ and
- omitted a key component of its commitment to the MMF for 10 percent Métis construction content in the Project.⁶

The MMF requested that the Commission ensure that Manitoba Hydro complies and fulfills Conditions 3 and 15, including with respect to the implementation of the MAP Documents.

On 26 July 2019, Manitoba Hydro requested a right of reply to the MMF ([C00704-1](#)). The NEB granted ([C00836-1](#)) a right of reply and set out a process regarding the MMF comment letter in a 2 August 2019 letter.

On 9 August 2019, Manitoba Hydro submitted a response to the MMF letter ([C00912-1](#)). Their response maintained that MAP was not a commitment. Manitoba Hydro stated that it made certain that the MMF was aware of its position regarding the MAP prior to the hearing, as indicated on the record of the EH-001-2017 proceeding. Manitoba Hydro noted the following:

³ C00653-1 pdf page 14.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

Manitoba Hydro submits that the document referred to by the MMF as the "July 2017 Agreement" [the MAP] is not a "commitment" made by Manitoba Hydro as alleged by the MMF. Accordingly, compliance with Condition 3 is not at issue. Secondly, while Manitoba Hydro agrees that the document referred to by the MMF as "the Contract" (January 2016) [the Contract] contains commitments made by Manitoba Hydro to the MMF that are on the record of this proceeding, Manitoba Hydro disagrees that it is non-compliant with those commitments.

Thus, in its submissions, Manitoba Hydro conceded that some commitments were made on the EH-001-2017 record, which were also contained within the Contract. However, Manitoba Hydro did not acknowledge the Contract in its entirety was a commitment and maintained that it was honouring the commitments it made.⁷ In further support of its assertion that it was complying with specific commitments, Manitoba Hydro set out various examples of instances of offers to meet with the MMF and to provide honoraria and reimbursement of reasonable expenses. Manitoba Hydro also pointed out commitments that were included in the Condition 15 Condition Tracking Table such as continued engagement in the planning process, and in respect of mitigation measures and identification of sites that are important to the MMF.

On 16 August 2019, the MMF sent a letter which provided further comments on the Manitoba Hydro response of 9 August 2019 ([C01061-1](#)), including, among other submissions, that Manitoba Hydro could not have sole discretion to determine what might be a commitment, the MMF experienced limits on meaningful participation in processes related to the Project and that MMF was not seeking a determination on the enforceability of the MAP documents. On 5 September 2019 the MMF filed another letter ([C01479-1](#)) with the Canada Energy Regulator (CER) expressing concern they had not received a response to their submission of 23 July 2019, from the CER.

On 6 September 2019, Manitoba Hydro filed its monthly Commitment Tracking Table⁸ pursuant to Condition 15 ([C01510-3](#)). Included in this submission was an update to the previously filed Commitment Tracking Table that reflected 10% Metis content in its construction tenders. This update addressed commitment #315 which was one of the concerns raised in the MMF's 16 August 2019 letter.

On 10 October 2019, the Commission issued a letter accepting the MMF submissions of 16 August 2019 and 5 September 2019 onto the record for the purposes its consideration of this matter. The Commission again gave Manitoba Hydro the final right of reply to the comments filed by the MMF. The Commission noted that, for the final right of reply to be effective, the Commission would not consider further comments by the MMF ([C02204-1](#)).

On 16 October 2019, Manitoba Hydro replied to the further MMF submissions ([C02280-1](#)). Manitoba Hydro stated that there were no new issues raised in the letters from the MMF, and that those letters were a re-iteration of the issue previously considered and rejected by the NEB prior to it authorizing the Project.

⁷ *Ibid.*

⁸ [C01510](#)

Manitoba Hydro re-stated its view that the MAP is not a commitment, that the relevance of the Contract to Conditions 3 and 15 is uncertain, and that Manitoba Hydro's approach to Conditions 3 and 15 continues to be appropriate.

On 23 October 2019, the MMF submitted a letter to the CER ([C02373-1](#)) making reference to the 16 October 2019 reply, and stated, among other things, that:

- the MAP reached between the MMF and Manitoba Hydro is uncontested evidence before the CER and acknowledged – on its face – that impacts of the MMTP on “Aboriginal Rights of Metis” required accommodation;
- Manitoba Hydro has provided no evidence to the CER to demonstrate that it is meeting the commitments it acknowledges exist and has omitted evidence that it is, in fact, not fulfilling its commitments; and
- the CER must determine that Manitoba Hydro either is, or is not, complying with the Certificate Conditions for the MMTP. It cannot “reject” the MMF's arguments without a determination and reasons.

On 5 December 2019, the MMF submitted to the CER a letter, ([C03468-1](#)) expressing concern that they had not received a response to their submissions. Further, the MMF stated that by, not enforcing Manitoba Hydro's compliance with Condition 3, the CER is failing to uphold section 35 of the Constitution Act, 1982. The MMF repeated its request that the “CER promptly exercise its jurisdiction to determine that Manitoba Hydro is not complying with Condition 3, and takes whatever steps are necessary to ensure Manitoba Hydro's compliance with this conditions, as an accommodation measure imposed by the Crown”.

On 21 May 2020, the Commission invited updates from both the MMF and Manitoba Hydro ([C06416-1](#)) as a result of the Manitoba Court of Queen's Bench decision on the MMF's judicial review application in *MMF v. Pallister*⁹ (Judicial Review Decision). The Commission's invitation stemmed from mention of the case made in previous submissions by both the MMF and Manitoba Hydro. In that proceeding, MMF had asserted that the government of Manitoba's Directive,¹⁰ which directed Manitoba Hydro not to proceed with the MAP at that time, was unlawful and that it did not uphold the honour of the Crown. The Commission's letter set out a deadline of 4 June 2020 for updates from both parties, and a deadline of 11 June 2020 for concurrent reply from both parties to the other's update.

Both the MMF ([C06675-1](#)) and Manitoba Hydro ([C06665-1](#)) filed updates by the 4 June 2020 deadline. The MMF's update set out that neither the Judicial Review, nor the MMF's Civil Action¹¹ are relevant to the issue of the MAP Documents being commitments under Condition 3, currently before the Commission. For its part, Manitoba Hydro submitted that

⁹ <https://www.canlii.org/en/mb/mbqgb/doc/2020/2020mbqgb49/2020mbqgb49.html>

¹⁰ Order in Council 82/2018 and Directive, “A Directive to Manitoba Hydro Electric Board Respecting Agreements with Indigenous Groups and Communities” (21 March 2018): <https://oic.gov.mb.ca/OICDocs/2018/03/Crown%20Services.180321.Crown%20Corporations%20Governance%20and%20Accountability%20Act.822018.pdf>

¹¹ Manitoba Court of Queen's Bench File No. CI20-01-26496.

the MMF's attempted judicial review of the Directive is not relevant to Conditions 3 and 15 of the Certificate, but rather, Manitoba Hydro had raised the Judicial Review Decision to illustrate the appropriate forum to be used for this type of dispute. Manitoba Hydro also noted that the MMF had initiated the Civil Action.

On 11 June 2020, Manitoba Hydro filed a response to the MMF's 4 June 2020 update. In that response, Manitoba Hydro disagreed with the MMF that the Civil Action is not relevant to the issue before the Commission. According to Manitoba Hydro, the Civil Action is evidence in support of Manitoba Hydro's position that the issue being brought before the Commission is really a dispute between two parties regarding the enforcement of a document that properly belongs before the Courts ([C06776-1](#)).

On 4 June 2020, the MMF submitted a Notice of Application ([C06687-1](#)) to the Commission. The Notice re-asserted that Manitoba was not in compliance with Certificate EC-059 and sought orders that Manitoba Hydro be made to comply with Condition 3 of the Certificate, or alternatively, that the Commission order the suspension of the Certificate pending Manitoba Hydro's compliance with Condition 3.

On 11 June 2020, Manitoba Hydro filed comments in response to the Notice of Application. ([C06776-1](#)). That same day, the MMF filed comments ([C06785-1](#)) in response to Manitoba Hydro's 11 June 2020 comments on the Notice of Application.

On 25 June 2020, the Commission sent a letter ([C06988-1](#)) to Manitoba Hydro and the MMF stating that it was continuing to consider the submissions received to date from both the MMF and Manitoba Hydro relating to Condition 3 and Condition 15 issues raised by the MMF, dating from 23 July 2019. Also within this letter the Commission stated that it would not consider any further submissions from Manitoba Hydro or the MMF with regard to either the MMF's letter of 23 July 2019, or the MMF's Notice of Application dated 4 June 2020, unless the Commission requests or indicates otherwise.

2. Preliminary Matters

a) Commission's Jurisdiction

The Commission is a creature of statute, created to exercise the decision making authority conferred upon it by Parliament. Subsection 31(2) of the CER Act sets out that the Commission is a court of record. This provision gives the Commission the power over procedures in relation to matters under the CER Act that the Commission is entitled to do, such as the gathering of evidence.

Under subsection 32(1), Parliament has conferred on the Commission the full and exclusive jurisdiction to inquire into, hear and determine any matter. In its 10 October 2019 submission,¹² and in its 4 June 2020 Notice of Application,¹³ the MMF submitted that the Commission has the jurisdiction to consider whether Manitoba Hydro has failed in its

¹² [C02373-1](#)

¹³ Particularly at paras 56-60.

requirement to include the MAP, contrary to or in contravention of both Conditions 3 and 15 of the Certificate and the CER Act. The MMF further pointed out that the Commission also has the power to act on its own initiative, under section 33 of the CER Act, and to inquire into, hear, and determine the matter.

The Commission accepts the MMF's argument raised in both its 9 October 2019 submission and in paragraphs 56 to 60 of its Notice of Application. The Commission has the jurisdiction to inquire into whether Manitoba Hydro failed to include the MAP as a commitment, contrary to the requirements of Conditions 3 and 15 of the Certificate. The Commission is also of the view that this jurisdiction extends to all compliance issues raised by the MMF in respect of not just Condition 3, but also Condition 15. The Commission also agrees with the MMF, as further set out in paragraphs 56-60 of its Notice of Application, that the Commission has the power to act on its own initiative to inquire into, hear and determine any matter. Upon receiving the MMF's initial filing in July 2019,¹⁴ the NEB set out a process to inquire further into the matters raised by the MMF in that unsolicited submission. In respect of the preliminary issue of jurisdiction, the Commission notes that Manitoba Hydro has remained silent, neither indicating objection to, nor support of, the Commission's jurisdiction to decide all of the compliance matters raised by the MMF regarding Condition 3 and Condition 15.

In agreeing with the MMF that the Commission has the jurisdiction to consider the complaint under the CER Act, the Commission is of the view that it would have also had the jurisdiction to consider the matter under the now repealed *National Energy Board Act*.¹⁵ The timing of the MMF's initial complaint was while (NEB Act) was still in force, and the transitional provisions of the CER Act are such that the Commission would have had the authority to continue acting under the NEB Act. The Commission is further of the view that regardless of the Act under which the Commission considered the complaint, the outcome would not change. In proceeding with consideration of the complaint, the Commission has done so under the CER Act.

b) Submissions filed outside the Commission established process

Following the MMF's initial submission in July of 2019, the then NEB established a process for final reply from Manitoba Hydro. After that final reply, as noted above, the Commission received a number of additional submissions from both parties, including:

- further comments and replies from the MMF and Manitoba Hydro;
- updates from both parties, and reply from both parties, pertaining to the outcome of the MMF's application for judicial review, pursuant to an invitation by the Commission to address this court decision; and
- the MMF's Notice of Application of 4 June 2020.

¹⁴ [C00653-1](#)

¹⁵ R.C.S.1985, c.7, repealed.

Notwithstanding that a number of submissions were filed by both the MMF and Manitoba Hydro outside of the Commission's initially established process, the Commission has considered all submissions received from both the MMF and Manitoba Hydro. This includes submissions from the MMF's July 2019 letter, to the filings made by both the MMF and Manitoba Hydro on 11 June 2020, including the MMF's Notice of Application.

In doing so, the Commission took into account that processes to evaluate condition compliance are historically set on a case by case basis and should allow for fulsome evaluation of potential non-compliance issues (for example, a formal notice of application is not required for a party to trigger a review of condition compliance). In keeping with the principles of administrative law, notably procedural fairness and natural justice, the Commission has afforded several opportunities to both the MMF and to Manitoba Hydro to raise and respond to issues and provided a framework and timelines that extended reasonable opportunities for both the MMF and Manitoba Hydro to participate. In the Commission's view, the opportunities for participation were appropriate in the circumstances.

c) Scope of documents in dispute

The Commission notes that the MMF provided detailed background and context in a number of its submissions to the CER. For example, the MMF's 23 July 2019 submission sets out the MMF's view of the history of interactions between Manitoba Hydro and the MMF, including an explanation of the Kwaysh-kin-na-mihk la paazh Agreement/Turning the Page Agreement, the Contract, a negotiation process, and the Major Agreed Points document (MAP). While the MMF provided substantial background for context, the Commission notes two agreements were the focus of both parties submissions – the Kwaysh-kin-na-nihk la paazh Agreement/Turning the Page Agreement and the MAP.

While the MMF has put forth full enumeration of the steps leading to the MAP, it is the MAP itself that the MMF contends is the commitment that Manitoba Hydro made, and which Manitoba Hydro must now be required to fulfil. For example, the Commission notes that in the MMF's Notice of Application, the declaratory relief sought requests that Manitoba Hydro be directed to fulfill its commitments, the grounds enumerate the MAP as the commitment sought to be included in Condition 3, and the Contract is only mentioned in the Background and Context. Similarly, the Commission observes that the Turning the Page Agreement serves as context that sets out the subsequent MAP. The MMF's reference to the Turning the Page Agreement does not change the outcome of the Commission's finding in respect of the MAP.

In conducting its analysis, the Commission observes that it is not being asked to adjudicate the legal characterization of the any of the MAP Documents. Rather, what is in dispute between the MMF and Manitoba Hydro is whether the MAP Documents, and particularly the MAP itself, are commitments within the meaning of Condition 3 of the Certificate. If the MAP Documents, and particularly the MAP, are commitments, then the Commission must consider whether those commitments need to appear in the Condition Tracking Table required by Condition 15 of the Certificate.

The Commission notes that the MMF's submissions during this process evolved and the Commission is of the view that what it was being asked to consider during this process also evolved, culminating in the request, in the Notice of Application, ultimately being the consideration of the MAP as a commitment within the meaning of Condition 3 and Condition 15. In coming to its conclusion on the matter, the Commission has considered whether Conditions 3 and 15 apply to the MAP Documents in their entirety, except where Manitoba Hydro as clearly indicated, in their submissions, that certain elements, particularly related to the Contract, are commitments that it has made, within the meaning of Condition 3.

3. Reasons for the Commission Decision that the MAP Documents are not a commitment pursuant to Conditions 3 and 15 of Certificate EC-059

Having evaluated all submissions received as well as the relevant record and conditions arising from the Proceeding, the Commission is of the view that the term "commitments" as used in both Conditions 3 and 15 should not be interpreted to include the MAP Documents. The Commission finds that the MAP Documents are not a commitment within the meaning of Condition 3 of Certificate EC-059. As a result, Manitoba Hydro is not required to include any of the MAP Documents in the Commitments Tracking Table under Condition 15 of the Certificate.

a) Certificate Conditions 3 and 15

Under section 58.16 of the NEB Act, the NEB had the jurisdiction to issue a certificate in respect of an international power line,¹⁶ if the NEB was satisfied that the line is and will be required by the present and future public convenience and necessity. After holding a mandatory hearing under section 24 of the NEB Act, the NEB determined that a certificate for the Project should be issued. Under subsection 58.35(2) of the NEB Act, the NEB had the jurisdiction to make the certificate subject to such terms and conditions that the NEB considered necessary or desirable in the public interest.

The NEB set out Condition 3 in its EH-001-2017 Reasons for Decision:

Manitoba Hydro must implement or cause to be implemented all of the policies, practices, and mitigation measures recommendations, and procedures for the protection of the environment and the promotion of safety referred to in its application, or as otherwise agreed to in its related submissions.

¹⁶ Under paragraph 58.16(1)(a) of the NEB Act, repealed, the NEB could issue a certificate for an international power line where the Governor in Council made an order designating an international power line as an international power line that is to be constructed and operated under and in accordance with a certificate issued under 58.16. By Order in Council 2017-1693, dated 15 December 2017, the Governor in Council designated the Project as one to be considered under section 58.16 of the NEB Act, repealed ([A90752-1](#)).

Under subsection 58.16(1) of the NEB Act, the issuance of a certificate was subject to the approval by the Governor in Council.¹⁷ Prior to the Governor in Council's approval of the issuance of the Certificate, the Crown conducted a supplemental consultation process, culminating in the recommendation to the Governor in Council that certain of the conditions contained in the Certificate be modified, prior to the Certificate being issued.¹⁸

On 13 June 2019, the Governor in Council issued Order in Council 2019-784, approving the issuance of the Certificate. In so approving, the Governor in Council considered the Crown's consultation report entitled *Federal Consultation and Accommodation Report for the Manitoba-Minnesota Transmission Project (CCAR)*.¹⁹ In doing so, the Governor in Council was of the opinion that outstanding Indigenous concerns could be accommodated by amending some of the terms and conditions set out in the NEB's Reasons for Decision. Specifically, the Governor in Council, in approving the issuance of the Certificate, amended Condition 3,²⁰ which now reads:

Manitoba Hydro must implement or cause to be implemented all of the policies, practices, mitigation measures, recommendations, and procedures for the protection of the environment and promotion of safety referred to in its application, or as otherwise agreed to in its related submissions *as well as commitments made to Indigenous groups through its Project application or otherwise on the record of EH-001-2017*. [emphasis added]

The NEB also set out Condition 15 in its EH-001-2017 Reasons for Decision:

Manitoba Hydro must:

- a) file with the [NEB] and post on its website, **at least thirty (30) days prior to commencing construction**, a commitments tracking table listing all commitments it made in its application and otherwise agreed to during questioning or in its related submissions in the NEB's EH-001-2017 proceeding, as well as commitments from the Clean Environment Commission hearing process that are of federal interest, and that includes references to...

The Governor in Council, in approving the issuance of the Certificate, amended Condition 15,²¹ which now reads:

Manitoba Hydro must:

- b) file with the [NEB] and post on its website, **at least thirty (30) days prior to commencing construction**, a commitments tracking table listing all commitments made in its application, *including all commitments made to Indigenous communities*, and otherwise agreed to during questioning or in its related submissions in the NEB's EH-001-2017 proceeding, as well as commitments from the Clean Environment Commission hearing process that are of federal interest, and that includes references to...[emphasis added]

¹⁷ Subsection 58.16(1) and paragraph 58.16(4)(a), NEB Act, repealed.

¹⁸ [A99793-1](#)

¹⁹ [MMTP Crown Consultation and Accommodation Report](#).

²⁰ [Order in Council 2019-784](#).

²¹ [Ibid.](#)

b) Commitments made by Manitoba Hydro on the record of the EH-001-2017 Proceeding

The Commission understands Condition 3 to require Manitoba Hydro to implement commitments to Indigenous peoples, but also notes that the Governor in Council amendment includes a qualification that refers specifically to commitments made by Manitoba Hydro to Indigenous peoples “through its Project application or otherwise on the record of EH-001-2017”. The Commission is mindful that it must examine the amendments added by Governor in Council carefully. The Commission must attempt to follow the plain and obvious meaning of the amendments, when read in totality with the Condition. Accordingly, to find that the MAP Documents must be implemented by Manitoba Hydro pursuant to this Project approval, there must be persuasive evidence that the MAP Documents were a commitment made by Manitoba Hydro through its Application or otherwise on the record before the NEB in the EH-001-2017 proceeding.

The Commission has examined the Application and notes that Manitoba Hydro did not record any commitment to the MAP Documents in its application materials. The Commission also examined the relevant portions of the record from EH-001-2017 and finds that Manitoba Hydro offered no commitment to implement the MAP Documents. On the contrary, Manitoba Hydro objected to the MAP Documents, and particularly the MAP itself, being before the NEB, as follows:

- The NEB asked Indigenous peoples who were intervenors in the proceeding, in an Information Request,²² if they had any comment on the appropriateness or effectiveness of mitigation measures proposed by Manitoba Hydro, or alternatively, if there were any mitigation measures that would effectively address their concerns. The MMF filed the MAP as part of its response to the information request.
- Manitoba Hydro objected to the filing of the MAP by the MMF in its response to the Information Request on the basis that it was a confidential and without prejudice document. The NEB issued a ruling in respect of Manitoba Hydro’s objection in which it elected not to strike the Information Request response on the basis that the MMF’s filing of the MAP did not constitute an abuse of process or breach of settlement privilege. Of relevance to the issues now before the Commission, the NEB noted that Manitoba Hydro took the position that the MAP was not binding and that Manitoba Hydro expressly confirmed that it was not relying on the MAP as a mitigation measure.²³
- The NEB made no further mention of the MAP either as a commitment to which Manitoba Hydro agreed, or as a commitment that Manitoba Hydro otherwise made on the record.

The Commission finds that there was no explicit commitment or formal acknowledgement by Manitoba Hydro that the MAP Documents were a commitment. To the contrary, Manitoba Hydro took steps to record its position that this document was neither binding, nor part of its application before the NEB. Accordingly, the Commission finds the MAP Documents were not a commitment made by Manitoba Hydro on the record of EH-001-2017 or in its Application.

²² [A92218-1](#)

²³ [A92734-3](#), page 2.

As the Commission understands the MMF's argument, the phrase "implement or cause to be implemented... all commitments made to Indigenous groups through its Project application or otherwise on the record of EH-001-2017" is meant to be read in such a way that it need not have been Manitoba Hydro who put the commitment on the record of EH-001-2017.²⁴ The Commission understands the MMF submission to mean that the inclusion of the MAP in the information request response means that the MAP Documents are a commitment made by Manitoba Hydro in EH-001-2017. This interpretation is not supported by an overall plain reading of Condition 3. In the Commission's view, pursuant to a plain reading of Condition 3, the only party who could make a commitment on behalf of Manitoba Hydro is Manitoba Hydro itself. As previously noted, Manitoba Hydro took explicit steps to prevent any promises it may have offered in the MAP Documents from being a commitment on the hearing record, following which the NEB did not refer to the MAP Documents as a factor or mitigation measure that was considered as part of its decision.

The Commission notes that this interpretation does not mean that Manitoba Hydro would have discretion to cancel or terminate any commitment once the commitment or promise was made on the hearing record, as the language of Condition 3 would establish the commitment as a regulatory requirement. In this regard, Manitoba Hydro acknowledged certain commitments that were referenced in the Contract and noted these commitments were being honoured in its submissions of 9 August 2019 ([C00912-1](#)). Where Manitoba Hydro expressly acknowledge those commitments as being ones that it made within the meaning of Condition 3, those commitments are regulatory requirements and must be fulfilled.

While the hearing record closed at the end of the last day of the oral portion of the proceeding, after final arguments,²⁵ the Commission also notes that the close of the record did not preclude the Governor in Council from adding additional conditions following the Crown's supplemental consultation with Indigenous peoples. The Crown exercised this authority by adding its amendments.²⁶ However, the Governor in Council cannot put on the hearing record that which was not put on the hearing record and therefore any added conditions would have had to somehow otherwise capture the MAP Documents with appropriate drafting. Such an amendment, without a qualification linking commitments to the hearing record, would likely occur after the Governor in Council had determined what the effect of the MAP Documents was, what the Governor in Council's ability (if any) was to bind Manitoba Hydro, and what jurisdiction the NEB (now CER) has to oversee the fulfilment of such a commitment.

c) Consultation activities giving rise to the amendments to Condition 3 and Condition 15

The MMF argues that the Governor in Council's amendments to Condition 3 and Condition 15 were made in response to the history of Manitoba Hydro not fulfilling its agreements and commitments to the MMF and to require that Manitoba Hydro implement "all commitments made to Indigenous groups" including the MAP Documents. Broadly, the MMF asserts that Manitoba Hydro's non-compliance reflects a failure to address the documented impacts of the Project on the Aboriginal Rights of the Metis. With respect to Conditions 3 and 15, the MMF submits that the Crown's consultation process leading to amendments to Condition 3

²⁴ *Supra*, note 1 at pdf page 14.

²⁵ [A92680-1](#) [EH-001-2017 Transcript Volume 10](#) at 8466.

²⁶ [A99793-1](#)

and Condition 15 supports that these conditions should be interpreted to include the MAP Documents as commitments. The MMF submits that a failure to interpret the conditions in this manner would result in a failure by the Crown to meet its constitutional obligations flowing from the honour of the Crown ([C02373-1](#)).

In its submissions regarding Crown consultation, the MMF referred to the CCAR²⁷ created by the Crown after the close of the NEB record to document the Crown consultation that took place. Neither party filed a copy of the CCAR. The Commission notes, however, that the majority of the CCAR is a publicly available document and it is on that basis that the Commission makes reference to it.²⁸

The Commission has considered each of the points raised by the MMF in respect of Crown Consultation and the CCAR. The Commission is not persuaded that the CCAR or context regarding Crown consultation tendered by the MMF supports that the MAP Documents constitute a Project condition under either Condition 3 or 15. The Commission is of the view that the Crown considered a wide range of matters brought forward by Indigenous peoples during consultation and that Canada was aware of a number of agreements, including cancelled agreements, entered into by Manitoba Hydro with Indigenous peoples. As a result, the Commission concludes it would not be reasonable to interpret that the amendments to Condition 3 and Condition 15 were intended to specifically address impacts raised by the MMF or to address the disputes between the MMF and Manitoba Hydro regarding the MAP Documents. Similarly, the Commission is of the view that it is not necessary to interpret Conditions 3 and 15 in this expansive manner in order to preserve the Crown's discharge of its obligations with respect to the Aboriginal Rights of the Metis. The Commission was particularly persuaded by the following consultation considerations noted in the CCAR and eventual Governor in Council order when making these findings.

First, the MMF submitted that, in its consultation with the Crown, it outlined its history of discussions with Manitoba Hydro, including the MAP, and its concerns about the company not following its commitments. It said that the CCAR acknowledged and set out this history and context that informed the consultation process and the condition amendments that resulted. The Commission notes that, in the CCAR, the Crown acknowledged the existence of agreements between Manitoba Hydro and some Indigenous peoples to ensure that Indigenous peoples were able to benefit from the Project. The CCAR also acknowledged that there was a legal dispute between the MMF, Manitoba Hydro and the province of Manitoba over Manitoba's direction to Manitoba Hydro not to proceed with what the Crown referred to as a \$67M compensation agreement.²⁹

However, the Commission notes that the CCAR documents concerns raised by a number of Indigenous peoples other than the MMF, some of whom also entered into agreements with

²⁷ [Supra, note 18.](#)

²⁸ Note that the CCAR was not filed on the NEB's Record as the supplemental consultation took place after the NEB hearing record closed. It should also be noted that the community specific annexes attached to the CCAR are not public documents and so the Commission is not privy to that information and so makes no references to them.

²⁹ CCAR at PDF page 30.

Manitoba Hydro. One of the concerns raised, but not attributed to the MMF in an explicit manner, was the need for direct economic benefits and financial compensation for Indigenous peoples. Although not intended as mitigation or financial compensation related to rights impacts, the CCAR noted that economic benefits from the Project included six agreements between Manitoba Hydro and Indigenous peoples. The CCAR also noted that Manitoba Hydro cancelled the negotiation of six other agreements and that Indigenous communities with cancelled agreements tended to focus on this issue during Crown consultations.³⁰ Further on, the CCAR additionally observes that the federal Crown does not have the jurisdictional authority to compel a provincial Crown corporation or provincial government to offer economic accommodation.³¹

Second, the Commission also notes that the CCAR makes reference to amendments to Conditions 3 and 15 throughout but that the reference to commitments is primarily in relation to issues of concern such as the use of herbicides, impacts to fish habitat, impacts to cultural sites, accidents and malfunctions, navigation and navigation safety, completion of Indigenous knowledge studies (the additional funding of which is committed to by Natural Resources Canada), and to wetlands and vegetation. No mention is made of the MAP. However, the CCAR does note, for instance, that Manitoba Hydro made commitments regarding the percentage of Indigenous peoples hired for the project and expressed the view that these hiring commitments would be legally enforceable as against Manitoba Hydro under Conditions 3 and 15.

Third, in the CCAR, the Governor in Council concluded that, based on Manitoba Hydro's commitments to Indigenous content, including incentives to increase Indigenous content in contracts, as well as NEB Conditions 22 and 26 for Crown land and wetlands, no further action was required regarding concerns raised by Indigenous peoples regarding economic benefits and financial compensation in respect of the Project.

In addition to the report language, the Commission is also mindful of the Order in Council generally, and the following specific wording:

“Whereas the Governor in Council is of the opinion that outstanding Indigenous concerns can be accommodated by amending some of the terms and conditions set out in Appendix III of the NEB’s Report.”

In the Commission's view, this preamble, read in conjunction with the publicly available portions of the CCAR, support the view that the MAP Documents do not fall within the scope of commitments captured by Conditions 3 and 15.

Finally, in accordance with section 56 of the CER Act, the Commission is satisfied that its finding in this decision, namely that the MAP Documents are not a commitment, does not undermine the honour of the Crown or undermine the Crown's discharge of its duty to consult and accommodate. Based on its evaluation of the submission of the MMF regarding the Crown's activities after the decision and recommendation of the NEB as well as the CCAR, the Commission is of the view that the reasonableness and appropriateness of the

³⁰ *Ibid.* at PDF pages 62 to 65.

³¹ *Ibid.* at PDF page 63.

consultation undertaken by the Crown vis a vis the MMF before its decision on the Project is unchanged by our interpretation and application of Conditions 3 and 15. On this point, the Commission notes that the Crown's consultation extended to many Indigenous peoples and that the CCAR confirmed consideration of, and responses to, a wide range of concerns raised by different Indigenous peoples. When considering how to accommodate outstanding concerns, the Governor in Council chose to make amendments to the NEB conditions that linked commitments to those that were made on the record of the Proceeding, with knowledge of cancelled or disputed agreements between Manitoba Hydro, the MMF and other Indigenous peoples.

d) Condition 15

Much of the preceding analysis focuses on Condition 3, but the Commission's findings and reasoning apply equally to Condition 15. Condition 15 requires Manitoba Hydro to submit to the NEB, and update, a commitments tracking table that includes "all commitments made in its application, *including all commitments made to Indigenous communities*, and otherwise agreed to during questioning or in its related submissions in the NEB's EH-001-2017 proceeding" [emphasis added to reflect amendment to the NEB condition]. While the wording in Condition 15 is not identical to Condition 3, the Commission is of the view that the reference to the hearing record in Condition 3 and proceeding in Condition 15 should be interpreted in the same manner.

Moreover, in the Commission's view, Condition 15 merely requires the creation of an accurate Commitments Tracking Table, reflecting the commitments made within the scope of Condition 3. Condition 15 is intended to enhance transparency regarding Manitoba Hydro's performance of commitments, but did not add substantive obligations that Manitoba Hydro is required to fulfill.

The only other note that the Commission would make in regard to Condition 15 is that Manitoba Hydro has not listed the MAP Documents as one of the commitments to be tracked. This is consistent with Manitoba Hydro's rejection of the MMF argument that the MAP is a commitment.

e) Percentage of Metis contribution in construction content

In its initial submission, the MMF also raised the matter of the percentage of Metis content included in construction tenders, asserting that the commitment tracking table failed to include this commitment. The Commission notes that Manitoba Hydro responded to this matter ([C00912-1](#)). On September 6 2020, Manitoba Hydro updated their commitment tracking table to clearly indicate that Commitment 315 (related to construction tenders), was separated out to ensure that 10% of construction tenders was dedicated to Metis content ([C01510-1](#)). The Commission also notes that Manitoba Hydro has recently filed an update indicating that construction tenders will stipulate 10% Metis content ([C07194-2](#)).³² The Commission is of the view that Manitoba Hydro's responses address the matter raised by the MMF.

³² pdf page 30 of 30.

5. Legal proceedings commenced by the MMF in relation to the MAP

The dispute between the MMF and Manitoba Hydro regarding the Agreements has given rise to litigation before the Manitoba Court of Queen's Bench, in relation to which the Commission received submissions. The Commission finds that the MMF's application for judicial review, and the resulting Judicial Review Decision³³ is not related to the Commission's decision. Similarly, the Commission finds that the Statement of Claim by the MMF against the Government of Manitoba, Manitoba Hydro and others, (alleging, among other matters, a breach of the honour of the Crown, and seeking enforcement of the MAP in accordance with its own terms and or based on the honour of the Crown) has no bearing on the present Commission decision regarding Manitoba's compliance with the conditions applicable to the Project.

In the EH-001-2017 hearing, the NEB heard submissions related to the legality of the Agreements. In particular, Manitoba Hydro submitted that the NEB could not address the legality of the Agreements, which was already a matter before the Manitoba Court of Queen's Bench. The NEB agreed with that position. The Commission adopts that ruling by the NEB and expressly refrains from exploring the enforceability or legality of the Agreements.

6. Conclusion

For all of the reasons above, the Commission concludes that the MAP Documents are not a commitment within Condition 3 and that they need not be listed as a commitment in the Commitment Tracking Table pursuant to Condition 15. The Commission finds that the matter related to the percentage of construction tenders offered to Métis communities has been fully answered by Manitoba Hydro's update to its Commitment Tracking Table. In making this ruling, the Commission notes that the Notice of Application raises the same issues as those raised in the 23 July 2019 complaint and that our findings regarding condition compliance dispose fully of the condition compliance issues raised by the MMF. Having found that the MAP is not a commitment within Condition 3 or Condition 15, there is no basis for the Commission to take further steps related to condition compliance, nor grant any of the relief requested by the MMF (including a declaration that Manitoba Hydro is in breach of section 247 of the CER Act, an order that Manitoba Hydro must fulfil the requirements of Condition 3 and Condition 15, or alternatively, an order suspending the Certificate).

The Commission is committed to timely and efficient processes and acknowledges that the MMF was looking for an earlier decision in response to its original 23 July 2019 letter. The Commission notes that the timing of its decision was complicated by factors such as the transition from the NEB to the CER, the CER's interest in receiving submissions regarding the outcome of the Manitoba Court of Queen's Bench in *MMF v. Pallister*, and the occurrence of the COVID-19 pandemic as well as its determination to review all submissions received on this matter, whether filed as part of the Commission's initially established process or outside of the formal process directions. The Commission is mindful that CER

³³ *Supra*, note 9.

oversight of performance of commitments by Project proponents, consultation related to Aboriginal Rights of the Metis and the honour of the Crown as well as other matters raised before the Commission are important. The Commission considered fully the appropriate interpretation and potential scope of the Project conditions and all the submissions before it in coming to the decision.

Yours sincerely,

Original signed by

Jean-Denis Charlebois
Secretary of the Commission

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