

Decision of Power Pool Council
Regarding TransAlta Utilities Corporation's
Force Majeure Claim for Units 1, 2 and 6 of the Sundance A and C
Power Purchase Arrangements

August 14, 2002

Decision of Power Pool Council as Balancing Pool Administrator
Regarding TransAlta Utilities Corporation's
Force Majeure Claim for Units 1, 2 and 6 of the Sundance A and C
Power Purchase Arrangements

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I. BACKGROUND

In August 2000, TransCanada Energy Ltd. (“TransCanada”) purchased the Sundance A (Units 1 and 2) Power Purchase Arrangement (the “PPA”) and EPCOR PPA Management Inc (“EPCOR”) purchased the Sundance C (Units 5 and 6) PPA. The Sundance A PPA expires December 31, 2017 and the Sundance C PPA expires December 31, 2020.

In a letter dated October 15, 2001 the Balancing Pool Administrator (the “BPA”) received a notice from TransAlta Utilities Corporation (the “Owner”) of the occurrence of an event of Force Majeure affecting the PPAs for the Sundance Power Plant. The notification was provided pursuant to Section 45.95(1) of *The Electric Utilities Act* and Article 14.2(a) of the Sundance PPAs. Specifically, the notice indicated that a legal strike of workers at the Highvale Mine impacted the quality of the coal supply to the Sundance Power Plant and pickets set up at the Sundance plant gate caused a delay in the return to service of Sundance Unit 6. On December 4, 2001 TransAlta informed the Balancing Pool that the strike had ended on November 14, 2001 and that the impacts of the strike ended on November 28, 2001.

While the Highvale Mine services the entire Sundance Power Plant as well as the Keephills Power Plant, the only claims received and hence the only claims considered in this determination, are those related to Sundance Units 1, 2 and 6.

II. ROLE OF BALANCING POOL AND POWER POOL COUNCIL UNDER THE BALANCING POOL REGULATION

The Balancing Pool operates under the authority of the Electric Utilities Act and associated regulations. Under the Balancing Pool Regulation (AR 169/99, the “Regulation”¹), the BPA, upon notification, has the responsibility to “...assess and verify the occurrence of the extraordinary event and the need for any payment to be made into or out of the balancing pool by or to a party under the provisions of the arrangement...” [Section 5(1)(j)]. For the purposes of this assessment an extraordinary event means “an event, other than the termination of an arrangement, in respect of which the arrangement provides for a payment into or out of the balancing pool” [AR 169/99 Section 1(1)(h)].

The Power Pool Council (the “Council”) has the authority to carry out all the powers and duties given by the regulations or by an arrangement to the BPA. As a result, the Council has the authority to make decisions concerning the matters referred to in Section 5(1)(j). Accordingly, with respect to this decision, references to the BPA include the Balancing Pool Administrator himself, the Balancing Pool staff and Council. The decision rendered in this report has been made by Council.

III. ROLE OF BALANCING POOL UNDER THE POWER PURCHASE ARRANGEMENT

Under the Sundance A and C PPAs, Section 14.1 provides:

“If either Party is unable, wholly or in part, to perform or comply with any obligation hereunder, and if such inability shall have been occasioned by or as a consequence of any event of Force Majeure, the obligations of such Party, insofar only as its obligations are affected by the event of Force Majeure, shall be suspended for so long as the event of Force Majeure continues to prevent the performance of or compliance with such obligation and for such time thereafter as such Party may reasonably require to fulfill such obligation.”

Section 14.2 of the PPAs provides that:

“If either Party relies on the occurrence of an event of Force Majeure as a basis for claiming suspension of an obligation under this Arrangement, such Party shall:

- (a) provide prompt notice to the other Party and the Balancing Pool of the event or condition being relied upon as an event of Force Majeure, including its expected duration and the probable impact on the performance of or compliance with its obligations hereunder;

¹ The Balancing Pool Regulation was amended on June 24, 2002 by Ministerial Order 29/2002 such that the requirement to verify and assess an extraordinary event is an option rather than a requirement of the Balancing Pool Administrator; however, for the purposes of the determinations in this instance, the Balancing Pool Regulation in force at the time of the event is assumed to govern.

- (b) exercise all reasonable efforts to continue to perform or comply with its obligations hereunder;
- (c) exercise all reasonable efforts to mitigate or limit the effect of the event of Force Majeure; and
- (d) provide prompt notice to the other Party and the Balancing Pool upon the cessation of the event of Force Majeure.”

Section 14.4 of the Sundance PPAs provides:

“During any period in which the Owner’s obligations to perform or comply with an obligation under this Arrangement are suspended pursuant to Section 14.1, the Monthly Capacity Payment shall be reduced as provided for in Schedule C to reflect the availability of Committed Capacity of each Unit during such Month. The Owner shall be entitled to payment from the Balancing Pool of the difference, if any, between the Provisional Capacity Payment and the Monthly Capacity Payment for such Month.”

Force Majeure in the Sundance PPAs “means any event or cause which is beyond the reasonable control of the affected Party, or its Affiliates, including a HILP Event, a mechanical breakdown but only insofar as such breakdown results from a HILP Event, an act of God, flood, earthquake, storm, lightning, fire, epidemic, war, blockade, explosion, riot, act of the Queen’s enemies, act of civil or military authority, civil disturbance or disobedience, strike, lockout or other labour dispute or industrial disturbance, accident, sabotage, lack or inadequacy of fuel supply from a fuel supplier, any suspension of delivery of Electricity pursuant to Section 5.4, restraint by court order or any Laws, or the action or inaction of any Governmental Authority, or inability to obtain or renew any Governmental Approval, provided that lack of funds or economic hardship shall not constitute a cause beyond the reasonable control of the affected Party”.

Section C6.3 of the Sundance PPAs specifies how capacity payments are to be made when an event of Force Majeure is declared and amounts are payable under Section 14.4:

“For any Month for which there is any Day on which an event of Force Majeure has been declared, the Daily Capacity Payment (DCP_{ud}) and Capacity Payment (CP_{um}) is calculated (based upon the Provisional Capacity Payment, PCP_{um}) as follows.

- (a) For any Day d in Month m for which no event of Force Majeure has been declared, $DCP_{ud} = PCP_{um} / DIM_m$
- (b) For any Day d in Month m for which an event of Force Majeure is claimed but the event of Force Majeure does not affect the availability of the Unit, $DCP_{ud} = PCP_{um} / DIM_m$
- (c) For any Day d in Month m for which an event of Force Majeure has been declared and for which the Unit was unavailable for all or most hours during this event of Force Majeure, $DCP_{ud} = 0$

where PCP_{um} is the Provisional Capacity Payment and DIM_m is the number of Days in the Month.

- (d) For any Day d in Month m for which an event of Force Majeure has been declared and for which the Unit was available for all or most hours during this event of Force Majeure at a level less than the Committed Capacity (CC_{um}):

the time weighted average of all values of Declared Availability (DA_{us}) expressed in terms of MW of Capacity available for the Settlement Periods s of this Day d (ADA_{ud}) is calculated as:

$$ADA_{ud} = [\sum_s^d (DA_{us} / SPD_s)] / HID_d$$

$$DCP_{ud} = (ADA_{ud} / CC_{um}) \times PCP_{um} / DIM_m$$

where DA_{us} is the Declared Availability CC_{um} is the Committed Capacity and HID_d is the number of hours in the Day and \sum_s^d means the sum of all Settlement Periods s in Day d.

The Capacity Payment (CP_{um}) is determined as follows:

$$CP_{um} = \sum_d^m DCP_{ud} \text{ (where } \sum_d^m \text{ means the sum of all Days d in this Month m)."}'$$

IV. REVIEW OF INFORMATION PROVIDED BY THE PARTIES AND OTHER INTERESTED GROUPS

The BPA met with the Owner on numerous occasions and made a site visit to the Sundance Power Plant. In addition, correspondence between the Owner and the BPA was used to gather information and obtain clarification of the situation surrounding the event of Force Majeure.

Other discussions were held with, and correspondence received from, TransCanada and EPCOR. TransCanada raised issues about the duration of the event of Force Majeure, while EPCOR focused on the timeliness of notification as required by the Sundance PPAs.

In the process of assessing and verifying the extraordinary event as required under the Regulation, a number of relevant questions arose. These are listed below and are addressed in Section V of this Decision Report.

Questions to be Addressed

1. Did an event of Force Majeure occur?
2. If it did, what units did it affect and for what duration?
3. What relief for Force Majeure is requested by the Owner under Section 14.1 of the PPA?
4. For the relief requested, did the Owner comply with the notification, performance and mitigation requirements under Section 14.2 of the Sundance PPAs?
5. What payments are required into or out of the Balancing Pool?

V. DECISION

The BPA has reviewed and considered all of the information submitted by the parties in the context of its requirements under the Regulation and the Sundance PPAs. The decision of the BPA was the result of the following process. First, there was a determination of whether the facts support the allegation by the Owner that an event of Force Majeure did occur with respect to certain of its Units over a specific period of time. Second, the specific relief being requested by the Owner for suspension of an obligation or obligations under the Sundance PPAs was verified. Third, it was determined whether the Owner could rely on the occurrence of an event of Force Majeure as a basis for claiming suspension of an obligation or obligations. Lastly, the required payments into or out of the Balancing Pool were verified based on the conclusions reached in the first three steps.

Event of Force Majeure

In discussions and correspondence with all parties, there was total agreement that the legal strike at the Highvale Mine by Luscar employees was an extraordinary event, beyond the reasonable control of the Owner. Correspondence from the Owner specified that the strike commenced on October 12, 2001 and ended November 14, 2001, although the effects continued until November 28, 2001. No party disputed these facts.

The Owner reported that “The strike had 2 different impacts on TransAlta’s operations. The first was an effect on the quality of coal delivered to the power plant and the second was interruptions to access to the power plant by plant workers”. The former resulted in compromised coal quality to Sundance Units 1 and 2 due to reduced blend management resources from Luscar and the latter created a delay in the repair work of Sundance Unit 6. This recognizes the assertion by the Owner that its efforts to mitigate the impacts of the strike resulted in no claims for Keephills Units 1 and 2, nor for Sundance Units 3, 4 and 5. All parties agreed with the impacts as reported by the Owner.

The BPA therefore determines that the event of Force Majeure commenced on October 12, 2001 and ended on November 28, 2001. The BPA further determines that Sundance Units 1, 2 and 6 were the only units for which claims were made by the Owner with respect to the event of Force Majeure.

Specific Relief Requested by the Owner

The Owner has identified the following periods for which it has requested suspension of its performance obligation to meet Target Availability under the Sundance PPAs:

Table 1: Specific Relief Requested

Unit	Date	Hours	Reason
Sundance 1	October 12, 2001	HE 10 to HE 23	Derating due to poor coal quality
	October 14, 2001	HE 00 to HE 08	
	October 24, 2001	HE 00 to HE 17	
	October 27, 2001	HE 08 to HE 23	
	October 28, 2001	HE 00 to HE 07	
Sundance 2	October 18, 2001	HE 09 to HE 11	Derating due to poor coal quality
	October 24, 2001	HE 00 to HE 17	
Sundance 6	October 12, 2001	HE 07 to HE 23	Delayed return to service due to pickets at plant gate
	October 13, 2001	HE 00 to HE 23	
	October 14, 2001	HE 00 to HE 23	
	October 15, 2001	HE 00 to HE 07	

TransCanada questioned whether the Owner could target specific hours to seek relief from obligations as opposed to suspending performance of obligations for the entire period of the event of Force Majeure. Section 14.1 of the PPA allows for suspension of the performance of obligations by a party only “insofar as its obligations are affected by the event of Force Majeure” and “ for so long as the event of Force Majeure continues to prevent the performance of or compliance with such obligation and for such time thereafter as such Party may reasonably require to fulfill such obligation”. Since calculation of the Settlement Period Availability Incentive Payment is based on a one hour Settlement Period, it is reasonable for the Owner to specify for which hours it seeks relief. No other party provided evidence that there were other hours in which the Owner could not meet its PPA obligations due to the event of Force Majeure.

Accordingly the BPA verifies that only the hours specified in Table 1 above are to be considered in the third and fourth steps of this deliberation.

Reliance on the Occurrence of an Event of Force Majeure as a Basis for Claiming Suspension

Four conditions must be met under Section 14.2 of the Sundance PPAs in order for the Owner to be able to successfully rely on the occurrence of an event of Force Majeure as the basis for claiming suspension of an obligation. Each will be dealt with separately as it relates to Sundance Units 1 and 2, and Sundance Unit 6.

- (a) “provide prompt notice to the other Party and the Balancing Pool of the event or condition being relied upon as an event of Force Majeure, including its expected duration and the probable impact on the performance of or compliance with its obligations hereunder”

EPCOR argued that they did not receive notification of the event of Force Majeure until October 18, 2001. They stated, “It is our position that the Notice was not provided promptly as required under Section 14.2(a). The Notice also does not address the expected duration of the event or condition being relied on or the probable impact on the performance by TransAlta of its obligations under the PPA as required under Section 14.2(a).”

The Balancing Pool received the formal notification letter via facsimile transmission on October 18, 2001. In addition, a letter had been sent to EPCOR on October 9, 2001 alerting EPCOR to the potential for an event of Force Majeure and an e-mail was sent to EPCOR (and other affected parties) on October 12, 2001 advising them that “pickets were present at entrances to some TransAlta facilities...”. In totality, EPCOR had prompt notice, and review of the contents of the correspondence indicates that the Owner provided as much information as was available to it at the time with respect to the expected duration and probable impact on the performance of its obligations.

Therefore, the BPA has determined that the Owner has met the requirements under Section 14.2(a) of the PPA.

- (b) “exercise all reasonable efforts to continue to perform or comply with its obligations hereunder” and
- (c) “exercise all reasonable efforts to mitigate or limit the effect of the event of Force Majeure”

The requirements under Sections 14.2 (b) and (c) are similar in this case and are considered together.

For Sundance Units 1 and 2, the Owner took steps to address the quantity and quality of coal supply as outlined in its December 4, 2001 letter to the BPA. However the Owner has acknowledged that the unit derates during the hours specified in Table 1 could have been mitigated by the supplemental firing of natural gas. The Owner also noted that it had made arrangements with its natural gas supplier to have the demand ratchet waived for the duration of the extraordinary event should gas be used for generation purposes. The Owner explained that it had conducted an economic analysis which showed that both it

and TransCanada would be disadvantaged if natural gas were to be used to increase output of the units and that it relied on that analysis in its decision not to burn the gas.

The exercise of “all reasonable efforts” may require the Owner to incur a smaller profit but is not intended to force the Owner to undertake mitigation efforts involving a crushing burden for its business. The test is what, in all the relevant circumstances, constitutes all reasonable efforts to continue to perform or comply with its obligations under the PPA and to mitigate or limit the effect of the Force Majeure. Here the evidence provided by the Owner suggests that the increased costs to the Owner from burning gas would, at the most, have been approximately \$27,000. In assessing the evidence of the Owner’s efforts to continue to perform or comply with its obligations and to mitigate or limit the effect of the Force Majeure, the BPA is not satisfied that the Owner has used “all reasonable efforts” in the circumstances.

Accordingly, the BPA has determined that the Owner has not established that it has met the requirements of Sections 14.2(b) and (c) of the Sundance A PPA, with the consequence that it cannot rely on the occurrence of an event of Force Majeure as the basis for suspension of its obligations for Sundance Units 1 and 2 for the hours identified in Table 1.

For Sundance Unit 6, the Owner acted expeditiously to obtain an injunction against picketing at the Sundance Plant gate which had prevented plant staff from entering the facility to return the unit to service as scheduled. The scheduled return to service was delayed by three days as a result. No party has expressed concern or produced evidence that the Owner did not take all reasonable efforts to mitigate the effect of the force Majeure on Sundance 6 and so the BPA has determined the Owner has met the requirements of Sections 14.2(b) and (c) for that unit.

- (d) “provide prompt notice to the other Party and the Balancing Pool upon the cessation of the event of Force Majeure”

On December 4, 2001 the Owner informed the BPA that the event of Force Majeure had ended as of November 28, 2002. Neither TransCanada nor EPCOR has submitted evidence regarding when notification under Section 14.2(d) was received, nor have they expressed an opinion regarding the Owner’s performance regarding this requirement. The BPA considers the notification it received regarding the cessation of the event of Force Majeure to meet the requirements of Section 14.2(d).

Required Payments Into or Out of the Balancing Pool

Under Section 5(1)(k) of the Regulation, when the BPA has received a notice in respect of an extraordinary event, the BPA must “commence making payments set out in the arrangement until the matters in question under clause (j) have been resolved, whether by agreement or in dispute

resolution proceedings...” The payments out of the Balancing Pool are for the difference, if any, between the Provisional Capacity Payment and the Monthly Capacity Payment for the Month in which the Owner’s obligation to perform or comply with an obligation under the PPA are suspended pursuant to Section 14.1 of the PPA. The payments amounted to \$109,253.68 (including GST) for Sundance Units 1 and 2, and \$566,772.21 (including GST) for Sundance Unit 6. However, the payment invoiced by the Owner and paid out of the Balancing Pool for Sundance Unit 6 represents four days of Capacity Payments rather than three days as claimed by the Owner. Accordingly, the correct amount payable out of the Balancing Pool under the claim for Sundance Unit 6 is \$425,079.16 (including GST).

Having given due consideration to the requirements under the Regulation and the Sundance PPAs as well as the deliberations and determinations above, the BPA verifies that the required payment out of the Balancing Pool amounts to \$425,079.16 and is solely with respect to the three days of relief claimed for Sundance Unit 6. Furthermore, the BPA concludes that no payment out of the Balancing Pool is justified with respect to Sundance Units 1 and 2.