

NORTHWEST TERRITORIES PUBLIC UTILITIES BOARD

IN THE MATTER OF the *Public Utilities Act*, R.S.N.W.T. 1988, c. 24 (Supp.), as amended; and

IN THE MATTER OF the *Northwest Territories Power Corporation Act*, R.S.N.W.T. 1988, c. N-2, as amended; and

IN THE MATTER OF Northwest Territories Public Utilities Board Decision 13-2007 dated August 29, 2007;

IN THE MATTER OF an application dated November 5, 2007 made by the Northwest Territories Power Corporation seeking review and variance of Board Decision 13-2007 (Directive Nos. 15 and 45); and

IN THE MATTER OF Northwest Public Utilities Board letter decision dated November 28, 2007.

**WRITTEN ARGUMENT OF
THE NORTHWEST TERRITORIES POWER CORPORATION**

DECEMBER 7, 2007

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1 **1. Introduction**

2 On November 5, 2007 the Northwest Territories Power Corporation (the “Corporation” or
3 “NTPC”) filed with the Northwest Territories Public Utilities Board (the “Board” or “PUB”) an
4 Application (the “R&V Application”) pursuant to section 23 and subsection 25(1) of the *Public*
5 *Utilities Act*¹ for review and variance of PUB Decision 13-2007 dated August 29, 2007
6 (“Decision 13-2007”). Specifically, the Corporation sought review and variance of Directive
7 Nos. 15 and 45 regarding the Corporation’s historical and future brushing expenses, respectively.

8 By letter dated November 8, 2007 the Board requested submissions from interested parties that
9 had participated in the Corporation’s 2006/07 and 2007/08 Phase I General Rate proceeding on
10 (i) whether NTPC had met the threshold to review Directives Nos. 15 and/or 45 and (ii) if so,
11 whether the Board should include Directive 14 in such review.

12 Submissions were filed on behalf of (i) the City of Yellowknife and the Towns of Hay River and
13 Fort Smith (collectively the “HC”) dated August 31, 2007 but received in an email dated
14 November 19, 2007 (the “HC Submission”) and (ii) the Town of Inuvik, Village of Fort Simpson
15 and Hamlet of Fort Liard (collectively the “TGC”) dated November 19, 2007 (the “TGC
16 Submission”). A reply submission was filed on behalf of the Corporation on November 23, 2007
17 (the “NTPC Submission”).

18 The Board subsequently issued a letter decision dated November 28, 2007 (the “November 28th
19 Decision”) and held, among other things, that:

- 20 • it would review Directive No. 15, but only pursuant to NTPC’s Ground No. 1 (not
21 Ground No. 3);
- 22 • it would not review Directive No. 45 pursuant to NTPC’s Ground Nos. 2 or 3; and
- 23 • it would add Directive No. 14 to its review of Directive No. 15.

24 This Written Argument is made pursuant to the November 28th Decision and, as directed by the
25 Board, only addresses the grounds granted a review in that decision. In following the Board’s
26 directions, NTPC should not be construed as conceding the Board’s position on other grounds
27 for review and variance raised in the R&V Application.

28 A more detailed description of the background events leading up to the R&V Application is
29 provided in paragraphs 2 to 9 of the R&V Application.

30 **2. Requested Relief**

31 For the reasons discussed in this Written Argument below, the R&V Application and the NTPC
32 Submission, the Corporation respectfully requests the Board to issue Order or Orders to:

- 33 i. vary Decision 13-2007 by vacating Directive No. 15; and
- 34 ii. confirm Decision 13-2007 by not varying Directive No. 14.

¹ R.S.N.W.T. 1988, c. 24 (Supp).

1 **3. Directive No. 15**

2 The Corporation's primary argument in support of vacating Directive No. 15 is set out in
3 paragraphs 13 to 27 of the R&V Application and in the NTPC Submission. Rather than repeat
4 that argument, a supplemented summary is provided below.

5 **(a) Supplemented Summary of NTPC's Argument**

6 The Board did not expressly or impliedly require in Decision 1-2002 that the Corporation spend
7 or incur a specific amount for any of the components that made up the total revenue requirement,
8 and certainly not a specific amount for brushing expenses.

9 The Corporation will almost always experience a variance in each of the components that make
10 up the total revenue requirement when actual expenditures are compared to GRA forecasts. The
11 approved total revenue requirement reflects the Board's consideration of a point-in-time forecast
12 of future expenditures. By its very nature, a GRA forecast rarely, if ever, match future actual
13 expenditures.

14 Adjustments to actual expenditures (as compared to a GRA forecast) inevitably result in the
15 Corporation incurring certain costs not foreseen and therefore not included in the GRA forecast
16 and approved total revenue requirement. Also, GRA forecast costs that do not materialize in
17 actual experience or that can be avoided by efficiency gains that were not foreseeable when a
18 GRA forecast was made reflect another type of adjustment. What is important to consider is the
19 Corporation's overall earning on its rate of return. The Corporation has not been "over-earning"
20 on its approved rate of return since 2002/03 as a result of any such adjustments, including
21 adjustments to brushing expenses.

22 It is factually incorrect to categorize a variance in actual brushing expenditures versus the
23 2002/03 test year forecast as "under-spending" or "over-collection". To do so suggests that the
24 Board had approved some specified amount for brushing expenses in Decision 1-2002, which it
25 did not. In that regard, Justice Bastarache, writing for the majority of the Supreme Court of
26 Canada, has held that the concept of "over-collection" did not even apply to a prospective form
27 of rate regulation.

28 *The Board was seeking to rectify what it perceived as a historic over-*
29 *compensation to the utility by ratepayers. There is no power granted in the*
30 *various statutes for the Board to execute such a refund in respect of an erroneous*
31 *perception of past over-compensation. It is well established throughout the*
32 *various provinces that utilities boards do not have the authority to retroactively*
33 *change rates. But more importantly, it cannot even be said that there was over-*
34 *compensation: the rate-setting process is a speculative procedure in which both*
35 *the ratepayers and the shareholders jointly carry their share of the risk related to*
36 *the business of the utility.*²

² *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 71 [cites omitted; emphasis added].

1 Therefore, in finding that "...the ratepayers paid \$345,000 for brushing services that they did not
 2 receive..." and that "...NTPC over-collected \$345,000 from the ratepayers from 01/02 to
 3 05/06"³ the Board committed an error in fact that is inconsistent with forward test year
 4 ratemaking. Based on the Board's reasoning on this point, correction of that error in fact would
 5 inevitably lead to vacating Directive No. 15 and thus materially affect Decision 13-2007.

6 The Corporation's revenue requirement has been set by the Board on a forward test year basis
 7 since at least 1992.⁴ Forward test year ratemaking involves the establishment of prospective
 8 rates for the recovery of the total revenue requirement. Forward test year ratemaking merely
 9 affords the Corporation the opportunity to recover its approved total revenue requirement
 10 through rates charged for service. The risk of over- or under-recovering its approved total
 11 revenue requirement is borne by the Corporation until revised rates are approved by the Board.

12 Canadian courts have consistently held that public utility regulators do not have jurisdiction to
 13 retroactively regulate utility rates without clear language in the empowering statute.⁵

14 There is a presumption against the retroactive application of legislation and retroactive
 15 ratemaking. This presumption may only be rebutted by express words or by an interpretation of
 16 necessary implication of the empowering statute. The doctrine of jurisdiction by necessary
 17 implication does not apply because it is limited to only what is rationally related to the purpose
 18 of the regulatory framework. There are no express words or interpretations of necessary
 19 implication in the *Public Utilities Act* that rebut the presumption against retroactivity in the
 20 present case.

21 As there is no express or implied power in the *Public Utilities Act* that would empower the Board
 22 to direct a retroactive refund related to the Corporation's 2001/02 to 2005/06, the Board has
 23 committed an error in law and jurisdiction by issuing Directive No. 15. Further, vacating
 24 Directive No. 15 will materially affect Decision 13-2007.

25 (b) NTPC's Argument Respecting the November 28th Decision

26 The Corporation also makes the following arguments in response to issues raised in the
 27 November 28th Decision.

28 (i) Directive No. 15 Constitutes Retroactive Ratemaking

29 The Board candidly acknowledges that Directive No. 15 constitutes retroactive ratemaking. The
 30 Board suggests that such retroactive ratemaking could be justified by relying upon "utility
 31 misconduct" as an exception to retroactive ratemaking. Further, "...when a utility's actual

³ PUB Decision 13-2007 at 105-06.

⁴ PUB Decision 9-93.

⁵ *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 71; *City of Calgary and Home Oil Company Ltd. v. Madison Natural Gas Co. Ltd. and British American Utilities Ltd.* (1959), 19 D.L.R. (2d) 655 at 661; *Western Decalta Petroleum Ltd. v. Alberta Public Utilities Board* (1978), 9 A.R. 175 at 178 (C.A.); and *Re Northwestern Utilities and the City of Edmonton* (1978), 89 D.L.R. (3d) 161 at 170 (SCC).

1 expenditures are significantly and consistently below what was forecast (and upon which the
 2 rates were approved by the Board as being just and reasonable) that these circumstances could be
 3 evidence of a violation of the regulatory compact.”⁶ The Board concludes that “...a “violation of
 4 the regulatory compact” could justify ordering the refund using the “utility misconduct”
 5 exception to retroactive ratemaking.”⁷

6 With respect, the Board’s findings are not supported by the evidence adduced in the Decision 13-
 7 2007 proceeding or Canadian jurisprudence. The Corporation has not breached the regulatory
 8 compact or committed “utility misconduct”. Moreover, even if the Corporation had breached the
 9 regulatory compact or committed “utility misconduct”, which is denied, “utility misconduct” is
 10 not an exception to the presumption against retroactive ratemaking. Each of those issues is
 11 discussed below.

12 **(ii) The Corporation Has Not Breached the Regulatory Compact or**
 13 **Committed “Utility Misconduct”**

14 The Board refers to Alberta Energy and Utilities Board (“AEUB”) Decision 2005-019 as
 15 authority for the regulatory compact. In that case, the AEUB defined the regulatory compact in a
 16 similar manner to the Supreme Court of Canada’s definition in *Atco Gas & Pipelines Ltd. v.*
 17 *Alberta (Energy & Utilities Board)* discussed at page 3 of the NTPC Submission.⁸ It is
 18 important to consider, however, the specific facts of AEUB Decision 2005-019 to understand the
 19 AEUB’s findings on the regulatory compact.

20 AEUB Decision 2005-019 involved unique facts that do not apply to NTPC. The AEUB
 21 summarized AltaLink’s evidence and argument as follows.

22 *In the Application, AltaLink submitted that short-term reductions in operating*
 23 *expenses forced AltaLink to defer key activities that it considered were required to*
 24 *deliver transmission services safely, reliably and on a sustainable basis. In*
 25 *AltaLink’s view, this deferred activity placed increased risk on AltaLink and the*
 26 *consumers of electric transmission services in Alberta. A summary of some of*
 27 *the activities deferred was set forth at page 5-2 of the Application.*

28 The rebuttal evidence filed by AltaLink outlines the rationale for its decision to
 29 defer activities stating:

⁶ If the Board’s concern was that NTPC’s GRA brushing forecasts have significantly and consistently exceeded actual expenses, then the appropriate course of action within the Board’s jurisdiction would have been to scrutinize NTPC’s forecast methodology, potentially find that the 2006/07 and 2007/08 brushing forecasts are likewise too high and reduce the total approved revenue requirement. Alternatively, the Board could direct that a deferral account be established for brushing expenses. A deferral account for brushing, much like the deferral account for overhauls, would ensure that only actual costs are passed on to customers and afford NTPC the operational flexibility to conduct its brushing operations in a reasonable and prudent manner having regard to unforeseen events while at the same time ensuring safe and reliable service. A deferral account avoids the incentive to conduct brushing activities based simply on a historical GRA forecast without an assessment of current day requirements.

⁷ November 28th Decision at 2-3.

⁸ [2006] 1 S.C.R. 140 at para. 71.

1 *The reality is that AltaLink took the operating budget that was approved*
 2 *by the Board in the previous GTA and prudently executed activities on a*
 3 *priority basis (as determined by safety, reliability and customer service)*
 4 *until there was no more money to fund the activities. In fact, as can be*
 5 *seen from the 2003/04 actual results, AltaLink hired additional resources,*
 6 *above that contemplated by the Board in Decision 2003-061, to minimize*
 7 *the number of deferred activities.⁹*

8 In AEUB Decision 2005-019, AltaLink’s clear and uncontradicted evidence was that it had
 9 prioritized O&M projects that formed the basis of its GRA budget and then executed such
 10 projects on a priority basis up to and beyond its GRA budget. In doing so, the AEUB found that
 11 AltaLink had violated the regulatory compact because AltaLink failed to meet its obligations to:

12 ...conduct its affairs in a manner to ensure that it did not compromise service and
 13 reliability, seeking efficiencies as means to achieve any perceived extra resources,
 14 and to better present its case in future test periods. This was not an invitation to
 15 AltaLink to deliberately reduce the level of service it provided, particularly if the
 16 deferred activities involved actions which could affect reliability and safety.¹⁰

17 In the present case, the Board expressed its concern (but did not conclude) that the same
 18 circumstances may also apply to the Corporation.¹¹ That concern appears to be based on the fact
 19 that NTPC’s actual transmission and distribution brushing expenses in 2001/02 to 2005/06 were
 20 on average lower than GRA forecasts.¹² That fact, however, does not inevitably lead to the
 21 conclusion that the Corporation’s level of service has been adversely impacted or that it has
 22 deferred brushing activities over 2001/02 to 2005/06.

23 Unlike AEUB Decision 2005-019, there is no evidence on the record of the Decision 13-2007
 24 proceeding to suggest that satisfactory service levels in different areas of the Corporation’s
 25 operations, specifically brushing, have not been maintained over 2001/02 to 2005/06.¹³ Rather,
 26 NTPC provided a description and related costs of its major brushing activities, broken out by
 27 system, incurred over 2003/04 to 2005/06.¹⁴ NTPC also provided its outage reports from
 28 2002/03 to 2005/06 and noted that “[t]he majority of transmission outages are caused by weather
 29 (lightning, ice, wind, etc.)...”.¹⁵ None of that evidence was challenged or contradicted. In fact,

⁹ AEUB Decision 2005-019, *AltaLink Management Ltd. and TransAlta Utilities Corporation 2004-2007 General Tariff Application*, March 12, 2005 at 6 [emphasis added].

¹⁰ AEUB Decision 2005-019, *AltaLink Management Ltd. and TransAlta Utilities Corporation 2004-2007 General Tariff Application*, March 12, 2005 at 8-9.

¹¹ November 28th Decision at 2.

¹² Ex. 25, Response to Undertaking #7.

¹³ The evidence on brushing in the Decision 2007-13 proceeding consists primarily of (i) Ex. 2, NTPC 2006/07-2007/08 Phase I GRA at 3-10, (ii) Ex. 7, BR.NTPC-12(b) & (i) and TGC.NTPC-38(e), (iii) Tr. I, pp. 151-56, (iv) Tr. II, pp. 16-17 and (v) Ex. 25, Response to Undertaking #7.

¹⁴ Ex. 7, BR.NTPC-12(b).

¹⁵ Ex. 7, NUL.NTPC-8 and NUL.NTPC-30(b), respectively.

1 perhaps the most compelling evidence of service levels is the fact that the Corporation's overall
2 system availability rate from 2001/02 to 2005/06 has been consistently over 99.96%.¹⁶

3 The fact that the Corporation adjusted its actual expenditures is in fact evidence of satisfactory
4 service levels being maintained within the approved total revenue requirement. The Corporation
5 prudently incurred costs to establish an apprentice program to address the shortage of line
6 personnel with initially six new positions and to establish three new positions to address
7 increased safety and environmental training requirements to ensure that service levels were
8 maintained across its operations.¹⁷ None of those costs were foreseeable and thus not forecast in
9 2002/03.

10 Also unlike AEUB Decision 2005-019, there is also no evidence whatsoever that the Corporation
11 deferred on-going maintenance or brushing programs. Rather, NTPC provided forecast costs for
12 2006/07 and 2007/08 based on "...a level that is generally representative of the typical average
13 annual level of effort required to address all brushing requirements in a timely fashion."¹⁸ The
14 uncontradicted evidence and previous finding of the Board is that the forecast brushing costs for
15 2006/07 and 2007/08 are for normalized activities on a go-forward basis.¹⁹ Had the Corporation
16 deferred on-going maintenance or brushing programs, the forecast brushing expenses would have
17 exceeded typical average annual levels.

18 Absent clear evidence that NTPC deferred brushing projects, that it reduced the level of service
19 provided to its customers or that reliability and safety were affected by variances in brushing
20 expenses, the Board's concern is unfounded and does not lead to the conclusion that the
21 Corporation has breached the regulatory compact or committed "utility misconduct".

22 **(iii) "Utility Misconduct" is Not an Exception to the Presumption Against**
23 **Retroactive Ratemaking**

24 Even if the Corporation had breached the regulatory compact or committed "utility misconduct",
25 which is denied, "utility misconduct" is not an exception to the presumption against retroactive
26 ratemaking. The Board does not refer to any legal authority that establishes "utility misconduct"
27 or breach of the regulatory compact as exceptions to the presumption against retroactive
28 ratemaking. Moreover, the Corporation is not aware of any legal authority.²⁰

29 As discussed at paragraph 23 of the R&V Application, the presumption against retroactive
30 ratemaking may only be rebutted by express words or an interpretation of necessary implication
31 found in legislation. That is because the Board's jurisdiction is derived entirely from its
32 empowering statute. Therefore, the only true "exceptions" to retroactive ratemaking applicable
33 to the present case are those provided in the *Public Utilities Act*.

¹⁶ Ex. 7, NUL.NTPC-8.

¹⁷ Ex. 7, TGC.NTPC-36(e).

¹⁸ Ex. 7, TGC.NTPC-38(e); Tr. I, pp. 155-56.

¹⁹ Decision 13-2007 at 105.

²⁰ The Corporation is also not aware of any legal authority to support the "unforeseeable and extraordinary revenues or expenses" exception.

1 One such “exception” is *Public Utilities Act* subsection 51(2)(b) which empowers the Board to
2 direct a public utility to collect excess revenue received or any revenue deficiency incurred at
3 any time the public utility’s entire fiscal year in which a proceeding is initiated that the Board
4 determines is just and reasonable, even if the date of the Board’s order is after the start of the
5 public utility’s fiscal year. Another such “exception” is subsection 51(2)(c) which empowers the
6 Board to direct a public utility to collect excess revenue received or any revenue deficiency
7 incurred after the date on which a proceeding is initiated (but prior to the date of the Board’s
8 order) due to undue delay in hearing or determination of the matter.

9 A nearly identical amendment to *Public Utilities Act* subsection 51(2)(c) was considered by the
10 Supreme Court of Canada in *City of Edmonton v. Northwestern Utilities Ltd.*.

11 There has been much discussion in argument before the Appellate Division and in
12 this Court as to whether the amendment was retroactive, or whether it was simply
13 declaratory of the law as it stood before its enactment. In my opinion, it is
14 unnecessary to determine this question since, in agreement with the majority of
15 the learned judges of the Appellate Division, I consider that the language of the
16 amendment is perfectly clear.

17 Under the decision approving the new rate schedule made on August 26, 1959,
18 authority was given to add to the rates over a term of years the amount by which
19 the revenue of the company fell short of what it would have been, had the new
20 rates been in effect throughout the year 1959. No doubt, the vast majority of the
21 consumers who purchased gas from the utility during the first eight months of the
22 year 1959 continued as customers thereafter. Those persons had paid the rates
23 approved by the Board during this period and, while they were less than what was
24 fair and reasonable, it is clear than in the absence of an order of the Board the
25 utility had no enforceable claim against them for any difference. *The new rates*
26 *while prospective created a new obligation in respect of transactions already past*
27 *in the case of these consumers and, in that respect, were retroactive.*

28 *This, however, is exactly what the amendment authorized since it empowered the*
29 *Board to give effect to such part of any excess revenues received or losses*
30 *incurred by a proprietor after an application has been made to the Board for the*
31 *fixing of rates, to the extent that the Board may determine these to have been due*
32 *to undue delay in the hearing and determining of the application. The*
33 *amendment applies to both losses and gains and, if during the prescribed interval*
34 *it were shown that the proprietor had earned amounts in excess of what were*
35 *determined to be fair and reasonable, the continuing consumers might be given*
36 *the benefit in the rates to be fixed. Since in the interval between the return date of*
37 *the application and the going into effect of the new rates the customers would be*
38 *required to pay the existing rate on the former date, of necessity an order made*
39 *under the subsection would be retroactive in its effect, whether the proprietor had*

1 *suffered losses or realized excess revenues in the sense that these expressions are*
 2 *used.*²¹

3 The *Northwestern Utilities* case illustrates how express words in an amendment to the Alberta
 4 *Public Utilities Act*²² rebut the presumption against retroactive ratemaking to allow a public
 5 utility to collect revenue shortfalls incurred prior to the date of the tribunal's order as a result of
 6 the undue delay.

7 Canadian courts have also considered the following circumstances in which regulatory tribunals
 8 did not engage in retroactive or retrospective ratemaking:

- 9 • where the challenged order is a final order varying an interim order;²³ and
- 10 • where the challenged order is affirming a previous order and correcting for
 11 transactions which failed to comply with specific directions in the original order.²⁴

12 The Board also notes the situation where an impugned order relates to a deferred cost or deferral
 13 account. In that case, the presumption against retroactive ratemaking does arise because the
 14 deferred cost or deferral account has been previously approved by the Board.

15 Strictly speaking, the above cases do not constitute exemptions to the presumption against
 16 retroactive ratemaking, but rather the presumption simply does not apply in the first instance.
 17 The impugned order in all of those cases imposes obligations that were specifically addressed in
 18 a prior order. While retroactive ratemaking is not a bar in those circumstances, none of them
 19 apply to the case at hand.

20 For the reasons discussed above, in paragraph 23 of the R&V Application and in the NTPC
 21 Submission, "utility misconduct" or breach of the regulatory compact are not exceptions to the
 22 presumption against retroactive ratemaking.

23 **4. Directive No. 14**

24 As noted in the NTPC Submission, the Board has correctly found that "[a]s there is no evidence
 25 to the contrary, the Board accepts NTPC's argument that the forecast expenditures of \$393,000
 26 for 06/07 and \$401,000 for 07/08 represent the necessary, normalized level of brushing on a go-
 27 forward basis."²⁵ That finding of fact is consistent with all of the evidence on brushing in the
 28 Decision 2007-13 proceeding noted above. Absent contradictory evidence, the Board should not
 29 exercise discretion to vary Directive No. 14.

²¹ [1961] S.C.R. 392 at 402 [cites omitted, emphasis added].

²² R.S.A. 1955, c. 267, as amended by 1959 (Alta.), c. 73.

²³ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722. See also *Coseka Resources Limited v. Saratoga Processing Company Limited* (1980), 16 Alta. L.R. (2d) 60 (Alta. C.A.); leave to appeal denied (1981), 34 A.R. 360 (S.C.C.).

²⁴ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1990), 45 Admin. L.R. 291 (Nfld. C.A.); reversed on other grounds [1992] 1 S.C.R. 623.

²⁵ Decision 13-2007 at 105.

1 **5. Conclusion**

2 This Written Argument, together with paragraphs 13 to 27 of the R&V Application and the
3 NTPC Submission, set out the reasons and support for the R&V Application. We respectfully
4 request that the Board grant the requested relief set out in section 2 above.

5 **ALL OF WHICH** is respectfully submitted this 7th day of December, 2007.

6 **Borden Ladner Gervais LLP, counsel for**
7 **the Northwest Territories Power**
8 **Corporation**

9
10 *“Stephen Lee”*

11
12 per:

 Stephen C. Lee