EB-2014-0363

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 an application by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta") for certain preliminary determinations of the Ontario Energy Board in regard to the interpretation of the T1 / T2 contract.

WRITTEN REPLY SUBMISSIONS OF TRANSALTA

1. TransAlta is in receipt of Union Gas Limited's ("Union's") written submissions filed on the evening of April 6, 2015. The following sets out TransAlta's written reply submissions.

2. TransAlta has asked the Board to determine three (3) specific preliminary jurisdictional issues related to the TransAlta-specific complaint and become seized of the broader, sector-wide issue if Union and affected entities, including APPrO and IGUA members cannot reach a negotiated solution before June 30, 2015. The Board has invited submissions of other entities on this last tenet of the requested relief. TransAlta is seeking a ruling on these threshold issues and has not put the determination of the substance of its complaint before the Board at this time.

3. Union's submissions at paragraphs 12 through 14 of its written submissions deal squarely with the merits of TransAlta's complaint, and not the preliminary issues now before the Board. TransAlta therefore asks that the Board strike those paragraphs from the record at this time.

A. Omitted Background and Context

4. The matters that are before the Board in this proceeding arise out of: (i) a long-standing, sector-wide, natural gas electricity interface review issue related to discriminatory obligations for *only certain customers* to deliver an obligated daily contract quantity of gas (ODCQ), which has resulted in (ii) a TransAlta-specific complaint related to the harm that it has suffered as a result of being subject to discriminatory ODCQ terms and conditions of a combined gas transportation/storage contract, under the T1/T2 rates and rate schedule regulated by the Board.

5. In the winter of 2014, TransAlta was forced to purchase and deliver uneconomic gas, which it did not need and was prevented from freely selling, at "obligated DCQ" quantities, which were not supported by the express T1/T2 contract wording then in force. Contrary to Union's suggestion in paragraphs 3 and 7- 11, inclusive, these challenges are not remedied by a new contract, when a limited number of electricity generation and other customers continue to incur uneconomic ODCQ terms and conditions and other customers do not. In fact, Union relied on the flexibility benefits of an unobligated DCQ for certain T1/T2 contract to support its leave to construct application in EB-2014-0147 as set out in Appendix I to TransAlta's Application.

6. Contrary to Union's submissions in paragraphs 1 through 23, the preliminary issues and requested relief that are now before the Board do not result from a fleeting, "Old Contract/New Contract" commercial matter between two private sector parties, but rather a long standing issue of monopoly utility terms of service for certain customers under a regulated rate schedule that the Board has been seized of in each of the following proceedings.

(i) NGEIR

7. The Board first considered the ODCQ issue and issues related to the changing gas service needs of electricity generators in the Natural Gas Electricity Interface Review (EB-2005-0551, or "NGEIR").

8. The NGEIR Decision also included a Union Settlement Agreement – that expressly addressed the ODCQ issue in that early context and initially allowed for differential treatment of electricity generation customers based on their size and age stating that:

> *"[f]or New T1 or U7 customers and for existing customers with new firm incremental loads greater than 1,200,000 m3 per day, at the customer's option there will be no obligated DCQ requirement, subject to the facilities required to support the incremental load being economic*."[1]

9. In the NGEIR Decision with Reasons, dated November 7, 2006 ("NGEIR Decision"), the Board found that "it is essential that there be clear, standardized and consistently applied rules"[2] for allocating certain utility storage services to customers, those rules were not in effect, and related contract changes to the T1 contract were required and would be done by the Board in a controlled an deliberate manner.[3]

10. Further, in the NGEIR Decision, the Board expressly took jurisdiction over and considered the specific non-uniform terms and conditions of certain T1 contracts, finding that: *"If there are to be non-standard allocations**, it is important that the Board understand the circumstances and be satisfied that any such exceptions are justified.** … the Board directs Union to file with the Board, on a confidential basis if necessary, the terms and conditions of these three contracts, the basis for storage the allocations, **and the terms and conditions of any other multi-year T1 storage contracts***".[4]

11. As a result, contrary to Union's submissions in paragraphs 15-23 (in which Union attempts to conflate the Board's jurisdiction to review specific terms and conditions of a utility contract with the Board's jurisdiction to award damages), TransAlta respectfully submits that the NGEIR decision is clearly relevant. It not only expressly indicates that the Board has jurisdiction over the specific terms and conditions of individual T1 customer contracts, but that the Board has actively exercised that jurisdiction to review the terms and conditions of specific T1 contracts.

(ii) EB-2007-0724/0725

12. In 2008, the Board then attempted to develop "clear, standardized, and consistently applied rules" related particularly to T1 customers, their storage needs and the utility allocation of storage capacity in EB-2007-0724 and EB-2007-0725.[5]

---

[1] Union Gas Settlement Agreement in NGEIR Decision, dated June 13, 2006 at p. 17
[2] NGEIR Decision at p. 88-90
[3] NGEIR Decision at p. 90
[4] NGEIR Decision at p. 93 (emphasis added)
[5] Decision with Reasons dated April 29, 2008

(iii) STAR

13. In 2009, the Board then developed and issued the Storage and Transportation Access Rule for the fundamental purpose of ensuring non-discriminatory access to storage and transportation services.[6] The STAR expressly applies to transmitters and integrated utilities, including gas distributors providing competitive storage services, and covers mixed storage and transportation contracts like the T1/T2 contract(s) in question. STAR requires, among other things, Union to provide for: (i) standard terms of service and form of contract for transportation services including, among other things, an alternate dispute resolution mechanism.[7]

14. However, despite the implementation of the STAR and ongoing changes in the electricity sector requiring electricity generators to be more dispatchable, the discriminatory treatment of customers in relation to ODCQ requirements has never changed and continues to result in significant challenges for the sector.

15. Contrary to Union's assertions in paragraph 6, TransAlta is not seeking that the Board resolve all such sector-wide ODCQ issues in this proceeding, but rather resume its ongoing oversight to initiate a proceeding to review the ODCQ issue if it is not resolved through consensus in ongoing negotiations with Union on or before June 30, 2015, after which winter season 2016 gas arrangements should be made.

(iv) Natural Gas Market Review (NGMR)

16. The current and ongoing challenges for the sector were recently put before the Board by APPrO in the context of the Board's recent Natural Gas Review (EB-2014-0289) by letter dated September 30, 2014 and submissions dated November 23, 2014 and December 3, 2014 (as set out at pages 2 and 3 of Appendix A to TransAlta's March 23, 2015 letter to the Board).

17. The general differential treatment of obligated DCQ issue persists, and was not expressly addressed in the March 31, 2015 Board Staff Report on the Natural Gas Market Review or in the Board's stated next steps in relation to that review.

18. Similarly, contrary to Union's suggestions, the resulting harm and inequities continued in 2015, under TransAlta's "New Contract" with Union, which still includes an ODCQ while the bigger ODCQ issue is pending resolution.

19. Union continues to consult with a number of entities that are impacted by the discriminatory treatment of ODCQ, but currently there is little progress toward a consensus based resolution and there are concerns about the ODCQ issue remaining unresolved prior to the 2015/2016 winter season.

(v) Union Penalties (EB-2014-0154)

20. The harm resulting from the ODCQ issue is not academic, and gave rise to very significant inequities and damages to TransAlta in 2014 that are the subject of the TransAlta complaint giving rise to the preliminary issues now before the Board in EB-2014-0363, as a result of the Board's express direction in EB-2014-0154.

21. The Board did not, as Union suggests in paragraph 19 of its submission, decide that the Board did not have jurisdiction to consider Union's discriminatory application of the ODCQ

[6] STAR and supporting Decision in EB-2008-0052
[7] STAR definitions and s.2.3.4(viii) and s.5.1

terms and conditions of services in the T1/T2 contract. The Board's actual ruling was as follows:

> *Although the issues raised by TransAlta and Kitchener in their interrogatories and motion materials do not fall within the scope of this proceeding,* ***that does not mean that the issues raised by these parties are not valid. The issues raised represent legitimate issues that may fall within the jurisdiction of the Board.***
>
> ***TransAlta and Kitchener may wish to file a complaint with the Board by way of letter alleging that Union is failing to comply with an enforceable provision under the Act (e.g. a provision of a rate order of the Board). The matter could then be considered by the Board to determine if a compliance review is warranted. Alternatively, if TransAlta or Kitchener accepts that Union is properly implementing a rate approved by the Board, the letter could request that the Board on its own motion review the rate in question. Such a letter would have to address the Board's jurisdiction, any issue of retroactivity and the exceptional circumstances that would persuade the Board to inquire into the matter.*** *The Board has set just and reasonable rates for Union and the resolution of contractual disputes is generally outside of the mandate of the Board.*[8]

B. <u>Additional Requested Relief</u>

22. TransAlta relies upon the grounds set out in its March 23, 2015 letter in support of its additional requested relief. The issue of differential treatment of ODCQ issues has been within the Board's purview and consideration since 2005. It continues to have very significant and damaging impacts for a number of stakeholders, who continue to incur inequitable costs and spend resources in attempting to resolve the issue through Board for a including the NGMR, the Union penalties case (2014-0154), and ongoing Union consultations – with little to no redress at this point.

23. The issue is relevant, pressing, supported by APPrO, Veresen, and IGUA, and therefore warrants of the Board's involvement and decision-making should a consensus solution not be reached as the next winter and gas contract negotiation season approaches.

24. TransAlta has requested that, if no consensus is reached through the Union consultations on or before June 30, 2015, the Board order that the ODCQ issue become: the subject of and NGMR proceeding, like the annual combined Natural Gas and Electricity 'Energy Sector Forum' as recently announced by the Board on March 31, 2015; a Union rate proceeding before 2016, or a dedicated proceeding.

25. Contrary to Union's submissions, TransAlta did not ask the Board to resolve the substance of the sector-wide ODCQ matter in this proceeding and the additional requested relief is properly before the Board.

C. <u>Preliminary threshold issues</u>

26. TransAlta relies upon it submissions set out in December 3, 2015 Complaint to the Board.

27. TransAlta submits that, contrary to Union's submissions in paragraph 4, the Board's lengthy and significant history and involvement on the terms and conditions of the T1/T2 contract, under the T1/T2 rates and rate schedule regulated by the Board, and specific involvement on the ODCQ issue over the last decade make the Board, and not the courts, the most appropriate and expert forum for resolution of the TransAlta Complaint.

[8] EB-2014-0154, Decision on Motion and Procedural Order No. 3 dated July 29, 2014 at p. 6 and 7 (emphasis added)

28. Alternatively, if the Board decides that it does not have or will not exercise its jurisdiction to hear either the substance of the Complaint or matters related to damages, TransAlta submits that the Board should order that the matter be resolved through binding arbitration to binding arbitration by a qualified arbitrator with considerable expertise in Ontario energy law.

29. However, before the Complaint falls squarely before a decision-maker, TransAlta is seeking a determination of the Board the three preliminary jurisdictional issues set out in its December 3, 2014 Complaint Letter. As this will shape both the substance and process surrounding the Complaint.

30. Board jurisdiction to interpret the T1/T2 Contract. Contrary to Union's submissions in Paragraphs 15-23, TransAlta submits that the Board both has and should exercise its jurisdiction over the T1//T2 contract implementing the T1/T2 rates and rate schedule regulated by the Board. As indicated in paragraphs 7-11 above, the Board both has, and has exercised that jurisdiction in relation to specific T1 contracts in the context of the NGEIR.

31. The T1/T2 Contract is not simply "a private commercial agreement" entered into by "sophisticated commercial parties" as Union indicates in paragraph 16 of its submissions. It is the embodiment of the regulatory compact implementing Board regulated rates and rate schedules that are intended to ensure that all customers have fair and equitable access to monopoly services.

32. The T1/T2 utility contract has been the subject of a decade of related Board jurisprudence and is fundamentally intended to implement the regulated rates determined by the Board. This was not the case in the series of Tribute Resources cases that Union relies upon, where the courts were first seized with a matter between a private landowner and a private storage company, and the landowner holding company was arguing that the court's had no jurisdiction to determine a matter that the Board was now seized with. As a result, the Tribute cases are entirely distinguishable.

33. Similarly, TransAlta submits that the exercise of Board jurisdiction in relation to the interpretation of the T1/T2 contract, would not, as Union suggests, constitute retroactive rate-making, but rather the appropriate oversight, customer protection, and control of current and future utility implementation of Board approved utility rates and rate schedules.

34. In summary, TA submits that the Board both has, and should exercise its, jurisdiction to determine the correct interpretation of the T1/T2 contract on the following grounds:
    a. First – the Board's historical supervisory jurisdiction and decade of involvement in reviewing the T1/T2 contracts supports the Board's necessary and continued jurisdiction over at least the interpretation of the contract.
    b. Second – the T1/T2 Contract falls within the Board's rate-making and oversight jurisdiction (including its administration of compliance with the STAR)
    c. Third – Union's conduct and the terms of the T1/T2 contract are contrary to the STAR (sections 1.1, definitions and 2.3, 5)– over which the Board has enforceable jurisdiction
    d. Fourth – the Board has Broad jurisdiction to review contracts relating to the storage, transportation and distribution of natural gas – and has exercised that jurisdiction.
    e. Fifth, if the courts and not the expert Board determine this issue, the Board may face restrictive and uninformed limits on the Board's exclusive and expert jurisdiction. If the courts become seized of the matter and make a determination that is not informed by the requisite expertise, context, and long OEB procedural history in relation to these storage and transportation contracts and the related

STAR – there could be wide reaching consequences for the Board. TransAlta therefore submits that all of these issues are most appropriately within the expert jurisdiction of the OEB and therefore should be determined by the OEB

35. Board has limited jurisdiction to award damages. While the Board and the courts have generally limited the Board's jurisdiction to award damages in relation to a contract, the courts have also recently ruled that the Board has the jurisdiction to award restitution-based damages.[9]

36. In *Summit Energy*, the Divisional Court distinguished Garland (as relied upon by Union) to uphold the Board's order of restitution damages under a private contract between a marketer and a customer pursuant to s. 112.3 of the Ontario Energy Board Act.

37. TransAlta acknowledges that the scope of the Board's jurisdiction to impose damages under a contract and willingness to exercise that jurisdiction will be limited by the specific facts of the matter at issue. However, TransAlta submits that the nature and extent of the harm incurred by Union's unsupported interpretation and implementation of the utility T1/T2 contract may very well warrant the Board's exercise of jurisdiction to award damages under the T1/T2 contract that is the subject of the Complaint.

38. In the alternative, the Board may decide to hear the Complaint and determine the appropriate contractual interpretation of the ODCQ issue in light of its clear and exclusive expertise relating to the history context and substance of the T1/T2 contracts, and subsequently refer any applicable quantification and award of damages to arbitration by an arbitrator experienced in Ontario energy law.

39. The Board has jurisdiction to mandate arbitration. Contrary to Union's submission at paragraph 17, the T1/T2 contract does not have a dispute resolution clause and merely indicates that the parties will attorn to the jurisdiction of the Courts of Ontario as part of a forum conveniens governing law clause.[10]

40. The Board does, in fact, have express jurisdiction to require parties to participate in alternative dispute resolution on a mandatory basis. Rule 29.01 of the Board's Rules of Practice and Procedure stipulates that: The Board may direct that participation in alternate dispute resolution ("ADR") be mandatory.

41. The STAR (s.5.1, and s.2.3.4(viii)) also expressly requires that a storage provider, transmitter, or integrated utility have and implement a dispute resolution mechanism.

42. On these grounds, TransAlta submits that the Board both has, and should exercise its jurisdiction to order any preliminary issue that it will not determine, to be determined by and through binding arbitration by an arbitrator experienced in Ontario energy law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

[Original signed by Lisa DeMarco]

Lisa (Elisabeth) DeMarco, Counsel to TransAlta

[9] Summit Energy Management Inc. v. Ontario (Energy Board), 2013 ONSC 318, 228 ACWS 93d) 306 ("Summit Energy")
[10] T1/T2 Contract General terms and Conditions, s. 12.03