



**Mackenzie Valley Land and Water Board**  
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### Staff Report

<b>Applicant:</b> Northwest Territories Power Corporation and the Carter Family	
<b>Location:</b> Nonacho Lake, NT	<b>Application:</b> MV2011L4-0002
<b>Date Prepared:</b> February 21, 2017	<b>Meeting Date:</b> March 1, 2017
<b>Subject:</b> Taltson Hydro-electric Compensation Claim Re-Hearing Work Plan Update and Extension Request	

#### 1. Purpose/Report Summary

The purpose of this Report is to present to the Mackenzie Valley Land and Water Board (MVLWB/the Board):

- a) An extension request submitted by the Carter Family legal counsel for the submission of its Expert Reports;
- b) A confidentiality request for part of the 'KRP Rebuttal Report'; and
- c) An Updated Work Plan based on the extension request.

#### 2. Background

##### File History

- June 3, 2011 – Northwest Territories Power Corporation (NTPC) applied for a renewal of their Type A Water Licence for storage and diversion of water at the Taltson Hydroelectric Facilities;
- July 29, 2011 – Reviewer comment deadline on Application;
- August 15, 2011 – Technical Session;
- September 2, 2011 – Written Interventions due;
- September 15, 2011 – Public Hearing presentations due;
- September 20-21, 2011 – Public Hearing;
- November 29, 2011 – Board recommends approval to the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) of Water Licence MV2011L4-0002 for Taltson;
- December 12, 2011 – Letter from Minister stating that he cannot approve the Water Licence until the Board “fully addresses the issue of compensation;”
- December 20, 2011 – Board issues an Information Request for Claims of Compensation addressed to both the DKFN and the Carter Family;
- March 15, 2012 – Carter Family submission on claim for compensation;

- April 23, 2012 – NTPC’s response to claim for compensation by the Carter Family;
- April 27, 2012 – Letter from Carter Family’s legal representatives seeking further opportunity to make submissions with respect to the compensation issue;
- May 3, 2012 – Letter from the Board ruling against further dialogue from the Carter Family in response to the NTPC submission;
- May 22, 2012 – Letter from Carter Family’s legal counsel regarding the right to reply to NTPC submissions relating to compensation;
- May 24, 2012 – Letter from Board counsel re-iterating Board decision to end dialogue regarding compensation;
- May 31, 2012 – Board recommends approval to Minister of AANDC of Water Licence MV2011L4-0002 for Taltson including compensation (\$62,500 to the Carter Family);
- June 25, 2012 - Carter family filed for Judicial Review of the Board’s decision;
- July 26 2012 – Minister approves renewal of licence MV2011L4-0002.
- August 14, 2013 – Judicial review of the Board’s decision on compensation heard at the Supreme Court of the Northwest Territories;
- March 7, 2014 – Reasons filed with the Supreme Court of the Northwest Territories in the judicial review of the Board’s decision on compensation; and
- November 26, 2016 – the final record for the compensation re-hearing established.

#### Re-Hearing Work Plan History

- January 24, 2017 – Compensation Re-Hearing Work Plan Distributed;
- January 27, 2017 – Deadline for submission of Carter’s Expert Reports;
- February 17, 2017 – Carter Family legal counsel submits Expert Reports and an extension request to the submission date;
- February 20, 2017 – Board staff issue letter to NTPC legal counsel regarding extension request;
- February 21, 2017 – NTPC legal counsel responds to the extension request;
- February 24, 2017 – Carter family legal counsel submits confidentiality request for portions of the Expert Report submission; and
- **March 1, 2017 – Extension and confidentiality requests and updated Work Plan presented to the Board for decision.**

### **3. Discussion**

#### Background

On June 3, 2011, the NTPC applied to renew a Type A water licence in relation to the Taltson Hydro Facility on Nonacho Lake. On September 2, 2011, the Carters filed a Notice of Intervention/Claim for Compensation for past and future economic losses. The Board initially issued reasons supporting that the NTPC pay compensation in an amount to be determined but the Minister of AANDC declined to approve the licence absent a specific decision on the amount of compensation. Following further proceedings, the Board ordered compensation for nuisance and inconvenience in the amount of \$62,500. The Carters brought an application for judicial review which resulted in the portion of the Board’s decision and Minister’s approval dealing with compensation to be quashed and sent back to the Board for further consideration on the matter of compensation.

The Judicial Review decision issued by Mme. Justice Shaner, ruling that the Carter Family be given the opportunity to file rebuttal evidence, was released on March 7, 2014 and on April 23, 2014, the Board requested that the Carter Family provide its rebuttal evidence by June

19, 2014. On June 6, 2014, the Board received a letter from the Carter Family's legal counsel requesting that the compensation proceedings before the Board be postponed until the Supreme Court proceedings are complete. On June 11, 2014, the Board confirmed that the compensation claim process has been postponed. On November 26, 2016, the final record for the compensation re-hearing was established.

#### Work Plan

On January 24, 2017, the MVLWB released a Work Plan for the Re-Hearing of a Claim of Compensation arising from the NTPC's Type A Water Licence in relation to the Taltson Hydro Facility. The purpose of the Work Plan is to outline the process and timelines for the re-hearing of the claim for compensation brought by the Carter Family in the context of the NTPC Type A Water Licence since issued on August 31, 2012.

The Board issued a description of the scope of the review, guiding principles for procedural fairness, and a list of objectives with the Work Plan. Included in the guiding principles was a requirement that:

*Any requests relating to the procedure or timeline described in the Work Plan, shall be made in writing to the Board for approval. Requests relating to timelines (e.g. adjournment requests) shall be no less than 14 days prior to the date in question (exceptions may be made in extenuating circumstances at the Board's discretion).*

The Carter Family deadline for the Expert Report submissions was set for January 27, 2017. This date, from the Board's understanding, was previously established through meetings and discussions amongst legal counsels for all parties (Carter Family, NTPC, and the MVLWB). The Board issued the Work Plan so that there would be a clear, formal timeline for all parties to work within.

#### Extension Request

The January 27, 2017 deadline for the Carter Family expert reports came and went with no word from the Carter Family counsel. On February 17, a letter was submitted to the Board requesting an extension to the submission deadline (to February 17, 2017). This submission included the Carter Family expert reports, provided in rebuttal to the NTPC April 23, 2012 response to the Carter Family Claim for Compensation (March 15, 2012). This letter is attached for the Board's consideration.

The NTPC deadline to advise whether or not cross examination of the Carter Family factual witnesses is required was supposed to be on February 10, 2017, as set by the initial, approved Work Plan for the Re-Hearing. This deadline was also missed as a result of the late submission of the Carter Family expert reports.

On February 21, 2017, NTPC legal counsel responded to the extension request. Though they took the opportunity to identify several issues with the request, they did not oppose it. This letter is also attached for the Board's consideration.

#### Confidentiality Request

One of the rebuttal reports submitted by the Carter family was in a secured format with a "Private and Confidential" caveat. On February 21, 2017, Board staff requested clarification on the submission and provided information on the confidentiality application process

identified in the Board's "Rules of Procedure". The formal request for confidentiality was received on February 24, 2017 (attached).

#### **4. Comments**

##### Work Plan Update

If the Board is willing to approve the extension request, Board staff have provided an updated Work Plan for Board consideration. The updated Work Plan provides the same amount of time to NTPC for its review and response regarding cross examination of the Carter Family witnesses as previously allowed. As a result of the proposed changes, the timeline for Board issuance of potential questions that may be raised at the Re-Hearing has been pushed back several weeks but will still be available for review by all parties for more than a month before the scheduled Re-Hearing. Dates identified in the original Work Plan for the Pre-Hearing Conference and Re-Hearing have not changed. A copy of the original Work Plan and the Draft Updated Work Plan are provided for Board consideration.

##### Confidentiality Request

The document in question has already been shared by Carter family legal counsel with NTPC and Board staff/counsel. It is Board staff's opinion that any non-disclosure agreements between the Carter family and NTPC can be worked out between their respective counsels. If the Board confirms the Carter Family request for confidentiality, a redacted version of the KRP Rebuttal Report can be placed on the registry. All parties to the Compensation Re-Hearing have access to the original submission.

#### **5. Reviewer Comments**

N/A

#### **6. Security**

Not relevant to the matter at hand.

#### **7. Conclusion**

Board staff conclude that there are two options for the Board to consider:

- 1) Approve the Carter Family extension and confidentiality requests and continue the current process under an updated Work Plan; or
- 2) Reject the Carter Family extension (and confidentiality) request and begin a new process for the Re-Hearing of a Claim of Compensation arising from the NTPC's Type A Water Licence in relation to the Taltson Hydro Facility.

Board staff believe that re-starting the process will result in further, unnecessary delays in a process that has already remained open for several years. The original Work Plan provided enough time to allow for some revisions without delaying the entire process and can be updated so that final arguments on the matter can be heard within the timeline previously approved by the Board.

## 8. Recommendation

As above, Board staff recommend the following options for the Board's consideration:

1) Approve the Carter Family extension and confidentiality requests and continue the current process under an updated Work Plan

a) Approve the Updated Work Plan

or

2) Reject the Carter Family extension (and confidentiality) request and begin a new process for the Re-Hearing of a Claim of Compensation arising from the NTPC's Type A Water Licence in relation to the Taltson Hydro Facility.

## 9. Attachments

- [Carter Family Letter Re: Expert Reports and Extension Request](#)
- [Board letter to NTPC legal counsel Re: Extension Request](#)
- [NTPC Letter Re: Extension Request](#)
- [Approved Work Plan](#)
- Carter Family Legal Counsel Confidentiality Request
- Draft Updated Work Plan
- Draft Extension and Confidentiality Requests Decision Letters

Respectfully submitted,



Shannon Allerston  
Regulatory Officer