

July 7, 2014

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Dear Ms. Walli:

Re: EB-2014-0154 - Reply Submissions of TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta")

We are the solicitors for TransAlta in the above mentioned matter. Please find attached the Reply Submissions of TransAlta on its motion seeking an Order of the Board requiring Union to provide full and adequate responses to certain interrogatories.

Should you have any further questions on this matter, please do not hesitate to contact us.

Sincerely,

Norton Rose Fulbright Canada LLP



Elisabeth L. DeMarco

Attachments

- c. Chris Ripley (Union)
Intervenors EB-2014-0154
Lawrie Gluck, Case Manager
Jennifer Lea, Counsel

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF a hearing of the Ontario Energy Board on its own motion in order to determine the Application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations;

AND IN THE MATTER OF a motion brought by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. seeking an order of the Ontario Energy Board requiring Union Gas Limited to provide full and adequate responses to certain interrogatories.

REPLY SUBMISSIONS OF TRANSALTA

JULY 7, 2014

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1. We are counsel to TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("**TransAlta**") in the Ontario Energy Board's (the "**Board's**") EB-2014-0154 proceeding relating to the calculation and application of certain gas costs and charges imposed by Union Gas Limited ("**Union**") under approved rate schedules on direct purchase customers that did, and did not, meet their contractual obligations during the extreme weather conditions of Winter 2014.

2. The following reply submissions are filed by TransAlta in accordance with Procedural Order No. 2, and in support of TransAlta's Notice of Motion dated June 20, 2014, and Written Submissions dated June 25, 2014 (the "**TransAlta Submissions**") seeking an order of the Board (the "**Requested Order**") requiring Union to provide a full and adequate response to each of the following interrogatories:
 - (i) Exhibit B.TransAlta.1 to 12, inclusive;
 - (ii) Exhibit B.TCE.4
 - (iii) Exhibit B.LPMA.4
 - (iv) Exhibit B.CESI.1
 - (v) Exhibit B.Kitchener.3(c) (amended as proposed by the City of Kitchener)collectively, the "**Subject Interrogatories**".

3. These submissions are also filed in response to:
 - (a) the submissions of London Property Management Association (**LPMA**), TransCanada Energy (**TCE**), Natural Resource Gas Ltd. (**NRG**), Canadian Manufacturers & Exporters (**CME**), the Association of Power Producers of Ontario (**APPrO**), and the City of Kitchener (**Kitchener**), dated June 27, 2014, all supporting TransAlta's motion and/or the hearing of the DCQ issues giving rise to TransAlta's Subject Interrogatories in the case of APPrO; and
 - (b) Union's submissions dated July 3, 2014 ("**Union's Submissions**") attempting to unduly narrow the scope of the EB-2014-0154 Application in a manner that is not supported by law, the Board's Notice of Application, the supporting record in this proceeding, and the Board's customer protection mandate.

4. The following TransAlta Reply Submissions are organized into the following four (4) main responding points:
 - I. First, Union's restricted construction of the scope of this proceeding in attempt to

avoid full response to the Subject Interrogatories:

- (a) unduly limits and potentially fetters the Board's jurisdiction under the Ontario Energy Board Act, 1998, as amended (the "**Act**");
 - (b) is not consistent with the Board's May 6, 2014, Letter of Direction and its corresponding Notice of Application; and
 - (c) is antithetical to the Board's consumer protection mandate and recent enhanced customer focus;
- II. Second, Union has made a number of assertions that are not supported by evidence or the record in this proceeding that should be struck from the record of this motion or afforded no weight by the Board;
 - III. Third, Union's attempt to mischaracterize the legitimate concerns of several intervenors in this proceeding relating to the harm resulting from Union's exercise of discretion and potentially discriminatory decision-making under its Board approved tariffs during the extreme weather events as effectively *private contractual disputes* is not supported by the regulatory compact and the Board's consumer protection obligations and oversight of the utility in its monopoly functions; and
 - IV. Fourth, the Board's regulatory efficiency and expediency is not well served by having multiple proceedings dealing with the concerns and issues of the same intervenors, resulting from the actions of the same utility (Union), and arising out of the same set of facts (Union's exercise of discretion and potentially discriminatory decision-making during the same extreme weather conditions of Winter 2014), and the proposed remedies thereto, which affect the same parties to the instant proceeding.

I(a). Union's restricted construction of the scope of this proceeding in attempt to avoid full response to the Subject Interrogatories, unduly limits and potentially fetters the Board's jurisdiction under the Act.

5. In Paragraphs 9 through 19 of Union's Submissions, Union attempts to narrow the scope of the instant proceeding and the Board's jurisdiction to a linear 'yes or no' proposition of whether to accept or reject Union's proposed penalty relief as strictly dictated by Union.
6. TransAlta submits that such a narrow approach as proposed by Union in order to avoid responding to the Subject Interrogatories is not supported by the Act, and unduly limits and potentially fetters the Board's jurisdiction under the Act in a manner that may negatively impact the future exercise of discretion by the Board. Further, Union's unduly narrow interpretation of the scope of this proceeding does not appear to be supported by the six (6) customer/customer group intervenors that support TransAlta's motion and/or

the subject matter of the interrogatories giving rise to the motion.

7. Union's narrow approach is not supported by section 19 of the Act, which provides the Board full jurisdiction to hear and determine all matters of fact and law within its jurisdiction. Nor is it supported by section 20 of the Act, which provides the Board with the authority to exercise its powers and procedures in all matters before it. TransAlta respectfully submits that the Board appeared to exercise its full jurisdiction in denying the summary exemption approach requested by Union and, instead:

(i) directed that an application be filed in light of the significant and material customer impacts, as outlined in paragraphs 5 and 6 of TransAlta's Submissions, and

(ii) granted intervenor status to all directly or indirectly affected customers who applied.

8. Moreover, Union's unduly restrictive 'yes or no' approach to the scope of this proceeding and the Subject Interrogatories is inconsistent with the Board's ability to consider and impose conditions upon its orders pursuant to section 23 of the Act. Union's proposed scope would restrict the Board's review to only a limited number of impacted customers, instead of all customers affected by Union's exercise of discretion and potentially discriminatory decision-making over the extreme weather conditions of Winter 2014 and Union's proposed remedy. TransAlta therefore respectfully submits that the Board should refrain from so limiting its jurisdiction on this motion and in this proceeding.

I(b). Union's restricted construction of the scope of this proceeding in attempt to avoid full response to the Subject Interrogatories is not consistent with the Board's May 6, 2014 Letter of Direction and its Notice of Application

9. At paragraphs 6 through 16 of Union's Submissions, Union attempts to justify its considerable restriction of the Board's jurisdiction to hear affected customers on the basis of the Board's Letter of Direction and Notice of Application in this proceeding. As outlined in paragraphs 6 through 8 of TransAlta's Submissions, this is not supported by the express wording of either the Letter of Direction or the Notice, which:

- (a) clearly reject Union's proposed approach in light of the Board's heightened customer focus and the significant and material customer impacts (Letter of Direction);
 - (b) applies broadly to the "*Reduction of Certain Charges Applied to Direct Purchase Customers*", without limitation to only those charges and the limited exemption proposed by Union (Letter of Direction);
 - (c) mandates a hearing on the grounds that "*some customers may be materially affected by the outcome of the application*" (Letter of Direction);
 - (d) clearly indicates that "*We will also hear arguments from individuals and groups that represent Union Gas Limited's customers and that choose to participate in the OEB's hearing*" (Notice); and
 - (e) makes specific reference to intervenors' rights to be informed and heard by the Board and the ability for intervenors to seek relevant information and material from Union that is in addition to the evidence filed with the application, through interrogatories (Notice).
10. Further, at paragraph 16 of the Union Submissions, Union argues that the Board's Notice was not broad enough to facilitate full public participation in the hearing.
11. TransAlta respectfully submits that the number and nature of intervenors participating in this proceeding, and the six (6) customers/customer groups that have filed submissions on this motion, appears to be clear evidence to the contrary.
12. However, should the Board find that its Notice was not sufficiently broad to address and "*hear arguments from individuals and groups that represent Union Gas Limited's customers and that choose to participate in the OEB's hearing*" as expressly stated in the Notice, TransAlta respectfully submits that the appropriate remedy is not to unduly restrict the proceeding at the expense of customers, but rather to expand the Notice to the benefit of customers.
13. In this manner, in the unlikely event that the Board finds its Notice lacking, TransAlta submits that the Board should proceed in a manner that does not unduly restrict the rights of intervenors to be heard on matters where the Board has created a legitimate expectation that they would be heard, but rather address any such concerns through the Notice, in order to ensure full and fair participation of all customers before the Board.

l(c). Union's restricted construction of the scope of this proceeding in attempt to avoid full response to the Subject Interrogatories is antithetical to the Board's consumer protection mandate and recent enhanced customer focus.

14. As indicated in paragraph 7 of TransAlta's Submissions, the Board's broad public interest mandate under the Act warrants a thorough review of the issues in this proceeding to ensure that all materially impacted customers have the opportunity to be heard.
15. Further, the Board's recent initiatives to enhance customer focus also support a thorough and efficient, consumer-centric approach in order to ensure that all affected customers' issues are addressed through this process.
16. On April 28, 2014 Rosemarie LeClair, Chair and CEO of the Board provided a speech to the Ontario Energy Network wherein she asks:

"How can... the regulator... within its mandate... better align the interests of legislators, utilities and consumers... and achieve all of the objectives with which we are tasked... in a way that keeps the consumer front and centre?" It is that question...that has guided the work of the Board over the last three years...as we have looked to become much more consumer centric in our approach to regulating the energy sector. And much has been accomplished... as we have looked into how we regulate...to ensure that we are providing value to consumers...and that they can see that value....*both in what we do...and how we do it.* " (emphasis added)¹
17. Throughout this proceeding, TransAlta has maintained that its issues and concerns arise from Union's exercise of discretion and potentially discriminatory decision-making by Union as it implements and applies its Board approved tariffs. It appears as though a number of intervenors supporting TransAlta's motion are in the same position and hope to have their concerns addressed in an efficient and effective manner as contemplated by the Chair of the Board.
18. The financial impact of Union's gas related charges on affected customers are very significant. They arise over the same period of time, through the same facts, as a result of the same extreme weather conditions, and are impacted by the precise penalties, that Union attempts to provide exemptions for under the application. TransAlta respectfully

¹ "Consumer-Centric Regulation: From Vision to Reality". Speech of Rosemarie T. LeClair, Chair and CEO, Ontario Energy Board, to the Ontario Energy Network, Toronto, April 28, 2014.

submits that the issues of impacted customer intervenors should therefore be addressed herein, and the Subject Interrogatories should be answered in full.

II. Union has made a number of assertions that are not supported by evidence or the record in this proceeding and therefore should be struck from the record of this motion or afforded no weight by the Board.

19. TransAlta objects to paragraphs 20, 21, 24, and 27 of Union's Submissions and asks that they be struck from the record of this proceeding or afforded no weight, as they are not supported by evidence or any material before the Board.
20. Paragraph 20 of Union's submissions indicates that nowhere in TransAlta's motion or submissions does it describe the nature of its concerns. This is clearly not supported by the record as summarized in paragraphs 9 through 11 and paragraph 16 of TransAlta's Submissions whereby TransAlta clearly summarized and footnoted the many instances where it outlines its issues around Union's exercise of discretion and decision making in a potentially discriminatory manner over the Winter 2014 and its issues regarding Union's unsupported approach to its tariff as it pertains to the DCQ.
21. Paragraph 21 of Union's submissions suggests that the many parties supporting TransAlta are doing so on the belief that its concerns pertain solely to its balancing obligations. This statement by Union is purely conjecture - and is clearly not supported by the record in this hearing, where:
 - (a) the Subject Interrogatories clearly detail the nature of TransAlta's concerns;
 - (b) APPrO's Submissions dated July 3, 2014 clearly indicate its understanding that TransAlta's issues pertain to the obligated DCQ and support the hearing of these issues as they are serious and relevant to the sector; and
 - (c) all of NRG, LPMA, and Kitchener support the relief requested in relation to the Subject Interrogatories on grounds that are far broader than Union's unsupported statement.
22. Paragraph 24 of Union's Submissions indicates that "TransAlta takes the position that the DCQ should be permanently revised..." This is clearly not the case as indicated in the supporting material filed by Affidavit of Ms. Tavares. TransAlta outlines in detail that its position is simply that Union should be bound by its own Board approved terms and conditions of contract, which, on any plain legal interpretation do not support a

permanent value. The same error is made in paragraph 27 of Union's Submissions. A number of the Subject Interrogatories probe and are relevant to understanding Union's apparently unsupported position in this regard.

23. TransAlta therefore respectfully requests that the above-mentioned paragraphs be struck from the record of this motion or afforded no weight by the Board in its consideration of this motion.

III. Union's attempt to mischaracterize the legitimate concerns of several intervenors as effectively *private contractual disputes* is not supported by the regulatory compact and the Board's consumer protection obligations and oversight of the utility in its monopoly functions.

24. At paragraphs 20 through 28 of Union's Submission, Union effectively attempts to characterize TransAlta's concerns as a private contractual dispute with Union. Similarly, at paragraphs 29 through 34, Union takes the same approach to the issues and concerns of Kitchener. Further, the written record between NRG and Union, also appears to reflect Union's attempt to similarly relegate NRG's concerns.
25. TransAlta respectfully submits that Union has thereby mischaracterized a number of its customers legitimate concerns regarding the monopoly utility's interpretation and implementation of its Board approved tariffs in a manner that is inconsistent with the regulatory compact that the Board is called upon to enforce.
26. TransAlta submits that Union is a monopoly utility with rates and privileges subject to the Board's economic regulation and customer protection mandate. The basic essence of this regulatory compact is outlined by McDermott who indicates that:

In order to facilitate this relationship between society and the ... utility, the concept of a regulatory contract, compact, or bargain has been employed to characterize the set of mutual rights, obligations, and benefits that exist between the utility and society. ... Under this contract both the utility and consumers give up certain rights, or in contract law terms, exchange detriments. Utilities accept the obligation to serve and charge regulated cost-based rates, and customers accept limited entry (i.e., loss of choice) for protection from monopoly pricing. This bargain represents an ongoing mutual relationship between the owners of the utility (and their agents) and the customers; in effect, a relational contract overseen by the regulator... Under this agreement, the utility is provided the opportunity to recover its actual legitimate or prudent costs—determined by a public examination of the utility's outlays—plus a fair return on capital investment as measured by the cost of obtaining capital in a competitive capital market. Investors will only provide capital for provision of utility services if they anticipate obtaining a return that is consistent with returns they might expect from employing their capital in an alternative use with

similar risk; customers will only accept utility rates if they perceive that the rates fairly compensate the utility for its costs, but are not excessive as a result of the utility taking advantage of its privileged position." (emphasis added)²

27. TransAlta's issues in this proceeding that are reflected in the Subject Interrogatories arise from Union's actions, which do not appear to be supported in a regulatory regime whereby Board approved tariffs and charges are being interpreted unilaterally by the monopoly utility in a manner that is potentially discriminatory to certain customers, does not appear to be supported by the posted tariff and related contract, and appears to be inconsistent with the Codes administered by the Board.
28. TransAlta submits that this potentially discriminatory exercise of discretion and decision making by the monopoly utility has clearly negatively affected the many intervenors in this proceeding, and requires the Board's oversight in order to protect customers pursuant to the Act and the regulatory compact in order to ensure that customers' costs are not excessive as a result of the utility taking advantage of its privileged position.
29. As a result, TransAlta hereby requests that the Board grant the relief requested and require Union to make full and fair response and provide the information requested in the Subject Interrogatories.

IV. The Requested Order is likely to assist the Board in achieving efficiency and expediency in its current and future procedures.

30. TransAlta submits that the significant customer impacts and proposed remedy(ies) that are the subject matter(s) of this proceeding all result from Union's exercise of discretion and decision-making, and its calculation and application of certain gas costs and charges that are imposed under Board approved rate schedules on direct purchase customers, which both did, and did not, meet their contractual obligations during the extreme weather conditions of Winter 2014.
31. Consistent with the submissions of Kitchener and paragraphs 24 through 26 of the TransAlta Submissions, and contrary to paragraphs 12 and 13 of Union's Submissions,

² Cost of Service Regulation in the Investor-Owned Electric Utility Industry: A History of Adaptation, prepared for Edison Electric Institute by Dr. Karl McDermott, June 2012 at p. 4 and 5

TransAlta submits that the Board's regulatory efficiency and expediency is not well served by having multiple proceedings.

32. TransAlta submits that the issues and concerns of the intervenors in this proceeding result from the same facts (Union's exercise of discretion and potentially discriminatory decision-making during the same extreme weather conditions of Winter 2014), dealing with the same utility (Union), and Union's proposed remedies thereto. The Board's efficiency in dealing with the issues arising from these same facts and parties is not enhanced by multiple uncoordinated proceedings.
33. In contrast, TransAlta submits that proceeding in a coordinated manner best allows the Board to control its procedures and use the Board's resources in the most efficient and effective manner, and thereby dispose of all related issues pertaining to Union's actions and proposed remedies most expeditiously. In doing so, TransAlta submits that the Board will best reflect its stated intent to ensure that it is providing value to consumers both in what it does and how it is done.³
34. In conclusion, TransAlta submits that the Subject Interrogatories:
 - (a) relate squarely to the issue of Union's discretion and decision-making resulting in significant gas costs and customer impacts during the extreme weather of Winter 2014, and Union's proposed remedy that is before the Board in its full discretion; and
 - (b) are likely to provide the Board with information that is relevant and helpful to the customer-focussed decision that the Board must make in this proceeding.

V. Relief Requested.

35. TransAlta hereby confirms its current and prior submissions on the Subject Interrogatories and their relevance and necessity to TransAlta in its full and fair participation, and the Board in its full consideration and decision making, in the EB-2014-0154 Proceeding. TransAlta hereby requests the following relief:

An order or order(s) of the Board:

- (a) requiring Union to provide a full and adequate response providing the requested information to each of the following Subject Interrogatories:

³ *ibid*, paragraph 16.

- (i) Exhibit B.TransAlta.1 to 12, inclusive;
 - (ii) Exhibit B.TCE.4
 - (iii) Exhibit B.LPMA.4
 - (iv) Exhibit B.CESI.1
 - (v) Exhibit B.Kitchener.3(c) (amended as proposed by the City of Kitchener)
- (b) providing TransAlta and Intervenors with an extension of time to file their evidence in this matter in order to accommodate any information arising out of this Motion; and
- (c) such further and other relief as counsel may request and the Board deems appropriate.

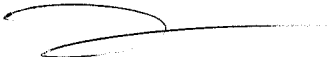
36. In the alternative, if the Board determines that the Subject Interrogatories do not fall within the scope of the current proceeding, TransAlta hereby requests an order or order(s) of the Board either:

- (a) revising and reissuing the Board's Notice of Application in this proceeding; or
- (b) establishing a separate proceeding

in order to ensure that all customers, like TransAlta, which have been materially and negatively impacted by Union's exercise of discretion, decision making and unsupported calculation and implementation of Board approved rates and contracts during the extreme weather conditions of Winter 2014, are provided with the right to be heard and potential redress for such harm.

All of this is respectfully submitted by TransAlta, this 7th day of July, 2014.

Norton Rose Fulbright Canada LLP



Elisabeth L. DeMarco

Attachments

- c. Chris Ripley (Union)
Intervenors EB-2014-0154
Lawrie Gluck, Case Manager
Jennifer Lea, Counsel