

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

IN THE MATTER OF Section 78 of the *Public Utilities Act* R.S.N.W.T. 1988, c. 24 (Supp.);

AND IN THE MATTER OF Decision 13-2007 of the Northwest Territories Public Utilities Board dated August 29, 2007 regarding the Northwest Territories Power Corporation's 2006/07 and 2007/08 Phase I General Rate Application;

AND IN THE MATTER OF an application for leave to appeal the aforesaid Northwest Territories Public Utilities Board decision by Northwest Territories Power Corporation being named therein;

**BETWEEN:**

**NORTHWEST TERRITORIES POWER CORPORATION**

Applicant  
(Appellant)

- and -

**PUBLIC UTILITIES BOARD of the NORTHWEST  
TERRITORIES**

Respondent  
(Respondent)

**AFFIDAVIT**

I, Leon Courneya, of the Town of Hay River in the Northwest Territories, **MAKE OATH AND SAY THAT:**

1. I am the President and CEO for the Applicant, Northwest Territories Power Corporation ("NTPC"), and as such have personal knowledge of the matters hereinafter deposed to except where stated to be based upon information and belief in which case I verily believe the same to be true.
2. NTPC is established under the *Northwest Territories Power Corporation Act*, R.S.N.W.T. 1988, c. N-2, and is indirectly wholly owned by the Government of the Northwest Territories.

3. NTPC is the main generator, distributor and transmitter of power in the Northwest Territories. NTPC provides power on a wholesale basis to Northland Utilities (YK) Ltd. in Yellowknife and to Northland Utilities (NWT) Ltd. in Hay River and area, provides industrial service to two properties in the Yellowknife area (Miramar Con mine and the Giant mine) and provides generation and distribution services to retail residents in most of the remainder of the NWT.
4. NTPC's systems serve a population of approximately 43,000 located in an area of 1.3 million square kilometres. The total electrical load is approximately 65 MW with isolated power systems having generating capacities ranging from 65 MW at Snare/Yellowknife to 240 kW at Colville Lake. As these systems are isolated and unconnected, each must be planned for and operated independently. Two of these systems are dominated by hydro (the Snare-Yellowknife system serving Yellowknife, Behchoko and Dettah, and the Taltson system serving Fort Smith, Fort Resolution and Hay River) while the rest are non-interconnected communities served by thermal generation (diesel or natural gas).
5. NTPC exists in a unique operating environment. Extremely low customer densities, harsh climate and the consequential logistics challenges, as well as the lack of an integrated transmission system, set the Corporation apart from most utilities. The unique environment within which the Corporation operates has a profound impact on NTPC's operations throughout its service area.
6. NTPC's rates for electric service are regulated by the Public Utilities Board of the Northwest Territories (the "Board") pursuant to the *Public Utilities Act* R.S.N.W.T. 1988, c. 24 (Supp.).
7. On November 24, 2006 NTPC filed its Phase I General Rate Application for the test years 2006/07 and 2007/08 (the "2006/08 Phase I GRA") with the Board which ultimately lead to Decision 13-2007 issued by the Board on August 29, 2007 ("Decision 13-2007").

**Extension of time to bring the leave to appeal application**

8. At a meeting of NTPC's Board of Directors held on September 18 and 19, 2007 in Fort Simpson, Northwest Territories, the NTPC Board of Directors passed a motion authorizing NTPC to (i) file an application with the Board to review and vary Decision 13-2007 as it relates to brushing expenses and (ii) take the steps required to commence an appeal of Decision 13-2007 in the Supreme Court of the Northwest Territories.

9. NTPC had intended to seek leave to appeal Directive Nos. 15 and 45 of Decision 13-2007 ("Directive No. 15" and "Directive No. 45", respectively) on the grounds set out in the within Originating Notice of Motion. A copy of excerpts from Decision 13-2007 relating to Directive Nos. 15 and 45 are attached hereto as Exhibit "A".

10. Due to a miscommunication with legal counsel regarding instructions to commence the appeal proceedings, an application for leave to appeal Decision 13-2007 was not filed within 45 days of NTPC receiving notice of Decision 13-2007. I am advised by NTPC's solicitors, Borden Ladner Gervais LLP, and verily believe that the applicable limitation period expired on October 15, 2007. The miscommunication with legal counsel was not discovered until October 22, 2007 and new instructions were issued immediately thereafter.

11. The Board has not directed a fixed timeline for compliance with Directive No. 15 and Directive No. 45. NTPC is not required to take any action in respect of Directive No. 15 and Directive No. 45 in the short term. Neither the Board, nor the customers of NTPC will be prejudiced if NTPC does not take immediate action to comply with Directive No. 15 and Directive No. 45.

12. I am advised by NTPC's solicitors, Borden Ladner Gervais LLP, and verily believe that NTPC's leave to appeal application and eventually its appeal of Decision 13-2007 on the grounds set out in the within Originating Notice of Motion has a reasonable chance of success.

**Adjournment of hearing of leave to appeal application *sine die* pending a decision from the Board on the R&V Application**

13. On November 5, 2007 NTPC filed an Application for Review and Variance of Board Decision 13-2007 (the "R&V Application"). A copy of the R&V Application is attached hereto as Exhibit "B".

14. The R&V Application raises the same issues as NTPC's leave to appeal application. Specifically the grounds of the R&V Application are as follows:

- (a) having previously approved a total revenue requirement for NTPC in Board Decision 1-2002 on a forward test year basis, the Board erred in law, jurisdiction and fact by (i) determining that "NTPC has either 1) under-spent \$345,000 from 01/02 to 05/06 or 2) over-collected \$345,000 in 01/02 to 05/06" and (ii) directing NTPC to "...propose a procedure for returning to the ratepayers over a 3-year period the \$345,000 that was over-collected by the Corporation for brushing over the 01/02 to 05/06 period" ("Directive No. 15");
- (b) having approved a total revenue requirement for NTPC in Decision 13-2007 on a forward test year basis, the Board erred in law and jurisdiction by directing that "...commencing with the 06/07 test year, NTPC's 3-year rolling average actual brushing expenditures must be no less than 10% below the 3-year rolling average forecast brushing expenditures. NTPC's 5-year rolling average actual brushing expenditures must be no less than equal to the 5-year rolling average forecast brushing expenditures" ("Directive No. 45"); and
- (c) having accepted and considered NTPC's 2006/07 and 2007/08 Phase I General Rate Application on a forward test year basis, the Board erred in law by failing to give the Corporation notice that the Board was considering Directive Nos. 15 and 45.

15. NTPC fully intends to prosecute the R&V Application on a timely basis.

**Leave to appeal Decision 13-2007**

16. On May 9, 2001 NTPC filed its Phase I General Rate Application for test years 2001/02 and 2002/03 with the Board (the “2001/03 Phase I GRA”) which ultimately lead to Decision 1-2002 dated February 15, 2002 (“Decision 1-2002”). As part of the 2001/03 Phase I GRA, NTPC requested the Board to approve total revenue requirements for each of the 2001/02 and 2002/03 test years. A component of the total revenue requirement is operating and maintenance expenses, which in turn includes forecast brushing expenses.

17. In Decision 1-2002 the Board made the following determination regarding NTPC’s revenue requirement on a forward test year basis.

Based on its findings, the Board determines the total revenue requirement for the two Test Years to be as follows and as shown in Schedule C attached:

2001/02	\$63,566,000
2002/03	\$66,639,000

Schedule C breaks out the total revenue requirement for each test year into components, but does not specify a specific amount for brushing expenses. NTPC designed and the Board approved rates based on the approved total revenue requirement (and the approved forecast revenues) for 2002/03. Subject to rate riders, those rates have continued to be in effect through to today. A copy of excerpts from Decision 1-2002 relating to NTPC’s total revenue requirement is attached hereto as Exhibit “C”.

18. NTPC’s revenue requirement is not approved on a line by line or a community by community basis. Rather, NTPC’s forecasts are only tested for reasonableness at that level of detail and the revenue requirement is approved in its entirety and used to design rates on a prospective basis.

19. NTPC will almost always experience a variance going forward into subsequent non-test years in each of the components that make up the total revenue requirement, including forecast brushing expenses. This is consistent with public utility regulation throughout Canada.

20. Forward test year ratemaking merely affords NTPC the opportunity to recover its approved total revenue requirement through rates charged for service. The risk of over- or under-recovering its approved total revenue requirement is borne by NTPC until revised rates are approved by the Board.

21. NTPC's 2006/07 and 2007/08 test year forecasts for brushing expenses are not and have never been treated as a deferred charge or in a deferral account. Similarly, NTPC has never been required by the Board to make minimum expenditures for brushing, even within prescribed ranges.

22. NTPC expected, and has planned and conducted its operations on the basis that:

- (a) forecast total revenue requirements for the test years 2001/02 and 2002/03 were approved by the Board as final in Decision 1-2002 and would not be subject to further review;
- (b) non-test years 2003/04 to 2005/06 would not be retroactively reviewed by the Board nor would the Board direct a refund relating to brushing expenses incurred during those years; and
- (c) the revenue requirement approved in Decision 13-2007 would be in total and not requiring minimum expenditures relating to brushing expenses, even within prescribed ranges.

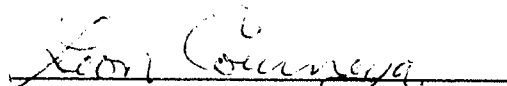
23. There is nothing on the Decision 13-2007 hearing record that would have alerted NTPC to the possibility of the Board departing from its traditional forward test ratemaking and, specifically, Directive Nos. 15 or 45.

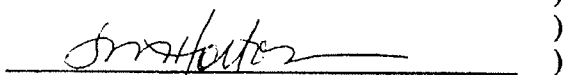
24. I am authorized by NTPC to make this Affidavit.

25. I make this Affidavit in support of an application to (i) extend the time period to apply for leave to appeal Decision 13-2007, (ii) adjourn the hearing of NTPC's application for leave to appeal Decision 13-2007 *sine die* pending a decision from the Board on the R&V Application

and (iii) upon receipt of a decision from the Board on the R&V Application, for leave to appeal Decision 13-2007.

SWORN BEFORE ME at the Town of )  
Hay River, Northwest Territories )  
this 5<sup>th</sup> day of November, 2007. )

  
\_\_\_\_\_  
Leon Courmeya

  
\_\_\_\_\_ )

**SHARMAYNE HORTON**  
**COMMISSIONER FOR OATHS**  
**IN AND FOR N.W.T.**  
**MY COMMISSION EXPIRES JUNE 23, 2008**

THE PUBLIC UTILITIES BOARD  
OF THE  
NORTHWEST TERRITORIES

DECISION 13-2007

August 29, 2007

IN THE MATTER OF the Public Utilities Act, being Chapter 110 of the Revised Statutes of the Northwest Territories, 1988(Supp.), as amended.

AND IN THE MATTER OF an application by Northwest Territories Power Corporation for changes in the existing rates, tolls and charges for electrical energy and related services provided to its customers within the Northwest Territories.

This is Exhibit " A "  
referred to in the Affidavit of  
Leon Courneya  
Sworn before me this 5th  
day of November A.D. 2007

Sharmayne Horton  
A Commissioner for  
Oaths in and for the  
~~Province of Alberta~~ N.W.T.

Territory

SHARMAYNE HORTON  
COMMISSIONER FOR OATHS  
IN AND FOR N.W.T.  
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*Bluefish* – The addition of the Bluefish Generating Station has increased supplies and services.

*Brushing* – NTPC has increased its brushing efforts to reflect a normal annual level of brushing work.

*Computer Licensing* – This is largely due to new annual licensing costs replacing one-time costs that were previously capitalized.

*Satellite and Communication Costs* – The Corporation has required increased telecommunication and bandwidth requirements since 02//03.

Outside of these 5 factors, the increase in supplies and services from the 01/03 Settlement to the 06/07 forecast is less than the rate of inflation.

The interveners raised concerns with 2 aspects of the supplies and services expense:

1. Transmission and Distribution Brushing
2. Operational Savings from Bluefish

These two issues are addressed by the Board in the following sections.

NTPC's supplies and services expense forecasts for 06/07 and 07/08 are approved by the Board subject to the Board directions in Sections 6.3.1 and 6.3.2.

### **6.3.1 Transmission and Distribution Brushing**

In recognition that brushing is an essential component of maintaining the reliability of transmission and distribution systems, NTPC proposes to significantly increase its brushing expenses, as compared to 2002/03, to reflect a

normalized annual level of brushing work. In TGC.NTPC-38(e), NTPC clarifies that in referring to an annualized level of brushing, NTPC meant that it has attempted to set brushing budgets for each area at a level that is generally representative of the typical average annual level of effort required to address all brushing requirements in a timely fashion.

In BR.NTPC-12, NTPC provided descriptions of its 03/04, 04/05 and 05/06 actual brushing activities and its 06/07 and 07/08 forecast brushing activities. NTPC also provided two tables (BR.NTPC-12(b).1 and 2) that showed its 01/02 and 02/03 forecast costs, its 04/05 and 05/06 actual costs and its 06/07 and 07/08 forecast costs.

The data in BR.NTPC-12 was supplemented with the 01/02, 02/03 and 03/04 actual costs by Undertaking 7. Table 6.5 provides a summary of the brushing expenses.

**Table 6.5 – Brushing Expenses**

	Transmission	Distribution	Total
<b>2001/02 Forecast</b>	\$114,000	\$79,000	\$193,000
<b>2001/02 Actual</b>	\$8,000	\$10,000	\$18,000
<b>2002/03 Forecast</b>	\$116,000	\$80,000	\$196,000
<b>2002/03 Actual</b>	\$33,000	\$11,000	\$44,000
<b>2003/04 Actual</b>	\$17,000	\$129,000	\$146,000
<b>2004/05 Actual</b>	\$207,000	\$71,000	\$278,000
<b>2005/06 Actual</b>	\$130,000	\$16,000	\$146,000
<b>2006/07 Forecast</b>	\$213,000	\$180,000	\$393,000
<b>2007/08 Forecast</b>	\$217,000	\$184,000	\$401,000

When the HC questioned NTPC regarding its brushing policy, NTPC responded as follows.

"MR. TERENCE COURTOREILLE: Historically the Corporation would conduct its brushing requirements on an as-and when-needed basis.

Recently, however, the Corporation undertook an internal evaluation of its brushing requirements and the forecast numbers that you see proposed for the test years in this table would represent what we're proposing as our minimum brushing requirements on an annual basis.

MR. TOM MARRIOTT: And can you explain what those are? Is it -- is it quite a complicated series of steps or is it something that you could describe at a high level? Like, I'm looking for perhaps a brushing cycle, something along those lines.

MR. TERENCE COURTOREILLE: It's certainly more defined for the transmission line. For the areas that have road access, we would brush on a rotating annual basis every five (5) to six (6) years. For those areas that do not have road access, we would brush on an annual rotating basis every twelve (12) years.

MR. TOM MARRIOTT: Okay. And is there no set time for distribution?

MR. TERENCE COURTOREILLE: Distribution is not as structured because a lot of our plants have very little sp -- particularly the plant -- the plants in the northern part of the territory, would have very little brushing requirements. So, in regards to those plants, we're still brushing on an as and when-needed basis.

In the southern communities where vegetation growth is much more rapid, we're proposing an annual budget of sixty thousand dollars (\$60,000) per year for the Dehcho region and an additional sixty thousand dollars (\$60,000) per year for the North Slave Region." (Tr. Vol. 1, p, 155, // 6 – p. 156, // 15)

The HC summarized the brushing data and provided its views in its argument.

"... it is noteworthy that NTPC's rates had provided for \$115,000 per year for the period 2001/02 through 2005/06, but it only expended \$79,000 per year on average or 32% below forecast for transmission. NTPC's rates provided for \$80,000 per year for the period 2001/02 through 2005/06 but it only expended \$47,400 per year on average or 40% below forecast for

distribution. It is apparent from the above table that NTPC is catching up in the test years for not maintaining brushing activities over the last 5 years. This has all the attributes of yet another retroactive deferral account.

NTPC advised that it did not have a written brushing policy and historically conducted its brushing "on an as when and needed basis" although it recently undertook an internal evaluation of its brushing requirements to determine its forecast for the test years. While there is no evidence to dispute the test years forecast per se, NTPC should not be compensated twice for the same work. Clearly, NTPC did not maintain its brushing program since the last GRA and is now faced with a serious catch up situation.

NTPC under spent by \$185,000 on transmission and by \$163,000 on distribution over the last 5 years. Assuming the forecast test year expenditures are now in fact required to bring brushing up to standard, the normalized annual brushing over the 7 year period will have been approximately \$92,000 per year for transmission and \$86,000 for distribution. On this basis, the Hydro Communities submit that transmission brushing should be reduced by \$121,000 and \$125,000 in the test years and distribution brushing should be reduced by \$94,000 and \$98,000 in the test years to ensure that NWTPC is not compensated twice for the same work." (HC Argument, p. 19)

NTPC responded to the HC in its reply.

"Clearly the forecast brushing expenses for the test years are intended only to reflect normal annualized amounts for brushing requirements and are not in any way to address a "serious catch up situation" for previous years. The appropriate basis for regulatory review is the level of costs forecast to be incurred in the test years, in this case to maintain a standard annual brushing requirement. The only evidence is that NTPC has forecast 2006/07 and 2007/08 brushing costs based on what will normally be required annually over the long-term to maintain an appropriate and safe brushing program. As a result, the Hydro Communities' speculation regarding a "serious catch up situation" is incorrect. The Board should reject the Hydro Communities' recommendation and approve the Corporation's forecast brushing requirements." (NTPC Reply, p. 15, // 11- 19)

TGC stated in its reply that it was in agreement with the position taken by the HC in its argument.

#### **Views of the Board**

The Board is concerned about the large discrepancy from 01/02 to 05/06 between revenue collected by NTPC for brushing and the actual brushing expenditures. The Board calculates this discrepancy to be \$345,000.

The HC argues that NTPC under-spent on brushing from 01/02 to 05/06 and that the increased brushing expenditures forecast for 06/07 and 07/08 are a result of NTPC now being in a catch-up situation. The HC assert that NTPC should not now be compensated for work for which it has already been compensated.

NTPC argues that the increase in brushing expense for the test years is not because it is in a catch-up situation. NTPC asserts that its proposed brushing expenditures in 06/07 and 07/08 accurately reflect the necessary level of normalized annual brushing and is not a result of under-spending in 01/02 to 05/06.

The Board finds the characterization of the situation to be beside the point. NTPC has either 1) under-spent \$345,000 from 01/02 to 05/06 or 2) over-collected \$345,000 in 01/02 to 05/06. Either way, the ratepayers paid \$345,000 for brushing services that they did not receive and the Board finds this to be unacceptable.

As 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.

Accepting NTPC's argument on this point effectively means that NTPC over-collected \$345,000 from the ratepayers from 01/02 to 05/06.

The Board directs NTPC, in its Phase 1 refiling, to calculate its total 06/07 and 07/08 supplies and services expenses using its forecast brushing expenditures of \$393,000 for 06/07 and \$401,000 for 07/08.

The Board directs NTPC, in its Phase 1 refiling, to propose a procedure for returning to the ratepayers over a 3-year period the \$345,000 that was over-collected by the Corporation for brushing over the 01/02 to 05/06 period. To be clear, the refunded \$345,000 is to be obtained from NTPC's non-regulated cash flow, not by reducing the test year brushing expenditures.

The Board recognizes that there will be year-to-year fluctuations in what is spent on brushing. However, to ensure that such a situation does not occur again and also to capture NTPC's assertion that the normalized brushing expenditure represents the minimum required annually, the Board directs NTPC that, commencing with the 06/07 test year, NTPC's 3-year rolling average actual brushing expenditures must be no less than 10% below the 3-year rolling average forecast brushing expenditures. NTPC's 5-year rolling average actual brushing expenditures must be no less than equal to the 5-year rolling average forecast brushing expenditures.

### **6.3.2 Bluefish Supplies and Services**

NTPC purchased the Bluefish Generating Station in 2002. The benefits expected by NTPC included avoided diesel generation, reduced future diesel

### **13. SUMMARY OF BOARD DIRECTIONS**

#### **Phase 1 Refiling**

1. The Board directs NTPC, in its Phase 1 refiling, to reduce the opening plant balance for 2006/07 by \$193,000 being that portion of the rate base addition for the Fort McPherson plant that has not been explained nor demonstrated to be a prudent expenditure by NTPC.
2. The Board directs NTPC, in its Phase 1 refiling, to reduce the cost of the Aklavik plant addition by 50% of the cost increase resulting from the delays. The costs to be included for the 50% risk sharing adjustment are overheads and Allowance for Funds Used During Construction ("AFUDC") resulting solely from the delays in completion of the plant caused by the unforeseen length of time spent on community consultations and the fire at Fort McPherson.
3. The Board directs NTPC, in its Phase 1 refiling, to exclude the capital addition related to the plant upgrade amounting to \$900,000 from rate base additions for Fort Liard in 2007/08.
4. The Board directs NTPC, in its Phase 1 refiling, to provide a computation of its cash working capital for the test years using the net lead or lag associated with each expense item.
5. The Board directs NTPC, in its Phase 1 refiling, to use a 6% sinking fund return for each of the test years for purposes of calculating the effective cost of long-term debt.

12. The Board directs NTPC, in its Phase 1 refiling, to provide complete and accurate analyses of the costs and benefits of the AMR projects that incorporate the reasons for and the effects of the redeployment of the linemen. These analyses are to be provided both from the perspective of the individual communities and NTPC.
13. The Board directs NTPC, in its Phase 1 refiling, to remove the 50% net income component of its at-risk compensation program from the revenue requirement calculations for NTPC's regulated business. For 06/07, the amount is \$270,000 and, for 07/08, the amount is \$279,000.
14. The Board directs NTPC, in its Phase 1 refiling, to calculate its total 06/07 and 07/08 supplies and services expenses using its forecast brushing expenditures of \$393,000 for 06/07 and \$401,000 for 07/08.
15. The Board directs NTPC, in its Phase 1 refiling, to propose a procedure for returning to the ratepayers over a 3-year period the \$345,000 that was over-collected by the Corporation for brushing over the 01/02 to 05/06 period. To be clear, the refunded \$345,000 is to be obtained from NTPC's non-regulated cash flow, not by reducing the test year brushing expenditures.
16. The Board directs NTPC, in its Phase 1 refiling, to reconcile the 06/07 and 07/08 Bluefish supplies and services forecasts shown in Tables BR.NTPC-9 and HC.NTPC-13(l) and described in NUL.NTPC-15(b). NTPC is to adjust the Bluefish supplies and services forecasts as needed to account for any errors in their information request responses.
17. The Board directs NTPC, in its Phase 1 refiling, to provide an assessment of the significant and growing gap between the accumulated balance in the

forecasts indicate the water stabilization fund might be impacted in any given year.

42. The Board directs NTPC, in its next Phase 1 GRA, to file with the Board details of all transactions with the Corporation's parent, other affiliates and non-regulated operations, including details of how the transfer pricing is determined (fair market value, allocated costs), the allocation drivers used, as well as identification of all amounts included in the Revenue Requirement with respect to costs or revenues related to parent, other affiliate and non-regulated operations.

#### **Other Directions**

43. The Board directs NTPC, in its dealings with contractors, to establish prudent contractual arrangements including the reasonable provisions for insurance and guarantees of proper workmanship and materials that a prudent owner would require.
44. The Board directs NTPC to ensure that the Governance and Compensation Committee is exclusively made up of independent directors.
45. The Board directs NTPC that, commencing with the 06/07 test year, NTPC's 3-year rolling average actual brushing expenditures must be no less than 10% below the 3-year rolling average forecast brushing expenditures. NTPC's 5-year rolling average actual brushing expenditures must be no less than equal to the 5-year rolling average forecast brushing expenditures.
46. The Board directs NTPC to provide to the Board and to all interested parties a report on the costs and revenues associated with new industrial, mining or

**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; and

**IN THE MATTER OF** Public Utilities Board Direction Nos. 15 and 45 respecting the Northwest Territories Power Corporation's historical and future brushing expenses, respectively.

**APPLICATION FOR REVIEW AND VARIANCE OF BOARD DECISION 13-2007  
BY THE NORTHWEST TERRITORIES POWER CORPORATION**

NOVEMBER 5, 2007

This is Exhibit " B "  
referred to in the Affidavit of  
LEON COURNEYA  
Sworn before me this 5<sup>th</sup>  
day of November A.D. 2007

  
A Commissioner for  
Oaths in and for the  
~~Province of Alberta~~ N.W.T.  
Territory Just.

**SHARMAYNE HORTON  
COMMISSIONER FOR OATHS  
IN AND FOR N.W.T.  
MY COMMISSION EXPIRES JUNE 23, 2008**

1. The Northwest Territories Power Corporation (the “Corporation” or “NTPC”) hereby makes application to the Northwest Territories Public Utilities Board (the “Board” or “PUB”) pursuant to section 23 and subsection 25(1) of the *Public Utilities Act*<sup>1</sup> for review and variance of the Northwest Territories Public Utilities Board’s (“PUB” or the “Board”) Decision 13-2007 dated August 29, 2007 (“Decision 13-2007”). Specifically, the Corporation hereby applies for review and variance of Board Directive Nos. 15 and 45 respecting the Corporation’s historical and future brushing expenses, respectively.

### **Background**

2. On November 24, 2006 the Corporation filed its Phase I General Rate Application for the test years 2006/07 and 2007/08 (the “Application”). The Application was marked by the Board as Exhibit 2. As part of the Application, the Corporation requested the Board to approve total revenue requirements for each of the 2006/07 and 2007/08 test years. A component of the total revenue requirement is operating and maintenance expenses, which in turn includes forecast brushing expenses.

3. The Corporation hosted a technical workshop on January 8, 2007 in Yellowknife and filed with the Board a list of parties in attendance, a copy of the Corporation’s presentation and a list of undertakings given at the technical workshop, all of which are marked by the Board as Exhibit 3. On January 12, 2007 the Corporation filed its responses to the technical workshop undertakings, which are marked by the Board as Exhibit 4.

4. The Corporation filed its responses to interrogatories posed by the Board and Interested Parties in February and March 2007. Those responses were collectively marked by the Board as Exhibit 7.

5. On February 23, 2007 the City of Yellowknife and the Towns of Fort Smith and Hay River (collectively the “Hydro Communities” or “HC”) filed their written evidence. The communities of Fort Liard, Fort Simpson and Inuvik (collectively the “Thermal Generation Communities” or “TGC”) filed their evidence by letter dated March 16, 2007. Both parties

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<sup>1</sup> R.S.N.W.T. 1988, c. 24 (Supp.).

subsequently responded to interrogatories. None of the HC's or TGC's written evidence or the corresponding responses to information requests addressed forecast brushing expenses.

6. The Corporation filed with the Board a letter dated May 16, 2007, which set out certain revisions to the Application and supporting materials, and was marked by the Board as Exhibit 13.

7. The Board convened an oral proceeding on May 23 to 25, 2007 in Yellowknife.

8. Written argument was filed by the Corporation and the Hydro Communities on June 18, 2007 addressing, among other things, the forecast of brushing expenses forming part of the applied for revenue requirements.<sup>2</sup> The TGC also filed written argument on June 18, 2007, but did not address forecast brushing expenses. Reply argument was filed by all parties on July 3, 2007, but only the Corporation addressed brushing in any substantive manner.<sup>3</sup>

9. On August 29, 2007 the Board issued Decision 13-2007. At pages 101 to 106 of the Decision 13-2007, the Board reviewed the respective positions of the Corporation, HC and TGC with respect to the forecast of brushing expenses and then made the following findings:

The Board is concerned about the large discrepancy from 01/02 to 05/06 between revenue collected by NTPC for brushing and the actual brushing expenditures. The Board calculates this discrepancy to be \$345,000.

The HC argues that NTPC under-spent on brushing from 01/02 to 05/06 and that the increased brushing expenditures forecast for 06/07 and 07/08 are a result of NTPC now being in a catch-up situation. The HC assert that NTPC should not now be compensated for work for which it has already been compensated.

NTPC argues that the increase in brushing expense for the test years is not because it is in a catch-up situation. NTPC asserts that its proposed brushing expenditures in 06/07 and 07/08 accurately reflect the necessary level of normalized annual brushing and is not a result of under-spending in 01/02 to 05/06.

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<sup>2</sup> NTPC Written Argument at 15, ln. 21; HC Argument at 18, s. 3.5.

<sup>3</sup> NTPC Reply Argument at 14, ln. 36. In its Reply Argument, the TGC stated its "general agreement" with the HC in a number of areas, including "brushing expenses" (see TGC Reply Argument at 23).

The Board finds the characterization of the situation to be beside the point. NTPC has either 1) under-spent \$345,000 from 01/02 to 05/06 or 2) over-collected \$345,000 in 01/02 to 05/06. Either way, the ratepayers paid \$345,000 for brushing services that they did not receive and the Board finds this to be unacceptable.

As 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.

Accepting NTPC's argument on this point effectively means that NTPC over-collected \$345,000 from the ratepayers from 01/02 to 05/06.

The Board then went on to issue the following directions to the Corporation:

The Board directs NTPC, in its Phase 1 refiling, to calculate its total 06/07 and 07/08 supplies and services expenses using its forecast brushing expenditures of \$393,000 for 06/07 and \$401,000 for 07/08. ["Directive No. 14"]

The Board directs NTPC, in its Phase 1 refiling, to propose a procedure for returning to the ratepayers over a 3-year period the \$345,000 that was over-collected by the Corporation for brushing over the 01/02 to 05/06 period. To be clear, the refunded \$345,000 is to be obtained from NTPC's non-regulated cash flow, not by reducing the test year brushing expenditures. ["Directive No. 15"]

The Board recognizes that there will be year-to-year fluctuations in what is spent on brushing. However, to ensure that such a situation does not occur again and also to capture NTPC's assertion that the normalized brushing expenditure represents the minimum required annually, the Board directs NTPC that, commencing with the 06/07 test year, NTPC's 3-year rolling average actual brushing expenditures must be no less than 10% below the 3-year rolling average forecast brushing expenditures. NTPC's 5-year rolling average actual brushing expenditures must be no less than equal to the 5-year rolling average forecast brushing expenditures. ["Directive No. 45"]

10. The Corporation is seeking to review and vary Directive Nos. 15 and 45 only. The Corporation is not seeking any review of Directive No. 14.

### **The Test for Review and Variance**

11. The test for review and variance of a Board decision was set out in PUB Decision 3-95. Specifically, the Board held that it will normally exercise its discretion to review and vary its decision in the following circumstances:

1. Where new evidence, which was not known or not available at the time evidence was adduced and which may have been a determining factor in the decision, became known after the Decision was made.
2. Where a decision is based on an error in law or in fact 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.
3. Where correction of a clerical error or clarification of an ambiguity is required.
4. Where other criteria, particular to a given case, are shown to be valid.<sup>4</sup>

### **Grounds for Review and Variance**

12. The Corporation's application for review and variance is based on the following grounds:

1. having previously approved a total revenue requirement for NTPC in Decision 1-2002 on a forward test year basis, the Board erred in law, jurisdiction and fact by (i) determining that "NTPC has either 1) under-spent \$345,000 from 01/02 to 05/06 or 2) over-collected \$345,000 in 01/02 to 05/06" and (ii) directing NTPC to "...propose a procedure for returning to the ratepayers over a 3-year period the \$345,000 that was over-collected by the Corporation for brushing over the 01/02 to 05/06 period" ("Directive No. 15");
2. having approved a total revenue requirement for NTPC in Decision 13-2007 on a forward test year basis, the Board erred in law and jurisdiction by directing that "...commencing with the 06/07 test year, NTPC's 3-year rolling average actual brushing expenditures must be no less than 10% below the 3-year rolling average

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<sup>4</sup> 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. See also PUB Decision 2-2006.

forecast brushing expenditures. NTPC's 5-year rolling average actual brushing expenditures must be no less than equal to the 5-year rolling average forecast brushing expenditures" ("Directive No. 45"); and

3. having accepted and considered the Application on a forward test year basis, the Board erred in law by failing to give the Corporation notice that the Board was considering Directive Nos. 15 and 45.

Each of those grounds for review and variance is discussed in more detail below.

**Ground No. 1: Having Previously Approved a Total Revenue Requirement for NTPC in Decision 1-2002 on a Forward Test Year Basis, the Board Erred in Law, Jurisdiction and Fact by (i) Determining that "NTPC Has Either 1) Under-spent \$345,000 From 01/02 to 05/06 or 2) Over-collected \$345,000 in 01/02 to 05/06" and (ii) Directing NTPC to "...Propose a Procedure for Returning to the Ratepayers Over a 3-Year Period the \$345,000 that was Over-collected by the Corporation for Brushing Over the 01/02 to 05/06 Period"**

13. In PUB Decision 1-2002 the Board made the following determination regarding the Corporation's revenue requirement.

Based on its findings, the Board determines the total revenue requirement for the two Test Years to be as follows and as shown in Schedule C attached:

2001/02	\$63,566,000
2002/03	\$66,639,000

Schedule C breaks out the total revenue requirement for each test year into components, but does not specify a specific amount for brushing expenses. The Corporation subsequently designed and the Board approved rates based on the above approved total revenue requirement (and the approved forecast revenues) for 2002/03.<sup>5</sup> Subject to rate riders, those rates have continued to be in effect through to today.

<sup>5</sup> PUB Decision 3-2003, *NTPC 2001/03 Phase II GRA*, July 28, 2003; PUB Decision 6-2003, *Application by the City of Yellowknife to Review and Vary Board Decision 3-2003*, September 17, 2003; PUB Decision 7-2003, *NTPC Refiling Pursuant to Board Decision 3-2003*, September 17, 2003; and PUB Decision 8-2003, *NTPC Refiling Pursuant to Board Decisions 6-2003 and 7-2003*, October 6, 2003.

14. In determining a total revenue requirement, the Board did not require in Decision 1-2002 that the Corporation spend or incur a specific amount for any of the components that made up the total revenue requirement, and certainly not a specific amount for brushing expenses. The Corporation's revenue requirement is not approved on a line-by-line or a community-by-community basis. Rather, the Corporation's forecasts are only tested for reasonableness at that level of detail and the revenue requirement is approved in its entirety and used to design rates on a prospective basis.

15. The Corporation will almost always experience a variance in each of the components that make up the total revenue requirement, including forecast brushing expenses. The Corporation continually reassesses its operating and maintenance priorities (as well as all other aspects of its operations) in relation to the approved total revenue requirement and the Corporation's available internal resources. The Corporation prudently adjusts its actual expenditures in all areas, resulting in a variance, as required to ensure safe and reliable service to its customers.

16. Actual expenditure adjustments inevitably result in the Corporation incurring costs not included in the approved forecast total revenue requirement and thus not built into rates, as well as avoiding forecast costs provided that safe and reliable service can be maintained (e.g. the subject brushing expenses). For example, in 2004/05 the Corporation prudently incurred costs to establish an apprentice program to address the shortage of line personnel with initially six new positions. Further, in 2005/06 the Corporation prudently incurred costs to establish three new positions to address increased safety and environmental training requirements.<sup>6</sup> None of those costs were included in the Corporation's approved 2002/03 revenue requirement (Decision 1-2002) and hence not built into rates at that time. However, those non-forecast costs were offset to some extent by the avoided brushing expenses subject to Directive No. 15.

17. Offsetting variances in actual expenditures, as compared to test year forecasts, is consistent with public utility regulation throughout Canada and should not cause the Board concern. The Corporation files its annual reports, which includes consolidated financial statements, with the Board on an annual basis which demonstrate that the Corporation has not been "over earning" on its approved rate of return since 2002/03.

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<sup>6</sup> Ex. 7, TGC.NTPC-36(e).

18. Therefore, the fact that a variance exists in any component of the approved total revenue requirement does not mean that the Corporation “under-spent” or “over-collected” in that expense category. With respect, it is factually incorrect to categorize a variance in actual brushing expenditures versus the 2002/03 test year forecast as under-spending or over-collection. To do so suggests that the Board had approved some specified amount for brushing expenses in Decision 1-2002, which it did not. Therefore, in finding that “...the ratepayers paid \$345,000 for brushing services that they did not receive...”,<sup>7</sup> the Board committed an error in fact that is inconsistent with forward test year ratemaking. Clearly, the correction of that error in fact would materially affect the Decision.

19. The Corporation’s revenue requirement has been set by the Board on a forward test year basis since at least 1992.<sup>8</sup> The Supreme Court of Canada, in *Re Northwestern Utilities Ltd.*, described forward test year ratemaking, applicable to both the Northwest Territories and Alberta, as follows.

The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from the many provisions of the *Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.<sup>9</sup>

And more recently, the Alberta Energy and Utilities Board (“AEUB”) described forward test year ratemaking under the same legislative framework that was considered in *Re Northwestern Utilities Ltd.* as:

...to determine the allowable revenue requirement for gas and electric utilities on a *prospective basis*. The sales forecasts and cost of service projections of the

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<sup>7</sup> PUB Decision 13-2007 at 105.

<sup>8</sup> PUB Decision 9-93.

<sup>9</sup> 89 D.L.R. 161 at 164.

utility are scrutinized, and then rates are set to recover *the anticipated utility revenue requirement for the forward test year*.<sup>10</sup>

20. Thus forward test year ratemaking merely affords the Corporation the *opportunity* to recover its approved total revenue requirement through rates charged for service. The risk of over- or under-recovering its approved total revenue requirement is borne by the Corporation until revised rates are approved by the Board. That is, the Corporation accepts the forecast risk in future years. The Corporation does not, however, accept the risk that its approved revenue requirement will be retroactively adjusted, either positively or negatively, by the Board. Directive No. 15 reflects retroactive regulation which, as discussed below, constitutes an error in law and jurisdiction.

21. In order to promote the rule of law, there is a presumption against the retroactive application of legislation. Similarly, as the Board's jurisdiction emanates entirely from its enabling statutes (i.e. the Board does not have any inherent jurisdiction),<sup>11</sup> any regulatory action undertaken by the Board is also subject to the presumption against retroactivity.

22. The rationale for this presumption is explained by Professor Sullivan as follows.

It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law. As Raz points out, the fundamental principle on which rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. *And when retroactive legislation results in a loss or disadvantage for those that relied on the previous law, it is unfair as well arbitrary.* Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.<sup>12</sup>

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<sup>10</sup> EUB Decision 2000-9, *Canadian Western Natural Gas Company Limited 1997 Return on Common Equity and Capital Structure, and 1998 General Rate Application*, March 2, 2000 at 4 [emphasis added].

<sup>11</sup> For example, see Macaulay, R.W. and Sprague, J.L.H., *Practice and Procedure Before Administrative Tribunals*, Vol. I, (Thompson Canada Limited: 2004) at 5-1 to 5-3.

<sup>12</sup> Sullivan, R., *Sullivan and Driedger on the Construction of Statute*, 4<sup>th</sup> ed. (Butterworths Canada Ltd.: 2002) at 553-54 [cites omitted; emphasis added].

23. This presumption may only be rebutted by express words or necessary implication.<sup>13</sup> For example, subsection 52(2) of the *Public Utilities Act* empowers the Board to, when fixing just and reasonable rates, consider the Corporation's revenues and costs applicable to the fiscal year in which a General Rate Application is filed and the subsequent fiscal year. However, as the Application was filed during the Corporation's 2006/07 fiscal year, that provision does not apply to the years 2001/02 to 2005/06 (i.e. Directive No. 15). There are no express words or interpretations of necessary implication in the *Public Utilities Act* that rebut the presumption against retroactivity in the present case.

24. With regard to the doctrine of jurisdiction by necessary implication, Supreme Court of Canada has held that:

...the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. *Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework.*<sup>14</sup>

25. While Canadian public utility regulators, such as the Board, have broadly drawn powers, their powers are not without limits. Canadian courts have consistently held that public utility regulators do not have jurisdiction to retroactively regulate utility rates without clear language in the empowering statute. In the case of *City of Calgary and Home Oil Company Ltd. v. Madison Natural Gas Co. Ltd. and British American Utilities Ltd.* the Alberta Court of Appeal upheld a decision of the AEUB's predecessor board that it did not have the authority to retroactively adjust the cost of gas to a utility to disgorge its surplus that had led to an unreasonably high rate of return.

...In its [prior] decision the Board considered that the rate of return should be 7% per annum and fixed 9c per mcf. as the "just and reasonable price" to be paid to the respondents. In arriving at this figure of 9c the Board had no previous experience to guide it. By experience I mean years of previous upon evidence of experts and the limited information which was obtained while the interim orders were in effect. In their decision (O. 34) they said: "A price of Nine(9) cents will

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<sup>13</sup> Sullivan, R., *Sullivan and Driedger on the Construction of Statute*, 4<sup>th</sup> ed. (Butterworths Canada Ltd.: 2002) at 562.

<sup>14</sup> *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 74 [emphasis added].

afford what the Board hopes to be a margin of safety so that a deficit for the period will be avoided and if it should turn out that there is a surplus, it can be dealt with when the time arrives.”

...

In my opinion, the decision of the board [10 years after the prior decision] under appeal is correct for the reason set forth therein. The Board has held that it has no jurisdiction to deal with or dispose of this surplus.

The powers of the Natural Gas Utilities Board have been quoted above the Board’s function was to determine “the just and reasonable price” or prices to be paid. *It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.*<sup>15</sup>

26. More recently, the Alberta Court of Appeal held that “[a] fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. *This principle is based on notions of fairness and the reliability of expectations.*”<sup>16</sup>

27. As discussed above, there is no express or implied power in the *Public Utilities Act*, never mind clear legislative language, that would empower the Board to direct a retroactive refund related to the Corporation’s 2001/02 to 2005/06 brushing expenses (i.e. prior to the 2006/07 fiscal year in which the Application was filed). Moreover, requiring the Corporation to now make a refund related to past expenses creates a loss or disadvantage to the Corporation, which relied on the Decision 1-2002 as being final. On that basis alone Directive No. 15 is unfair and arbitrary, and should be vacated. Directive No. 15 is a clear case of retroactive ratemaking and constitutes an error in law and jurisdiction. Further, vacating Directive No. 15 will materially affect the Decision.

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<sup>15</sup> (1959) 19 D.L.R. (2d) 655 at 661 [emphasis added]. See also *Western Decalta Petroleum Ltd. v. Alberta Public Utilities Board* (1978), 9 A.R. 175 (C.A.) at 178 and *Re Northwestern Utilites and the City of Edmonton* (1978), 89 D.L.R. (3d) 161 at 170 (SCC).

<sup>16</sup> *Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)* (2000), 186 D.L.R. (4<sup>th</sup>) 690 at 698-99 [emphasis added].

**Ground No. 2: Having Approved a Total Revenue Requirement for NTPC in Decision 13-2007 on a Forward Test Year Basis, the Board Erred in Law and Jurisdiction by Directing that "...Commencing With the 06/07 Test Year, NTPC's 3-Year Rolling Average Actual Brushing Expenditures Must Be No Less Than 10% Below the 3-Year Rolling Average Forecast Brushing Expenditures. NTPC's 5-Year Rolling Average Actual Brushing Expenditures Must Be No Less Than Equal to the 5-Year Rolling Average Forecast Brushing Expenditures."**

28. It is neither reasonable nor prudent for the Board to direct that NTPC spend a minimum amount on brushing. As discussed above, the Board has consistently regulated the Corporation (and other public utilities in the Northwest Territories) on a forward test year basis. While the Board approves the Corporation's total revenue requirement, the Corporation must retain the discretion and ability to prudently manage its operations consistent with good utility practices in response to future, unforeseeable events. Consequently, the Corporation may well be required to spend more or less than its approved total revenue requirement depending on the circumstances.

29. With respect, the Board should be very cautious about directly or indirectly impeding the Corporation's discretion and ability to prudently manage its utility operations. Other public utility regulators have been similarly cautioned. For example, in relation to the potential loss of a major industrial customer, the Yukon Territory Court of Appeal held that it was "hardly representative of normal regulation" for the Yukon Utilities Board to subject the acts of management to "minute scrutiny."<sup>17</sup>

30. The Corporation forecasted and the Board approved brushing expenses to reflect a normalized level of brushing on a go-forward basis.<sup>18</sup> As discussed in paragraphs 15 and 16 above, the Corporation continually reassesses its operating and maintenance priorities (as well as all other aspects of its operations) in relation to the approved forecast total revenue requirement and the Corporation's available internal resources. The Corporation will prudently adjust its actual expenditures in all areas, resulting in a variance from forecast, as required to ensure safe and reliable service to its customers. A minimum expenditure requirement imposed by the Board for brushing inhibits the Corporation's ability to adjust its operating and maintenance

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<sup>17</sup> *Yukon Energy Corp. v. Yukon (Utilities Board)*, [1996] Y.J. No. 3 at para. 36.

<sup>18</sup> Decision 13-2007 at 105.

priorities in response to future, unforeseeable events and is a clear departure from a forward test year ratemaking regulatory framework.

31. Imposing a minimum expenditure requirement for brushing also blunts the Corporation's incentive to seek out efficiency gains and minimize brushing costs where possible without affecting the provision of safe and reliable service. That result would certainly not be in the Corporation's customers' best interest.

32. Similar to retroactive ratemaking (see paragraphs 21 and 24 above), the Board's powers and jurisdiction respecting a minimum expenditure requirement are limited to that delegated by Legislature. There is no express provision in the *Public Utilities Act* that empowers the Board to impose minimum expenditures. Nor can such power be read into the *Public Utilities Act* by application of the doctrine of jurisdiction by necessary implication.

33. The *Public Utilities Act* confers upon the Board broadly drawn ratemaking powers to fix just and reasonable rates for the Corporation.<sup>19</sup> The Board's broad ratemaking powers, however, must be necessarily limited and do not by implication include the power to impose minimum expenditures because such minimums are not rationally related to the purpose of a forward test year regulatory framework (see paragraph 24 above). Consequently, a minimum expenditure requirement clearly exceeds the Board's jurisdiction.

34. As Directive No. 45 is unreasonable and requires the Corporation to take measures beyond the Board's power and jurisdiction under the *Public Utilities Act*, it is clearly an error in law and jurisdiction. Further, vacating Directive No. 45 will materially affect the Decision.

35. Alternatively, the Board could vary Directive No. 45 to direct the Corporation to establish a brushing deferral account for 2007/08 expenses onward. That alternative variation would not, however, resolve the error in fact, law and jurisdiction caused by Directive No. 15.

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<sup>19</sup> See for example subsections 49(1), 51(3) and 51(4).

**Ground No. 3: Having Accepted and Considered the Application on a Forward Test Year Basis, the Board Erred in Law by Failing to Give the Corporation Notice that the Board Was Considering Directive Nos. 15 and 45.**

36. Consistent with the Board's practice and tradition of public utility regulation in the Northwest Territories, the Application was based on forward test year ratemaking methodology. Approved deferred charges and deferral accounts are the only exception to that methodology. The Corporation's 2006/07 and 2007/08 test year forecasts for brushing expenses are not and have never been treated as a deferred charge or in a deferral account. Similarly, the Corporation has never been required by the Board to make minimum expenditures for brushing, even within prescribed ranges.

37. While the Board is not bound by its past decisions, consistency in its approach to public utility rate regulation is very important for a number of reasons. First, it allows public utilities and their customers to plan and conduct their affairs in an atmosphere of stability and predictability. Second, it fosters public confidence in the integrity of the regulatory process. Third, it emphasizes the importance of objectivity and discourages arbitrary or irrational decisions. For that reason alone, the Board should vacate Direction Nos. 15 and 45.

38. Notwithstanding that Directive Nos. 15 and 45 are beyond the Board's power and jurisdiction, as discussed above, if the Board was contemplating a departure from a forward test year ratemaking methodology, then the Board was required at law to provide the Corporation with notice of that possible change and the opportunity to make submissions.

39. Regarding common law principles of procedural fairness and an administrative tribunal's procedural requirements in light of a legitimate expectation, the Supreme Court of Canada has held that:

*[a]s applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded. Nevertheless, the doctrine of legitimate expectation cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances"*

affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that *it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.*<sup>20</sup>

40. The Corporation clearly had a legitimate expectation that:
- (a) forecast total revenue requirements for the test years 2001/02 and 2002/03 were approved by the Board as final in Decision 1-2002 and would not be subject to further review;
  - (b) non-test years 2003/04 to 2005/06 would not be retroactively reviewed by the Board nor would the Board direct a refund relating to brushing expenses incurred during those years; and
  - (c) the revenue requirement approved in Decision 13-2007 would be in total and not requiring minimum expenditures relating to brushing expenses, even within prescribed ranges.

It is manifestly unfair for the Board to act in contravention of the Corporation's legitimate representations as to procedure and to backtrack on the Board's consistent and long-held practice of forward test year public utility regulation without according the Corporation significant procedural rights.

41. There is nothing in the Board's Information Requests to NTPC, correspondence to NTPC or questions to the NTPC witnesses at the oral hearing that would have put the Corporation on notice of the possibility of Directive Nos. 15 or 45. In fact, none of the Board panel members, the Board's consultant or the Board's counsel asked the NTPC witnesses any questions whatsoever about brushing. Absent such notice, the Corporation could not have been reasonably expected to address the potential for Directive Nos. 15 or 45 in its submissions to the Board. Consequently, the Board committed an error in law by failing to give the Corporation notice that the Board was considering retroactively regulating brushing expenses for the years 2001/02 to

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<sup>20</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 26 [cites omitted; emphasis added].

2005/06 and imposing minimum expenditures on future brushing expenses. As noted above, vacating Directive Nos. 15 and 45 will materially affect the Decision.

**Relief Requested**

42. Based on the foregoing submissions, the Corporation respectfully requests the Board to:
- (a) review Directive Nos. 15 and 45 of the Decision; and
  - (b) vary the Decision by vacating Directive Nos. 15 and 45.
  - (c) Alternatively, in respect of Directive No. 45 only, the Board could vary it to direct the Corporation to establish a brushing deferral account for 2007/08 expenses onward.

**Communications**

43. Communications related to this proceeding should be directed to the Corporation, its legal counsel and its consultant as follows:

**Northwest Territories Power Corporation**  
4 Capital Drive  
Hay River, NT X0E 1G2  
**Attn: Judith Goucher**  
**Director, Finance & CFO**  
Telephone: (867) 874-5234  
Fax: (867) 874-5229  
Email: JGoucher@ntpc.com

**Borden Ladner Gervais LLP**  
Barristers & Solicitors  
1000 Canterra Tower  
400 Third Avenue S.W.  
Calgary, AB T2P 4H2  
**Attn: Stephen Lee**  
Telephone: (403) 232-9621  
Fax: (403) 266-1395  
Email: slee@blgcanada.com

**InterGroup Consultants Ltd.**  
604-283 Portage Avenue  
Winnipeg, MB R3B 2B5  
**Attn: Patrick Bowman**  
Telephone: 204-942-0654  
Fax: 204-943-3922  
Email: pbowman@intergroup.ca

ALL OF WHICH is respectfully submitted this 5<sup>th</sup> day of November, 2007.

**Northwest Territories Power Corporation  
by its counsel Borden Ladner Gervais  
LLP**

*“Stephen Lee”*

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per: Stephen C. Lee

THE PUBLIC UTILITIES BOARD  
OF THE  
NORTHWEST TERRITORIES

DECISION 1-2002

February 15, 2002

IN THE MATTER OF the Public Utilities Act, being Chapter 110 of the Revised Statutes of the Northwest Territories, 1988(Supp.), as amended.

AND IN THE MATTER OF an application by Northwest Territories Power Corporation for changes in the existing rates, tolls and charges for electrical energy and related services provided to its customers within the Northwest Territories.

This is Exhibit " C "  
referred to in the Affidavit of  
Leon Courneya  
Sworn before me this 5<sup>th</sup>  
day of November A.D. 2007

[Signature]  
A Commissioner for  
Oaths in and for the  
~~Province of Alberta~~

territory

NWT

SHARMAYNE HORTON  
COMMISSIONER FOR OATHS  
IN AND FOR N.W.T.  
MY COMMISSION EXPIRES JUNE 23, 2008

2001/02	\$169,639,000
2002/03	\$167,770,000

## 6. RETURN ON RATE BASE

Having determined the rate base for NWTPC for the Test Years, the Board is required, pursuant to section 50 of *the Act*, to fix a fair return on the rate base.

Section 50 of *the Act* provides as follows:

- "50. (1) The Board shall fix a fair return on the rate base of a public utility.  
(2) In fixing a fair return, the Board shall consider all the facts that it considers relevant."

The Board's objective in fixing a fair return on rate base is to enable NWTPC to recover its cost of servicing those portions of the rate base financed by long and short term debt, its capital lease obligation, and to provide an opportunity to earn a fair return on the portion of rate base deemed to be financed by common equity.

Having reviewed NWTPC's forecast capital structures and the effective cost of debt for each of the Test Years and the Agreement with respect to return on equity, the Board fixes for the Test Years the fair return on rate base as follows and as set out in Schedule B attached:

2001/02	\$16,076,000
2002/03	\$16,140,000

## 7. UTILITY REVENUE REQUIREMENT

Utility revenue requirement is composed of the following categories of cost:

- Cash Operation and Maintenance Expenses
- Non-Cash Operating Expenses
- Fair Return on Rate Base

As part of the settlement package the parties agreed on matters pertaining to cash operation and maintenance expenses and non-cash operating expenses. The Board approves adjustments, which formed part of the settlement package.

The fair return on rate base has been dealt with in a previous section.

The Board has reviewed the evidence contained in NWTPC's Application and the responses to interrogatories and will not disturb the settlement package with respect to the determination of NWTPC's revenue requirement for the two Test Years.

Based on its findings, the Board determines the total revenue requirement for the two Test Years to be as follows and as shown in Schedule C attached:

2001/02	\$63,566,000
2002/03	\$66,639,000

The Board has reviewed the forecast of revenues for the two test years and the negotiated adjustments thereto. The Board determines the revenue forecast to be as follows and as shown in Schedule D attached:

2001/02	\$53,710,000
2002/03	\$55,339,000

NorthWest Territories Power Corporation  
2001/02 and 2002/03 General Rate Application  
Schedule C

	Revenue Requirement (\$000)		
	Application	Negotiated Settlement & Approved by the Board	
	2001/02	2002/03	2002/03
Plant Operations & Maintenance			
Salaries & Wages	11390	11655	11610
Fuel & Lubricants	15703	15860	15546
Supplies and Services	7127	8029	7700
Reserve for Injuries & Damages	485	485	485
Travel & Accommodation	1411	1342	1342
Total Plant Operations & Maintenance Expense	36116	37371	36683
Head Office O&M Expense	5482	5622	5607
Head Office Donations	-71	-72	-71
Total Head Office O&M	5411	5550	5536
Total O&M	41527	42921	42219
Fixed Assets Amortization	8913	9117	7918
Other Amortization	312	312	312
Total Amortization	9225	9429	8230
Return	18918	18605	16140
Negotiated Settlement Revisions		-200	50
Revenue Requirement	69670	70955	66639
Revenue at Existing Rates	54169	54604	53339
Deficiency/Surplus	-15501	-16351	-11300

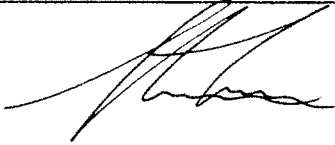
Action No.: FICV2007000219 2007

**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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**CERTIFICATE**

I, Stephen Lee of Borden Ladner Gervais LLP, solicitors for the Applicant, Northwest Territories Power Corporation, certify that on Tuesday, the 5<sup>th</sup> day of November, I received file # FICV2007000219 from Bernice Dillman Clerk of the Court by telephone/telecopier.



IN THE MATTER OF Section 78 of the *Public Utilities Act* R.S.N.W.T. 1988, c. 24 (Supp.);

AND IN THE MATTER OF Decision 13-2007 of the Northwest Territories Public Utilities Board dated August 29, 2007 regarding the Northwest Territories Power Corporation's 2006/07 and 2007/08 Phase I General Rate Application;

AND IN THE MATTER OF an application for leave to appeal the aforesaid Northwest Territories Public Utilities Board decision by Northwest Territories Power Corporation being named therein;

**BETWEEN:**

**NORTHWEST TERRITORIES POWER  
CORPORATION**

Applicant  
(Appellant)

- . and -

**PUBLIC UTILITIES BOARD of the  
NORTHWEST TERRITORIES**

Respondent  
(Respondent)

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**AFFIDAVIT**

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