

**Ontario Energy
Board**

**Commission de l'énergie
de l'Ontario**



EB-2014-0363

**IN THE MATTER OF AN APPLICATION BY
TRANSALTA CORPORATION**

DAILY CONTRACT QUANTITY OBLIGATION INTERPRETATION

PRELIMINARY ISSUES

**DECISION AND ORDER
May 7, 2015**

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EB-2014-0363

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. for certain preliminary determinations of the Ontario Energy Board in regard to the interpretation of the T1 / T2 contract.

BEFORE: Cathy Spoel
Presiding Member

Marika Hare
Member

DECISION AND ORDER
May 7, 2015

INTRODUCTION AND SUMMARY

TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. (TransAlta) filed an application dated December 3, 2014 seeking certain preliminary determinations of the Ontario Energy Board (OEB) in regard to the interpretation of TransAlta's T1 / T2 contract with Union Gas Limited (Union) and the alternative dispute resolution requirements applicable to contracts for transportation services.

TransAlta is a licensed natural gas fired electricity generator with operations located in Sarnia, Ontario. TransAlta is a customer of Union and is party to a T1 / T2 gas storage and distribution contract with Union.

TransAlta asked the OEB to make determinations on the following three preliminary issues:

1. Does the OEB have, and will it exercise, jurisdiction to determine the correct interpretation of TransAlta's daily contract quantity (DCQ) obligations under its T1 / T2 contract?
2. If the OEB determines that it does have jurisdiction to determine the correct interpretation of TransAlta's DCQ obligations under its T1 / T2 contract, does the OEB have, and will it exercise, jurisdiction over the amounts that may be owed to TransAlta under the T1 / T2 contract?
3. If the OEB determines that it does not have jurisdiction to determine the correct interpretation of TransAlta's DCQ obligation under its T1 / T2 contract, will the OEB refer TransAlta's application to binding arbitration in accordance with the *Storage and Transportation Access Rule* (STAR)?

TransAlta's application arose due to a disagreement with Union regarding the correct interpretation of its contractual DCQ obligations. TransAlta is of the view that Union's interpretation of TransAlta's contractual DCQ obligations is not correct. TransAlta stated that Union's incorrect interpretation of the DCQ obligations forced TransAlta to purchase and deliver uneconomic gas to Union, which resulted in significant harm to TransAlta.

The Process

In the Notice of Application and Procedural Order No. 1 issued on January 27, 2015, the OEB adopted Union as an intervenor in the proceeding and determined that it would have an oral hearing of TransAlta's application.

In a letter to the OEB, dated March 23, 2015, TransAlta requested that the relief set out in its application be amended. TransAlta asked the OEB to review and resolve certain sector-wide obligated DCQ issues if these issues could not be resolved through consultations with Union before June 30, 2015.

The OEB allowed interested parties to make submissions on the request for additional relief, which was considered at the oral hearing held on April 7, 2015. TransAlta, Union, the Industrial Gas Users Association (IGUA), and OEB staff made submissions on the preliminary issues and the relief amendment request. The Association of Power Producers of Ontario (APPrO) and Veresen Inc. also filed submissions on the relief amendment request.

OEB Findings

1. Does the OEB have, and will it exercise, jurisdiction to determine the correct interpretation of TransAlta's DCQ obligations under its T1 / T2 contract?

The OEB finds that it does have the necessary jurisdiction to interpret the contract between TransAlta and Union.

The OEB finds that TransAlta's T1 / T2 gas storage and distribution contract with Union is not solely a private commercial contract. The contract incorporates the OEB-approved T1 rate schedule. Ensuring that the contract properly reflects and implements an OEB-approved rate schedule is an aspect of the OEB's jurisdiction to set rates.

Union argued that the interpretation of TransAlta's contract is within the jurisdiction of the courts as section 12.03 of the contract provides that "the parties to this contract exclusively attorn to the jurisdiction of the Courts of Ontario."¹ The OEB finds that parties cannot contract out of any aspect of the OEB's regulatory oversight, which includes not only the setting of rates but also ensuring that they are properly assessed to customers.

¹ TransAlta Gas Storage and Distribution Contract, November 1, 2012, General Terms and Conditions, section 12.03.

2. Does the OEB have, and will it exercise, jurisdiction over the amounts that may be owed to TransAlta under the T1 / T2 contract?

The OEB agrees with the arguments of Union and OEB staff that it does not have jurisdiction over the amounts that may be owed to TransAlta under its contract with Union.

In the Garland decision, the Supreme Court of Canada held that the OEB does not have jurisdiction to award damages.²

If the issue in this case was whether Union had charged TransAlta the wrong rate, or had overcharged for a service under the contract, the OEB would have the necessary jurisdiction to rectify the issue. This would be analogous to the issues dealt with by the OEB in certain cases involving Natural Resource Gas Limited (NRG) and the Integrated Grain Processors Co-operative (IGPC).³ However, that is not the issue before the OEB in this instance. In this case, TransAlta is seeking to recover costs that it incurred to purchase and deliver incremental quantities of gas to Union above the amount that TransAlta believes it was required to deliver in accordance with its interpretation of the DCQ obligations in its contract. As the costs associated with these purchases were not paid to Union, but instead to third-parties, TransAlta's claim will be for an award of damages if the OEB were to interpret the contract in its favour. There is nothing in the legislation that allows the OEB to award damages.

TransAlta argued that the OEB has limited jurisdiction to award damages as the Divisional Court, in the Summitt proceeding⁴, ruled that the OEB has jurisdiction to award restitution-based damages. TransAlta submitted that the Divisional Court upheld the OEB's decision (EB-2010-0221) to order restitution-based damages under a private contract between a marketer and customer pursuant to section 112.3 of the *Ontario Energy Board Act, 1998* (the Act). TransAlta accepted that the scope of the OEB's jurisdiction to impose damages in relation to a contract is limited to the specific matters at issue in a given proceeding. However, TransAlta argued that the nature and extent of the harm it incurred due to Union's interpretation of the T1 / T2 contract would warrant the OEB exercising its jurisdiction to award damages to TransAlta.

The OEB finds that the Summitt decision cannot be used as authority for the OEB's jurisdiction to award damages in relation to the issue raised by TransAlta in this application. In EB-2010-0221, the OEB found that it had the necessary jurisdiction to

² Garland v. Consumers Gas Co., 2004 SCC 25, paragraph 70.

³ EB-2012-0396, EB-2012-0406, EB-2013-0081.

⁴ Summitt Energy Management Inc. v. Ontario (Energy Board), 2013 ONSC 318.

order restitution-based damages in accordance with a liberal interpretation of its authority under section 112.3(1) of the Act. This section of the Act only applies to compliance proceedings. The OEB finds that its jurisdiction to award damages is narrow and only applies where it is specifically provided for in legislation (as is the case with compliance matters). The jurisdiction granted to the OEB, pursuant to section 112.3 of the Act, to remedy a contravention of an enforceable provision can only be invoked when there is a compliance proceeding initiated by the OEB. The OEB does not have any inherent jurisdiction to award damages in relation to contractual matters, even where the OEB has jurisdiction to interpret the contract.

3. Will the OEB refer TransAlta's application to binding arbitration in accordance with STAR?

The OEB finds that it does not have jurisdiction to refer TransAlta's complaint to binding arbitration.

TransAlta argued that the OEB has jurisdiction to require arbitration, as it can require parties to participate in alternative dispute resolution on a mandatory basis under rule 29.01 of the OEB's Rules of Practice and Procedure. TransAlta also submitted that STAR requires that a storage provider, transmitter, or integrated utility have and implement a dispute resolution mechanism.

The OEB finds that it does not have inherent jurisdiction to make findings (even to refer a matter for arbitration) where it is not specifically provided for in the legislation. The OEB can only apply its rules (including STAR and the alternative dispute resolution section of the Rules of Practice and Procedure) when a matter is already properly before it and is an issue over which the OEB has jurisdiction.

The *Statutory Powers Procedure Act, R.S.O., 1990* (SPPA) allows decision makers to which it applies to have rules governing their practice and proceedings. These rules are a way for the OEB to carry out its decision making functions; they do not expand the scope of those functions. Alternative dispute resolution is allowed in the OEB's Rules of Practice and Procedure because the SPPA specifically allows it to be used as part of a proceeding if there are rules governing its use. However, if the OEB has no jurisdiction, there cannot be a properly constituted proceeding and the alternative dispute resolution provisions set out in the OEB's Rules of Practice and Procedure cannot be used.

As the OEB has no power to provide for the eventual remedy sought by TransAlta (i.e. damages) either itself or through the referral of the matter for binding arbitration, the OEB will not undertake a review of the appropriate interpretation of the contract.

Relief Amendment Request

In its March 23, 2015 letter, TransAlta asked the OEB to review and resolve certain sector-wide obligated DCQ issues if these issues could not be resolved through consultations with Union before June 30, 2015. TransAlta asked the OEB to resolve the DCQ issues in the context of: (a) the Natural Gas Market Review (or a follow-up proceeding); or (b) the annual review of Union's rates (prior to 2016); or (c) a dedicated proceeding on obligated DCQ issues.

The OEB notes that the DCQ issues were properly before the OEB in Union's most recent rebasing application (EB-2011-0210). This was the appropriate opportunity for TransAlta to raise its concerns regarding DCQ obligations. TransAlta did not do so. Union noted that with regard to the obligated vs. unobligated DCQ issues that arose in its rebasing proceeding: "...there was no specific dispute, but the terms and conditions and the availability of potentially for certain customers having a non-obligated daily contract quantity was ultimately reflected in the rate order issued by the Board..."⁵

The OEB agrees with the submissions of Union, OEB staff and IGUA that this is not the proper proceeding to make a determination on TransAlta's request to review and resolve certain sector-wide obligated DCQ issues. This panel cannot bind the OEB to hear the generic DCQ issues in a future proceeding.

The OEB notes that if the consultation does not lead to a satisfactory resolution of the generic DCQ issues amongst parties, TransAlta (or any other interested party) can apply to have these issues heard by the OEB at that time.

Cost Awards

The OEB may grant cost awards to eligible parties pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the OEB will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the OEB's Cost Awards Tariff will also be applied. The OEB notes that filings related to cost awards shall be made in accordance with the schedule set out below.

⁵ Oral Hearing Transcripts, April 7, 2015, EB-2014-0363, page 24.

THE OEB ORDERS THAT:

1. Eligible intervenors shall file with the OEB and forward to TransAlta their respective cost claims within 14 days of the date of this Decision and Order.
2. TransAlta shall file with the OEB and forward to the intervenors any objections to the claimed costs of the intervenors within 21 days from the date of this Decision and Order.
3. If TransAlta objects to the intervenor costs, intervenors shall file with the OEB and forward to TransAlta any responses to any objections for cost claims within 28 days of the date of this Decision and Order.
4. TransAlta shall pay the OEB's costs of, and incidental to, this proceeding immediately upon receipt of the OEB's invoice.

All filings to the OEB must quote file number **EB-2014-0363**, be made electronically through the OEB's web portal at www.pes.ontarioenergyboard.ca/eservice in searchable / unrestricted PDF format. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address.

All filings shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available, parties may email their documents to the address below.

For all electronic correspondence and materials related to this proceeding, parties must include in their distribution lists the Case Manager, Lawrie Gluck at Lawrie.Gluck@ontarioenergyboard.ca and Legal Counsel, Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

All communications should be directed to the attention of the Board Secretary and be received no later than 4:45 p.m. on the required date.

ADDRESS

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ISSUED at Toronto, May 7, 2015

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary