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November 23, 2007

Joe Acorn, Chairman
Northwest Territories Public Utilities board
203-62 Woodland Drive
Box 4211
Hay River, NT X0E 1G1

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Dear Mr. Acorn:

**Re: Northwest Territories Power Corporation (the “Corporation” or “NTPC”)
Application For Review and Variance of Board Decision 13-2007 (the “R&V
Application”)
Directive Nos. 15 and 45**

By letter dated November 8, 2007 the Board requested parties to provide submissions on the following questions.

- In its review and variance application, has the NTPC met the threshold for the Board exercising its discretion to review Directives 15 and/or 45 of Decision 13-2007?
- If the Board decides to exercise its discretion to review Directives 15 and/or 45 of Decision 13-2007, should the Board include Directive 14 in that review?

In response to the Board’s request, the Corporation has received submissions filed on behalf of:

- the City of Yellowknife and the Towns of Hay River and Fort Smith (collectively the “HC”) dated August 31, 2007 but received in an email dated November 19, 2007 (the “HC Submission”); and
- the Town of Inuvik, Village of Fort Simpson and Hamlet of Fort Liard (collectively the “TGC”) dated November 19, 2007 (the “TGC Submission”).

The following submission is made on behalf of the Corporation.

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Threshold for Review

The R&V Application is based on errors of law, jurisdiction and fact.¹ The threshold test for a review based on errors of law, jurisdiction and fact is "...if such error is either obvious or is shown on a balance of probabilities to exist and if correction of such error would materially affect the Decision."² Neither the HC Submission nor the TGC Submission, however, directly address whether that threshold test has been met in the present case.

For the reasons set out at pages 5 to 15 of the R&V Application (which are not repeated in this submission) and the reasons discussed below, the Corporation has shown that the errors of law, jurisdiction and fact related to Directive Nos. 15 and 45 are obvious or at least have been shown to exist on a balance of probabilities. Further, the correction of each such error would materially affect Decision 13-2007. Consequently, the Corporation has indeed met the threshold test for review of both Directive Nos. 15 and 45.

It is noted that the HC and TGC both take the position that the Board was entitled to review historical actual brushing expenses to assess the Corporation's forecast accuracy.³ That position, while correct, misses the point. The Board did not commit an error in considering the 2001/02 to 2005/06 actual brushing expenses. Rather, the conclusions drawn by the Board (after considering that evidence) that the Corporation either "under-spent" or "over-collected", and that "...the ratepayers paid \$345,000 for brushing services that they did not receive..." constitute errors of fact inconsistent with forward test year ratemaking.

A similar position was addressed by the Supreme Court of Canada in considering whether the Alberta Energy and Utilities Board ("AEUB") had jurisdiction to direct an implicit refund respecting a gain on sale of utility assets. In that case, Justice Bastarache, writing for the majority, held that:

[t]he Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates. But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders

¹ R&V Application, para. 12.

² PUB Decision 3-95, *Application by the Town of Hay River to Review and Vary Board Decisions 12-94 and 13-94*, March 1, 1995 at 3.

³ HC Submission at 1-2; TGC Submission at 1-2.

*jointly carry their share of the risk related to the business of the utility.*⁴

The Board's resulting Directive No. 15 requiring the Corporation to retroactively refund \$345,000 also constitutes an error in law and jurisdiction.

The TGC take the position that:

...when the Board approves a forecast item of expenditure, barring unusual circumstances, there is a reasonable expectation the utility will incur costs near that approved level until the approval of a revised forecast in a subsequent rate proceeding. In our view, this is part of the "regulatory compact".⁵

The TGC do not provide any authority for their view of the regulatory compact and, with respect, misconstrue the concept.

The regulatory compact was described by the Justice Bastarache, writing for the majority of the Supreme Court of Canada, as follows:

[u]nder the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the *opportunity* to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.⁶

The regulatory compact does not include any expectation that the Corporation will incur costs near the approved forecast level until the next GRA. Rather, the regulatory compact simply affords the utility the opportunity to earn a fair return based on rates fixed by a regulator (instead of free market prices) in exchange for a duty to serve within a prescribed area. As noted in paragraph 20 of the R&V Application, under forward test year ratemaking "[t]he risk of over- or under-recovering its approved total revenue requirement is borne by the Corporation until revised rates are approved by the Board." Thus it is Directive No. 15 that in fact violates the regulatory compact by requiring a retroactive refund of a portion of the fair return previously earned by the Corporation after it has already provided safe and reliable service.

⁴ *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 71 [cites omitted; emphasis added].

⁵ TGC Submission at 2.

⁶ *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 63 [cites omitted; emphasis added].

Lastly, the TGC suggest that "...the genesis for Directive 45 stems from the Board concern about the violation of the regulatory compact by NTPC in prior years and is an attempt to prevent such recurrence in future."⁷ As discussed above, the regulatory compact does not address variations in individual forecast expenses, but rather is concern with the overall fair return earned by the Corporation. To the extent that the Board is concerned about the Corporation undertaking an appropriate amount of brushing work to ensure safe and reliable service brushing activities, the Board has jurisdiction to direct the Corporation to provide the Board with a independent, third party assessment of brushing activities at the next GRA.

Directive No. 14

The Corporation acknowledges that the Board has the discretionary power to review a matter on its own initiative. However, it is submitted that the Board should not exercise such discretion in relation to Directive No. 14.

At page 105 of Decision 13-2007 the Board made a finding of fact that "[a]s there is no evidence to the contrary, the Board accepts NTPC's argument that the forecast expenditures of \$393,000 for 06/07 and \$401,000 for 07/08 represent the necessary, normalized level of brushing on a go-forward basis." That finding of fact is clearly within the Board's jurisdiction to make and does not raise a question of an error of law or jurisdiction. Further, there is no allegation in the R&V Application, the HC Submission or the TGC Submission of new evidence, a clerical error or an ambiguity. Absent a reviewable error (jurisdiction, law or fact), the fact that Directive Nos. 14, 15 and 45 resulted from the Board's analysis on a single issue should not on its own warrant exercise of the Board's discretion.

Should you have any questions or require further information, please contact the writer directly.

Yours truly,

BORDEN LADNER GERVAIS LLP



Stephen C. Lee

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⁷ TGC Submission at 2.