

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

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*¹ 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

¹ 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.² 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.³

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.

² NTPC Written Argument at 15, ln. 21; HC Argument at 18, s. 3.5.

³ NTCP 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.⁴

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

⁴ 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 2002/03.⁵ Subject to rate riders, those rates have continued to be in effect through to today.

⁵ 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.⁶ 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.

⁶ 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...”,⁷ 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 1992.⁸ 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.⁹

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

⁷ PUB Decision 13-2007 at 105.

⁸ PUB Decision 9-93.

⁹ 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*.¹⁰

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),¹¹ 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.¹²

¹⁰ 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].

¹¹ 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.

¹² Sullivan, R., *Sullivan and Driedger on the Construction of Statute*, 4th 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.¹³ 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.*¹⁴

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

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

¹⁴ *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.*¹⁵

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.*”¹⁶

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.

¹⁵ (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 Utilities and the City of Edmonton* (1978), 89 D.L.R. (3d) 161 at 170 (SCC).

¹⁶ *Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)* (2000), 186 D.L.R. (4th) 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.”¹⁷

30. The Corporation forecasted and the Board approved brushing expenses to reflect a normalized level of brushing on a go-forward basis.¹⁸ 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

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

¹⁸ 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.¹⁹ 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.

¹⁹ 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.*²⁰

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

²⁰ *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:

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ALL OF WHICH is respectfully submitted this 5th day of November, 2007.

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

“Stephen Lee”

per: Stephen C. Lee