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EMAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario
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Dear Ms. Walli:

Re: Complaint by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta")

We are counsel to Union Gas Limited ("Union"). We write in response to Elisabeth DeMarco's letter addressed to you dated December 3, 2014, submitted on behalf of TransAlta (the "TransAlta Letter").

The TransAlta Letter requests a "preliminary determination" from the Ontario Energy Board as to whether the Board has, and will exercise, jurisdiction to interpret the terms of and settle any amounts owing under a gas storage and distribution contract said to be in place between TransAlta and Union. Should the Board determine that it does not have jurisdiction, TransAlta requests that the Board refer the dispute to binding arbitration.

For the reasons that follow, Union submits that the Board should reject TransAlta's request.

1. No Contractual Dispute Between the Parties

The TransAlta Letter refers to a "T1/T2 Gas Storage and Distribution Contract dated November 1, 2012" between the parties ("the Old Contract"). In a nutshell, TransAlta seeks an order from the Board that the Daily Contract Quantity of Gas it is required to deliver to Union under the Old Contract is 12,912GJ/day.

The fundamental problem with TransAlta's position is that the Old Contract no longer governs the parties' relationship. Remarkably, this fact goes entirely unstated in the TransAlta Letter.

By notice dated July 30, 2014, and effective November 1, 2014, TransAlta terminated the Old Contract. As it advised Union, "Please accept this e-mail as notice that TransAlta wishes to terminate our gas delivery and storage T-2 contract at Sarnia, effective November 1, 2014. We look forward to discussing alternate contract parameters for a replacement contract."

Following termination, Union and TransAlta negotiated the terms of a replacement contract. On October 31, 2014, TransAlta executed a new T2 Gas Storage and Distribution Contract effective November 1, 2014 (the "New Contract"). The New Contract contains revised DCQ parameters acceptable to both parties. No concerns are expressed in the TransAlta Letter relating to the New Contract and none have been expressed to Union otherwise. The New Contract is attached to this letter. The Old Contract is attached to the TransAlta letter.

In the result, there is no existing contractual dispute between the parties that requires adjudication by the Board. TransAlta's request that the Board adjudicate a past dispute that has no bearing on the rate or terms of service applicable going forward should be rejected.

2. Complaints Relating to Old Contract without Merit and Outside Board Jurisdiction

In any event, TransAlta's complaints relating to the Old Contract are without merit on their face and its request that the Board determine "amounts that may be owing to TransAlta" is beyond the Board's jurisdiction.

No Merit to Complaints

First, in Union's view, there is no merit to TransAlta's suggestion that the maximum DCQ quantity applicable under the Old Contract was 12,912 GJs per day. As specifically set out in Schedule 1 to the Old Contract,[1] TransAlta's Obligated DCQ was 17,904 GJs per day at Dawn. In accordance with section 2.01 of Schedule 2 of the Old Contract, TransAlta was required to deliver the DCQ to Union on a Firm basis every day. There was no ambiguity in the Old Contract with respect to TransAlta's Obligated DCQ.

Further, TransAlta's own conduct under the Old Contract confirms Union's position. Last winter, TransAlta regularly delivered 17,904 GJs of gas to Union at Dawn. In addition, TransAlta's use of storage capacity under the Old Contract was also inconsistent with the position it is now taking. Under section 2.04 of Schedule 2 of the Contract, TransAlta was entitled to storage space equal to 15 times the Obligated DCQ for the Contract Year. Since TransAlta's Obligated DCQ was 17,904 GJs per day, as reflected on Schedule 1, its Firm Cost-based Storage Space was 268,000 GJs (approximately 15 x 17,904). If TransAlta's Obligated DCQ were 12,912 as it alleges, its Firm Cost-based Storage Space would have been approximately 193,680 GJs (15 x 12,912). Yet, on 26 days in November 2013, 16 days in December 2013 and 5 days in January 2014, TransAlta's storage balance exceeded 193,680 GJs. Thus, there is no merit to TransAlta's assertion that the maximum DCQ that Union may require under the Contract was 12,912 GJs per day.

There is similarly no merit to TransAlta's suggestion that STAR applied to the Old Contract. STAR does not apply to distribution contracts; as the name implies, it relates to storage and transmission (or transportation).

STAR does not apply in connection with the Obligated DCQ requirement in the Old Contract. STAR creates requirements for non-discriminatory access to transportation capacity (section 2). Nothing in STAR purports to apply to the terms of distribution contracts like the Obligated DCQ requirement.

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[1] T1/T2 Contract, Sched. 1, Tab 2

Finally, contrary to the TransAlta Letter, the simple fact that Union is subject to STAR in relation to other activities undertaken by it does not render STAR applicable in this context.

The Board has no Jurisdiction to Award Damages

In substance, TransAlta is seeking a determination by the Board that Union breached the Old Contract and an award of damages in respect of that alleged breach. In Union's submission, the Board has no jurisdiction to make this award.

None of the provisions of the *Ontario Energy Board Act, 1998* to which TransAlta refers give the Board jurisdiction to alter, interpret or give effect to the terms of the Old Contract, which is a private commercial agreement entered into between Union and TransAlta, both sophisticated commercial parties, where no concerns are raised relating to the rate or terms of service presently applicable to TransAlta. Any dispute as to the meaning of the terms in the Old Contract, and any legal proceeding to determine amounts owed under the Contract, is properly the subject of civil litigation before the courts, not of a proceeding before the Board.

Indeed, in an analogous case, the Court of Appeal confirmed that the interpretation of storage leases and the granting of remedies pursuant to those contracts is within the jurisdiction of the courts and is not within the exclusive jurisdiction of the Board.[2] Further, in *Garland*, the Supreme Court of Canada expressly held that the Board does not have jurisdiction to award damages.[3] Although the dispute in that case involved a rate order, at its heart it was a private law matter within the competence of the civil courts and the Board did not have jurisdiction to order the remedy sought by the plaintiff.

Likewise, the Board has no jurisdiction to compel Union and TransAlta to arbitrate a dispute. A private dispute is only subject to arbitration if both parties consent. Union does not consent to arbitrating this dispute with TransAlta. The proper forum to resolve TransAlta's complaints in the Ontario Superior Court of Justice. As Union has already advised TransAlta, Union is prepared to consent to having the dispute brought before the Superior Court of Justice's Commercial List.

TransAlta appears to be taking the position that the Board may refer the dispute to arbitration by applying section 5.1.1 of STAR. As set out above, STAR does not apply. In any event, section 5.1.1 provides only that gas storage companies, transmitters and integrated utilities must develop a dispute resolution process and post the process on their website. Nothing in STAR purports to require parties to submit to binding arbitration, even where STAR does apply.

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[2] *Tribute Resources v. 2195002 Ont. Inc*, 2012 ONSC 25 at para. 24, aff'd 2013 ONCA 576 at para. 29; *Tribute Resources v. McKinley Farms*, 2010 ONCA 392 at paras. 18-19.

[3] *Garland v. Consumers Gas Co.*, 2004 SCC 25 at para. 70.

Yours truly,

Crawford Smith

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