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May 8, 2017

VIA EMAIL

MacKenzie Valley Land and Water Board
7th Floor, 4922 – 48th Street
Yellowknife, NWT

Attention: Rebecca Chouinard, Executive Director

Dear Madame:

**Re: Northwest Territories Power Corporation (“NTPC”) Application for Type “A”
Water Licence Pursuant to the *Waters Act*, S.N.W.T. 2014,c.18**

This correspondence is filed on behalf of NTPC with respect to the request of the Carter Family for an amendment to the Hearing Agenda.¹ The specific request filed by Carter Family Counsel is for an amendment “to permit the Carters to present their Opening Statement and Presentation first”.

For the reasons that follow, NTPC respectfully requests that the Board deny this request, and therefore confirm the Hearing Agenda as previously established.

Agenda Follows Rules of Procedure and the Law in Respect of Type “A” Water Licence

We submit that the Hearing Agenda issued by the Board properly follows the *Board’s Rules of Procedure Including Public Hearings* (the “**Rules**”). More particularly, the Board’s order of events set out in the Hearing Agenda incorporates the sequence in the “Order of Events at a Public Hearing” set out in Section 93 of the Rules. This is the proper approach given the circumstances of this Proceeding.

¹ The draft Hearing Agenda was issued by the Board on April 20, 2017.

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Further, the Board has acted appropriately, having regard for the operation of the Rules and the status of NTPC as an applicant under the *Waters Act*. The Rules define an applicant as “a person who has filed an application with the Board.” In turn, an application is defined under the Rules as:

any application for a land use permit or water licence submitted in accordance with the MVRMA, the Mackenzie Valley Land Use Regulations (MVLUR) or the Northwest Territories Waters Act (NWTWA) or its regulations; [emphasis added]

Under the plain words of the Rules and the *Waters Act*,² NTPC is the applicant for the purpose of the statutory and regulatory scheme, because it is NTPC that requires a water licence to conduct its operations.

Further, under the *Waters Act*,³ the Board is required to conduct a hearing in respect of applications for an issuance or renewal of Type “A” Water Licences. While those hearings were indeed held in 2011 in connection with the filed NTPC licence application, in the current case the Board has exercised its discretion⁴ to hold a hearing in respect of the outstanding claim by the Carter Family for compensation.

It is important to note that the decision of Justice Shaner did not require the Board to hold a hearing to address the Carter’s compensation claim. That step is now being taken by the Board in exercising its discretion under the *Waters Act*. As discussed below, the remedial orders of the Court were limited to the right of the Carter Family to file a response to NTPC’s 2012 submissions and for the Board to consider and decide the Carter’s compensation claim.

However, the Court did recognize the right of NTPC, as the applicant, to have the “last word” on its application and any submissions responding to the application:

[103] Had the Board followed its Rules respecting Information Requests, the following would have happened: All of the parties would have submitted their responses, which would then have been circulated. Next, all of the parties would have had an opportunity to make submissions on one another’s responses. *NTPC, as applicant, would have had an opportunity to reply to all of those submissions*, but only after everyone else had an opportunity to put their evidence and arguments forward, and to make submissions, including submissions on NTPC’s response, pursuant to Rule 51.

² Per *Waters Act*, Section 10: (1) *Subject to subsection (2), no person shall use, or permit the use of, waters in a water management area except (a) in accordance with the conditions of a licence.*

³ Per *Waters Act*, Section 41 (2) (a).

⁴ Per *Waters Act*, Section 41 (1) (a).

[104] Inexplicably, the Board departed from its Rules and, in particular, it did not comply with Rule 51 and give the Carters an opportunity to make submissions on NTPC's response to the Information Request.

[105] Rule 54 contemplates that an "applicant" in a water licence proceeding, such as NTPC, can make a reply to other parties submissions, effectively having the "last word". The reason for this seems plain enough: since the applicant will be the party responsible for complying with the conditions of the licence and paying compensation to adversely affected parties.

[106] From a procedural fairness perspective, however, Rule 54 makes sense only if the Board first complies with Rule 51, and allows the other parties to make written submissions to the Board on other parties' responses after the Information Request stage of a proceeding is complete. [emphasis added]

It is clear from the foregoing that the Court directed its mind to the specific circumstances of the Carter family claim, and critically in the context of the entire statutory and regulatory licensing scheme contemplated by the *Waters Act* and the Board's Rules. The Court clearly understood --- and noted --- that NTPC was the "applicant" as the "the party responsible for complying with the conditions of the licence and paying compensation to adversely affected parties".

Despite these clear and unambiguous words, Counsel to the Carter Family appears to argue that the Court's comments should be read as the exact opposite, and applied to make the Carter Family the "applicant" for the purposes of the Hearing. With great respect, this is not an interpretation which can be reasonably taken from the words of the Court.

While the Carter Family is advancing a claim for compensation as an "Intervener",⁵ in no way does the Carter Family meet the requirements of both the *Waters Act* and the Rules as an applicant, nor does its claim constitute an application under the *Waters Act*. Only NTPC and its licence application meets those requirements. The Court has no power to grant the Carter Family a status which legislation does not provide for.

Accordingly, the Board has properly and correctly applied its Rules, the provisions of the *Waters Act* and the findings of Justice Shaner in establishing the Hearing Agenda in accordance with Section 93 of the Rules.

Remedial Purposes of Court Decision Are Limited

We submit that while the Board is bound by the relief granted in the judicial review decision of Justice Shaner, that relief is limited and does not extend to the matters sought by the Carter Family for the order of events at the Hearing. The decision of the Court contains the following specific orders and relief:

[141] The following relief is granted:

⁵ Per Shaner J. , in *Carter v. Northwest Territories Power Corp.*, 2014 NWTSC 19, at para 6.

1. An order in the nature of certiorari quashing those portions of the Board's decision and the Minister's approval dealing with compensation for the Carters;
2. An order in the nature of mandamus requiring the Board to provide the Carters with an opportunity to make submissions to the Board on NTPC's response to the Information Request in accordance with the Board's Rules;
3. An order remitting the matter of compensation to the Board for consideration and a decision, including consideration of the submissions from the Carters respecting NTPC's response to the Information Request; and
4. An order amending the style of cause to reflect that the applicants are Jean Carter, Myles Carter, Dean Carter and Kandee Froese. [emphasis added]

At this stage, the remedial aspects associated with Item 2 have been fulfilled by the Board, through providing for and allowing the Carter's response and submissions which were filed on February 17, 2017. This step met the Court's comments for the need by the Board of a "full explanation of a party's claim for compensation":

[95] To achieve these objectives in the context of a water licence hearing, the Board would surely need to have before it a full explanation of a party's claim for compensation, including the opportunity to respond to submissions and evidence disputing the entitlement and/or amount of any such claim. That is the most obvious means by which the Board can ensure it has the information necessary to make a decision setting out the conditions of development and use of water resources that will "provide optimum benefit for . . . residents of the Mackenzie Valley", including the Carters.

The third item of the Court's relief is still in progress, being the resultant process to be followed by the Board in the consideration of and a decision on the Carter Family claim for compensation. However, the remedial aspects of the relief are simply for the Board to hear the matter of compensation and make a decision on it, all within the regulatory scheme contemplated by the Board's Rules and the *Waters Act*.

This latter point was specifically considered by the Court⁶, and as Justice Shaner noted in the excerpt captioned above, by providing the Carter's the right to respond to NTPC, the Board will have "the information necessary" to make a decision on the NTPC application as required by the statutory and regulatory scheme.

In light of the foregoing, the remedial aspects of the Court's orders in respect of procedural fairness to the Carter Family have been and will be properly followed by the Board. As such, there is no need for the Board to amend the Hearing Agenda as requested by the Carter Family.

⁶ *Ibid*, see para 89-96.

Moreover, we respectfully submit that as a matter of procedural fairness, NTPC has legitimate expectations that the Board will follow its Rules for the order of events at a public hearing, including as more specifically as set out in Section 93 of the Rules. Justice Shaner made note of the doctrine of legitimate expectations in her decision,⁷ and we submit the doctrine applies equally to NTPC for the purposes of the upcoming hearing as it previously did for the Carter Family concerning the opportunity reply to NTPC.

Status of Adverse Effects and Compensation Findings

We lastly respond to the claim by Carter Family Counsel that “the Board has already found that the Carter Family has been adversely affected by the [NTPC] operations under the Licence and that the Carters are entitled to compensation.”

With great respect, this claim misapprehends the previous decisions and findings of the Board, as well as the orders of Justice Shaner.

We submit that the question of whether the Carter Family has been, or will be, adversely affected by NTPC’s use of waters at Nonacho Lake has not yet been conclusively decided by the Board. This is because in its initial decision and licence approval, the Board did not provide any specific findings on adverse effects, but instead left that matter to be decided by NTPC and the Carter Family.

The following was the principal condition on compensation placed upon NTPC in the initial licence approval:⁸

- J.1 The Licensee is directed to determine the nature and extent of the adverse effects its operations shall have on the Deninu K’ue First Nation and the Carter Family.

The only finding of the Board concerning effects of the operations of NTPC on the Carter Family, in the Board’s initial reasons for decision, was stated as follows:⁹

The Carter Family's intervention contained a specific notice of their claim for compensation. Although they acknowledged that the Board's jurisdiction does not allow the Board to determine compensation for past adverse affects, they argued that they do qualify as users of the water who stand to be adversely affected in the future by the continuation of operation of the Taltson facilities. The Board is satisfied that the Carter Family would be adversely affected by the Licensee's operations under this Licence.

⁷ *Ibid*, see para 98-99.

⁸ See Part J – Conditions Applying to Compensation – Licence in letter to Minister dated December 1, 2011. and Reasons for Decision.

⁹ See Reasons for Decision of the Mackenzie Valley Land and Water Board re File MV2011L4-0002, as per Meeting Dated November 24, 2011, Page 11 of 13 re Part J – Conditions Applying to Compensation.

The Board's findings set out in the above captions lack any specificity and clarity as to what specific adverse effects claimed by the Carter Family require compensation to be paid by NTPC. To the contrary, the Board (at the time) clearly directed NTPC to "determine the nature and effect" of its operations on the Carter Family. That direction was never fulfilled because the Minister found the direction to be invalid.

It is therefore clear from the foregoing that at no time have the nature and effects of NTPC's operations on the Nonacho Lake Fishing Lodge been conclusively determined by the Board. Those matters remain to be considered by the Board as part of the current Proceeding. With respect, Counsel to the Carter Family has therefore misapprehended and misstated the legal effect of the Board's previous findings as to adverse effects.

With respect to the claim by Counsel that the Board has already ordered compensation to be paid to the Carter Family, such a claim is also incorrect and misapprehends previous rulings. Justice Shaner's ruling quashed those portions of the Board's previous decision and the Minister's previous approval dealing with compensation for the Carters.

As a result, there is no binding decision of the Board on NTPC with respect to paying compensation to the Carter Family pursuant to the *Waters Act*. Those matters are also remain to be considered by the Board as part of the current Proceeding.

However, the foregoing does serve to illustrate that because these two fundamental and substantial matters remain open for determination by the Board, the proper and fair course is for the Board to apply its Rules and the applicable provisions of the *Waters Act* dealing with Type "A" water licences. As noted above, we submit that the Board has done so in the fashion and orders of events proposed in the current (unamended) Hearing Agenda.

Only in this fashion will the clear intent and direction of Justice Shaner be followed, as to Board process under the regulatory and statutory scheme for NTPC, who by law is the applicant and "the party responsible for complying with the conditions of the licence and paying compensation to adversely affected parties."

This completes the submissions of NTPC. Kindly contact the undersigned with any questions.

Yours truly,



DOUGLAS I. EVANCHUK

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From: [Shannon Allerston](#)
To: [Permits](#)
Subject: FW: Carter Request to Amend Rehearing Agenda - Response of NTPC
Date: Wednesday, May 10, 2017 9:16:18 AM
Attachments: [image001.png](#)
[NTPC Response to Carter Family on Hearinag Agenda Amendment \(01804654x7AC1F\).pdf](#)

NTPC Response/Counter Argument Regarding the Re-Hearing Agenda Amendment Request
MV2011L4-0002

From: Doug Evanchuk [mailto:devanchuk@mross.com]
Sent: May-08-17 3:42 PM
To: Eleanor Olszewski; Shannon Allerston
Cc: Amanda Gauthier; Sean Parker; Sheldon Toner (sheldon@dragontoner.ca); Caroline Wawzonek (caroline@dragontoner.ca); Jessica Buhler; Matthew Miller; Jay Pickett
Subject: RE: Carter Request to Amend Rehearing Agenda - Response of NTPC

Good Afternoon,

Further to the Board's notes from the Pre-Hearing Conference in respect of the above captioned matter, please find enclosed the response of NTPC to the Carter Family.

Regards, Doug



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From: Eleanor Olszewski [mailto:EOlszewski@mltaikins.com]
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Cc: Amanda Gauthier (agauthier@mvwlb.com) <agauthier@mvwlb.com>; Doug Evanchuk <devanchuk@mross.com>; Sean Parker <sparker@mross.com>; Sheldon Toner (sheldon@dragontoner.ca) <sheldon@dragontoner.ca>; Caroline Wawzonek (caroline@dragontoner.ca) <caroline@dragontoner.ca>; Jessica Buhler <JBuhler@mltaikins.com>
Subject: Carter Request to Amend Rehearing Agenda

Hello

In accordance with directions received during our pre-hearing telephone conference call of May 3, 2017 we now enclose, on behalf of the Carter family, our request to amend the rehearing Agenda.

Best regards,
Eleanor

Eleanor A. Olszewski, Q.C.
Partner

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