ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting – February 15, 2002
Date of Decision – June 26, 2002

IN THE MATTER OF Sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Enron Canada Power Corporation with respect to Approval No. 18528-00-03, issued to TransAlta Utilities Corporation by the Director, Northern East Slopes Region, Regional Services, Alberta Environment, for the construction, operation, and reclamation of a potable water treatment plant constructed on the Sundance Power Plant site at the N½-20-52-4-W5M and SE ¼-29-52-4-W5M.

Cite as: *Enron Canada Power Corporation* v. *Director, Northern East Slopes Region, Regional Services, Alberta Environment,* re: *TransAlta Utilities Corporation.*

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* to TransAlta Utilities Corporation for the construction, operation, and reclamation of a Water Treatment Plant to be constructed at the Sundance Power Plant site in the County of Parkland, Alberta. Enron Canada Power Corporation filed a Notice of Appeal objecting to the Approval on the basis that it indirectly imposed obligations under the Sundance Power Plant Approval, in which Enron claims an interest. Enron claims that it has the right to appeal the Water Treatment Plant Approval as a result of the Power Purchase Arrangement that it has with TransAlta in relation to the Sundance Power Plant.

The Board disagrees with Enron, and dismisses this appeal because:

1. Enron has sold "all of its interests" in the Power Purchase Arrangement to the ASTC Power Partnership, who has decided *not* to appeal;
2. Enron's financial and economic interests, which the Board found to be the *major* basis of Enron's appeal arguments, was not sufficient on the facts of this case to establish that Enron was directly affected; and
3. Enron's real challenge was not aimed at the decision of Alberta Environment, but at a commercial dispute with TransAlta, and as such, there was nothing claimed against Alberta Environment upon which the Board should decide or Alberta Environment could do.

PRELIMINARY MEETING BEFORE: William A. Tilleman, Q.C., Chair;
John P. Ogilvie; and
Ron Hierath.

PARTIES:

Appellants: Enron Canada Power Corporation, represented by Mr. Dalton McGrath, Blake, Cassels & Graydon; Lake Wabamun Enhancement and Protection Association, represented by Mr. Locke Boros and Ms. Linda Duncan; and Mr. David Doull.

Director: Mr. Rick Phaneuf, Acting Director, and Mr. Daryl Seehagel, Director, Northern East Slopes Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.

Approval Holder: TransAlta Utilities Corporation, represented by Mr. Ron Kruhlak and Mr. Corbin Devlin, McLennan Ross.

Other: ASTC Power Partnership, represented by Mr. Russ Hantho, TransCanada Pipelines Limited.

Not Attending: Mr. Blair Carmichael; and Mr. Nick Zon.

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I. BACKGROUND

[1] On July 30, 2001, the Director, Northern East Slopes Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 185528-00-03 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act")[1] to TransAlta Utilities Corporation (the "Approval Holder" or "TransAlta") for the construction, operation, and reclamation of a Class III potable water treatment plant (the "Water Treatment Plant") to be constructed on the Sundance Power Plant site at the N½ 20-52-4-W5M and SE¼ 29-52-4-W5M, in the County of Parkland, Alberta.

[2] The Environmental Appeal Board (the "Board") received Notices of Appeal on August 30, 2001, from Mr. Blair Carmichael, the Enron Canada Power Corporation ("Enron"), and Mr. David Doull, on August 31, 2001, from the Lake Wabamun Enhancement and Protection Association ("LWEPA"), and on September 4, 2001, from Mr. Nick Zon (collectively the "Appellants"). With the exception of Enron, all of the other Appellants have previously participated in appeals regarding TransAlta's operations at Lake Wabamun.[2] Enron claims an interest in this matter by virtue of a Power Purchase Arrangement (the "PPA" or the "Sundance 'B' PPA") that it holds in relation to the Sundance Power Plant.[3] The question that is before the Board, for the purposes of this Decision, is whether this interest is sufficient to give Enron standing to bring its appeal.

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[1] On January 1, 2002, the *Environmental Protection and Enhancement Act*, S.A. 1993, c. E-13.3 was replaced by the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

[2] See: *Nick Zon et al.* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* (September 26, 1997), E.A.B. Appeal Nos. 97-005-97-016; *Zon et al*. v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, re: *TransAlta Utilities Corporation* (December 9, 1997), E.A.B. No. 97-005-97-015; *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment* re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal Nos. 00-074, 075, 078, 01-001-055 and 011-ID ("*Bailey*"); Preliminary Motions: *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment* re: *TransAlta Utilities Corporation* (April 17, 2001), E.A.B. Appeal No. 00-074, 075, 078, 01-001-055 and 011-ID; and *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment* re: *TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 075, 078, 01-001-055 and 011-R.

[3] As will be discussed in more detail below in paragraphs 24 to 27, in "…simple terms, a Power Purchase Arrangement provides that the owner (here TransAlta) of an electrical generating facility agrees to allow the buyer … to sell the electricity produced by the facility." In this case the buyer is Enron. See *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment* re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 078, 01-001-055 and 011-ID at note 7.

[3] On August 31, 2001, the Board acknowledged receipt of the Notices of Appeal of Mr. Carmichael, Enron,[4] Mr. Doull, and LWEPA and provided copies of the Notices of Appeal to the Director and the Approval Holder. On September 5, 2001, the Board acknowledged receipt of the Notice of Appeal from Mr. Zon and provided copies of the Notice of Appeal to the Director and the Approval Holder. In these letters, the Board also requested that the Director provide the Board with a copy of his records (the "Record") relating to these appeals. The Record was subsequently received from the Director and copies were provided to the Appellants and the Approval Holder.

[4] In the Notices of Appeal filed by Mr. Carmichael and Mr. Zon, they suggested that the appeals be held in abeyance pending the decision of the appropriate Director under the *Water Act*, R.S.A. 2000, c. W-3 (the "*Water Act*").[5] When the Board acknowledged Mr. Carmichael and Mr. Zon's Notices of Appeal, the Board requested the comments of the other Parties respecting the request to hold the appeals in abeyance.

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board ("AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. Both Boards responded in the negative.

[6] On September 5, 2001, the Board received a letter indicating that the Director supported the request of Mr. Carmichael and Mr. Doull to hold the appeals "… in abeyance pending the finalization of the *Water Act* approval [(Licence)] for this facility." The letter from the Director went on to indicate that it was "…the intention of the Department that operational criteria belonged in the *Water Act* approval [(Licence)]." On September 7, 2001, the Board received a letter from the Approval Holder agreeing with the Director's comments and a letter from Enron objecting to holding the appeals in abeyance.

[7] On September 7, 2001, the Board wrote to the Parties and advised it had granted the request to hold the appeals in abeyance pending the decision respecting the Licence under the

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[4] Enron's Notice of Appeal also requested a Stay. The Board received a submission from Enron respecting the Stay, and subsequently denied the request. See: Board's letter, dated October 12, 2001.

[5] The proposed Water Treatment Plant requires an Approval under EPEA and a Licence (the "Licence") under the *Water Act*. On January 1, 2002, the *Water Act*, R.S.A. 2000, c. W-3 replaced the *Water Act*, S.A. 1996, c. W-3.5.

Water Act. The Board asked for a status report on October 10, 2001. The Board also advised the Parties that while it noted that Enron objects to its appeal being held in abeyance, the Board

> "…has decided to also hold Enron's appeal in abeyance as the Board feels that all of the appeals should be dealt with at the same time in order to ensure a fair and effective hearing of the appeals, and nothing in Enron's submission, to date, convinces the Board otherwise."

[8] On October 10, 2001, the Board received a status report from the Director advising that the decision had not yet been made respecting the *Water Act* Licence. The Director requested that the appeals continue to be kept in abeyance. On October 11, 2001, the Board granted the Director's request and asked for a status report by October 24, 2001.

[9] On October 24, 2001, the Board wrote to the Parties and requested submissions from the Parties on the following issues:

> "1. Is Enron directly affected?
>
> 2. Has Enron had the opportunity to participate in a proceeding with the Alberta Energy and Utilities Board with respect to this matter such that their appeal should be dismissed pursuant to section 87(5)(b)(i) [(now section 95(5)(b)(i))] of the *Environmental Protection and Enhancement Act*?"[6]

The Board went on to say that with respect to the second issue:

> "…for whatever value it may be, the parties are referred to the Board's Decision in *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment,* re: *TransAlta Utilities Corporation*, and in particular paragraphs 32 to 35, where the Board dismissed Enmax's appeal for, among other reasons, the fact that the matter has been considered previously by the Alberta Energy and Utilities Board."[7]

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[6] Section 95(5)(b)(i) of EPEA provides:

> The Board … (b) shall dismiss a notice of appeal if in the Board's opinion
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> (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with …."

[7] See: *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment* re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 078, 01-001-055 and 011-ID. In response to the request from Enron, the Board made copies of the transcript of the *Bailey* case available for viewing at the Alberta Energy and Utilities Board in Calgary. The Board also subsequently provided copies of the submissions of Enmax and LWEPA in the *Bailey* case to Enron. The Board noted that all of the other parties had been provided with these submissions during their participation in the *Bailey* case.

[10] On October 30, 2001, the Board received a letter from the Director indicating that the "…process under the *Water Act* will not be concluded until the middle of January at the earliest."[8] In response to this letter and in response to the requests by Enron and LWEPA to proceed with the appeals as soon as possible,[9] the Board indicated in a letter dated November 1, 2001, that it had reviewed the matter and

> "…has decided that it would not be an effective and efficient use of the Board's and the parties' resources to address these appeals in the absence of having the decision of the *Water Act* application. Based on the comments received from some of the Appellants in this matter, the Board has every expectation that there will be appeals in relation to the *Water Act* application in the event that a licence is granted. The number of parties associated with these appeals and the length of time that the hearing will likely take will be considerable and it is not appropriate to require the parties to participate in two or potentially more hearings regarding the same facility."

[11] Between November 5, 2001 and November 21, 2001, the Board received submissions from the Parties with respect to the issue of whether Enron is directly affected and whether Enron had an opportunity to deal with the subject matter of its appeal before the AEUB.

[12] On December 7, 2001, while it was considering the submissions on Enron's appeal, the Board wrote to the Parties and advised that it "…understands from newspaper[s] that Enron has sold all or part of its Power Purchase Agreement. The Board requests Enron advise as to whether this is the case, and if so what impact this may have on its appeal."

[13] On December 14, 2001, the Board received a letter from Enron advising that Enron "…has entered into an agreement to sell the Sundance 'B' PPA, however, the sale has not closed…. Accordingly, it is premature of the newspapers to suggest that the Sundance 'B' PPA has been sold." Enron also indicated that despite "…the bankruptcy of Enron Power's U.S. related entity, Enron Corp., the position of Enron Power remains the same to the effect that none of those factors affect its previously stated position."

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[8] The Board was subsequently advised that the Water Licence for the Water Treatment Plant was issued on March 8, 2002. (See: Letter from TransAlta, dated March 14, 2002.)

[9] On October 12, 2001, the Board received a letter from LWEPA indicating that they wish "…our appeals to continue before the Board, at the Board's earliest convenient date." On October 15, 2001, the Board received a letter from Enron further objecting to the decision of the Board to hold the appeals in abeyance.

[14] Therefore, on December 17, 2001, the Board wrote to the Parties and asked them to:

> "…provide their comments to the Board with respect to the agreement that Enron has entered into to sell the Sundance 'B' PPA, as the sale may have a direct effect on the standing of Enron. Attached for your reference is the Board's Decision *Westridge Water Supply #2* v. *Director, Bow Region, Natural Resources Service, Alberta Environment*, which deals with a similar situation."[10]

[15] On December 19, 2001, the Board received a letter from Enron restating that the sale of Sundance 'B' PPA had still not closed. Enron further stated that they reviewed the *Westridge #2* decision and were of the view that "…it is premature at this point for the Director to suggest that Enron's standing has been affected by merely entering into a conditional agreement to sell the Sundance 'B' PPA which has not closed." Enron went on to "…suggest this matter be delayed until we can inform you whether the sale has closed or not."

[16] On December 20 and 21, 2001, the Board received letters from LWEPA, the Director, the Approval Holder, and Enron in response to the Board's December 17, 2001 letter. On December 27, 2001, the Board received a letter from Mr. Doull in response to the Board's December 17, 2001 letter. Following its review of these letters, the Board wrote to the Parties on December 31, 2001, stating:

> "…the Board notes that Enron has asked (letter of December 19, 2001) that the determination of its standing be held in abeyance pending the sale of the PPA potentially closing. Given that the Board is holding the substantive matter of these appeals in abeyance pending the decision of the water licence, the Board grants Enron's request and will hold the determination of Enron's standing until further notice. The Board requests that Enron provide weekly status reports on the status of the potential sale of the PPA…."

[17] Significantly, then on December 31, 2001, the Board received a letter advising "…*that the sale of Sundance 'B' PPA has closed*."[11] (Emphasis added.) In response to a request from the Board, on January 4, 2002, Enron advised that the purchaser of the Sundance "B" PPA was the ASTC Power Partnership ("ASTC"), which is comprised of AltaGas Services Inc. and TransCanada Energy Ltd.

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[10] See: *Westridge Water Supply #2* v. *Director, Bow Region, Natural Resources Service, Alberta Environment* (May 10, 2001), E.A.B. Appeal No. 00-059-ID ("*Westridge #2*").

[11] See: Letter from Enron, dated December 31, 2001.

[18] On January 7, 2002, the Board wrote to AltaGas Services Inc. and TransCanada Energy Ltd. advising them of the appeals and asking if they "…wish to participate in the appeal currently before the Board…." On January 7, 2002, the Board also wrote to Enron asking "…whether ENRON wishes to continue with this appeal in light of the sale of the PPA." The Board also advised that once the Board has this information, the Board will then "…set a submission process to decide which party should be allowed to continue with this appeal as well as to determine what effect the sale of the PPA has on the Notice of Appeal."

[19] On January 24, 2002, the Board received a letter from Enron indicating that it wished to proceed with its appeal. Enron argued that its interest in this matter remains the same notwithstanding the sale of the Sundance "B" PPA.

[20] However, on January 25, 2002, the Board received a letter from ASTC stating that the:

> "…ASTC Power Partnership purchased the entire interest of Enron Canada Power Corp. in the Sundance 'B' PPA on or about December 31, 2001. …[W]e confirm that the ASTC Power Partnership *will not be participating in this appeal* that is currently before the Board." (Emphasis added.)

[21] On February 15, 2002, the Board convened a preliminary meeting at the Board's offices in Edmonton, Alberta, to determine the status of Enron's appeal. In attendance were Enron, the Director, the Approval Holder, LWEPA, and Mr. Doull. Mr. Zon and Mr. Carmichael did not attend the preliminary meeting. A representative of ASTC was in attendance observing the hearing and, at the request, of the Board answered a number of questions posed by the Board.

[22] On March 14, 2002, the Board wrote to the Parties and advised that Enron's appeal had been dismissed with reasons to follow. These are the reasons.

II. ISSUES

[23] The question before the Board is whether Enron has standing to bring this appeal. As indicated in the Board's letter of January 29, 2002, the specific issues before the Board are:

1. the directly affected status of Enron;
2. the effect of the sale of the Sundance "B" PPA on Enron; and

3. the participation of Enron in a process before the Alberta Energy and Utilities Board.

III. SUMMARY OF EVIDENCE

A. The PPA

[24] The basis for Enron's claim that it has standing to bring this appeal is the interest that it holds in the Sundance "B" Power Purchase Arrangement.

[25] In its most basic terms, the PPA requires TransAlta to make available to Enron a portion of the electricity produced by the Sundance Power Plant. Enron will then sell the electricity to its customers. In exchange, Enron is required to pay certain fixed and variable costs to TransAlta related to the operation, maintenance, and carrying costs of the Sundance Power Plant.[12]

[26] The Sundance "B" PPA was one of many PPAs developed through the electrical deregulation process that took place in Alberta over the past few years.[13] The goal of the electrical deregulation process is to restructure Alberta's electrical industry and move to a competitive market for the sale of electricity.[14] In developing the PPAs, one of the chief concerns between the owners of the power plants (here TransAlta) and the buyers of the PPAs (here Enron) was the apportionment of costs.[15]

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[12] See: Enron's submission, dated November 5, 2001, at paragraph 18:

"Pursuant to the Sundance 'B' PPA, Enron is also required to pay certain fixed and variable costs to TransAlta over the 20 year period related to the operation, maintenance and carrying costs specified in the Sundance 'B' PPA term (having an approximate present value of $2.1 billion)."

[13] See: Enron's submission, dated November 5, 2001, at paragraph 36.

[14] "Power of Competition: A Guide to Alberta's New Competitive Electrical Industry Structure" by Alberta Resource Development, May 1999. (See Tab 16 of Enron's Initial Submission, dated November 5, 2001.)

[15] Enron provided a copy of the "Report to the EUB 27 August 99 Revision" prepared by the Independent Review Team that was part of the electrical deregulation process. (See Tab 18 of Enron's Initial Submission, dated November 5, 2001, at page 4.) This report indicated:

"In general the IAT [Independent Assessment Team] has allocated risks as follows:

- Plant operational and coal procurement risks are generally within the control of the plant owner, and hence have been allocated to the Owner. …
- Market risks are best managed by the Buyer who is responsible for selling the output of the plant into the market. …

[27] In general, the PPAs are designed such that costs of plant operation and fuel are allocated to the owner of the power plant, and costs associated with the marketing are allocated to the buyer. However, the PPAs also identified that there could be a number of unanticipated costs that did not squarely fall into either of these two categories. One of the unanticipated costs that the PPAs contemplated are costs related to a "Change in Law." In simple terms, a "Change in Law" is where some form of regulatory change occurs that results in increased costs associated with the power plant.[16] It is the operation of this "Change in Law" provision of the PPA that brings us here now.[17]

- Certain costs are outside the control of either party because they are subject to external regulation or changes in law. In general the generator owner has been allowed to pass these costs though. In cases where the IAT believes that the Buyer is likely to be able to recover these costs in the electrical market, the IAT has allocated these risks to the Buyer …. In cases where the IAT believes that the Buyer may not be able to pass them through into the market, and/or one Buyer may be materially disadvantaged viz a viz [*sic*] his competitor and/or the potential changes are so uncertain and material that there would be significant discounting of bids in the auction if the Buyer were to bear them, the IAT has allocated these risks to consumers (through payment out of the Balancing Pool if the event occurs, for instance during an event of force majeure)."

[16] "Change of law" is defined in the PPA as:

"(a) the adoption, enactment, promulgation, modification, amendment, or revocation after May 31, 1999 of:

(i) any Laws applicable to the Owner or the Buyer, which relate to the following: (A) taxes, including any charge or tax related to the use or consumption of fossil fuels or the production of any related by-products from any such use or consumption, but excluding any change with respect to any taxes in respect of which an amount is calculated in Article C5 of Schedule C, (B) any Unit or the Plant including the ownership, operation, maintenance or decommissioning thereof, (C) the electricity sector, including re-regulation or deregulation affecting generation, supply, sale or transmission of electricity, transmission system or Power Pool access charges, (D) the environment, including any environmental taxes, or (E) this Arrangement or the subject matter of this Arrangement;

(ii) any interpretation, reinterpretation or administrative position relating to any of the Laws referred to in paragraph (i) above of any Governmental Authority;

(iii) any material requirements or condition in connection with the issuance, renewal, extension, replacement or modification of any Governmental Approval required in connection with this Arrangement;

(iv) the effective rate of coal royalties or other fuel related royalties associated with the provision of Generation Services in connection with the action of any Governmental Authority; or

(b) the entering into after May 31, 1999 of any TA Agreement which provides for the replacement of or changes to Measuring Equipment to bring non-compliant Measuring Equipment into compliance with appliance Laws." (See: Enron's submission, dated November 5, 2001, at Tab 17.)

The provisions within the PPA Agreement referring to the Change in Law state:

"**4.3 Change in Law**

(a) Subject to the provisions of this Section 4.3, this Arrangement shall be performed by the Parties from the Effective Date and throughout the Effective Term in accordance with any Change in Law.

(b) Subject to the provisions of this Section 4.3, the Owner shall be kept in the same financial position in respect of this Arrangement after giving effect to any Change in Law as it would have been had such Change in Law not occurred, and the amounts payable pursuant to this Arrangement shall be subject to adjustment for any Change in Law.

(c) If a Change in Law occurs which results in a net change in the Owner's revenues, fixed costs or variable costs associated with the provision of Generation Services pursuant to this Arrangement, such changes resulting from such Change in Law shall be passed on to the Buyer, effective from the effective date of such Change in Law, as a change to the monthly payments between the Parties, if practical, or otherwise as a separate payment from the Buyer to the Owner or from the Owner to the Buyer, as the case may be, as necessary to keep the Owner in the same financial position in respect of this Arrangement, after giving effect to such Change in Law, as it would have been had such Change in Law not occurred. In the event of a change in the Owner's revenues or costs, other than as allowed under this Arrangement, the Owner shall not be entitled to Change in Law protection under the terms of this Section 4.3 in respect of such changes in revenues or costs.

(d) Upon the occurrence of an event referred to in Section 4.3(c) above, the Owner will advise the Buyer as to the effect such Change in Law will have on the Owner's revenues, fixed costs and variable costs of the provision of Generation Services, and payments between the Parties shall be adjusted accordingly on an interim basis. The Buyer shall have the right to conduct an audit of the Owner's books and records to the extent necessary to verify the effect of such Change in Law.

(e) Notwithstanding and in the event of any of the foregoing, the Owner shall take all reasonable steps as agreed to by the Buyer, and at the cost of the Buyer, to minimize to the fullest reasonable extent (after taking account of such cost) any decrease in revenues or increase in the fixed costs or variable costs resulting from a Change in Law.

(f) After the effect of a Change in Law is determined, the Parties shall promptly make whatever final adjustments to payments which had been made on an interim basis as are required to give effect to such Change in Law as of the effective date thereof in accordance with Section 4.3(c), with interest on such adjustments for the period requiring adjustments at the Interest Rate until paid.

(g) The Parties shall make such amendments to the Schedules to this Arrangement as are required to give effect to this Section 4.3.

(h) To the extent that either the Owner or the Buyer is unable to perform its obligations (save and except, in all cases either the Buyer's or the Owner's inability to pay amounts to the other required hereunder or to provide any performance security called for by this Arrangement or the Regulations) as a result of a Change in Law, such event shall be an event of Force Majeure for the purposes of Article 14.

(i) In the event that any Change in Law requires the Owner to comply with any metering or measurement legal requirements in respect of which it had

previously been relieved (or substantially relieved) of its obligations by means of an exemption, derogation or dispensation granted by the appropriate authority, the Buyer shall be entitled to compensation for any additional costs it must bear under the terms of this Arrangement in accordance with the provisions of the Regulations.

(j) Notwithstanding any of the foregoing, to the extent that a Change in Law, after giving effect thereto and to this Section 4.3, could reasonably be expected to render continued performance by the Parties to this Arrangement for the balance of the Effective Term unprofitable to the Buyer in respect of a Unit, having taken account of any compensation entitlement under Section 4.3(i) or any amount due from the Balancing Pool, then the Buyer may terminate this Arrangement and shall not be liable for, or entitled to any Termination Payment." (See: Enron's submission, dated November 5, 2001, at Tab 17.)

See also Enron's submission, dated November 5, 2001, at Tab 18:

"(dd) **Change in Law**

This section details the considerations and rationale behind the IAT's [Independent Assessment Team] determination in respect of the Change in Law provisions set down in the thermal PPAs.

Section 45.5(2)(a) of the Electric Utilities Act (EUA) states that 'for each generating unit [the IAT shall] determine a power purchase arrangement that … (i) provides the owner with a reasonable opportunity to recover the fixed costs and variable costs of generating electricity. The IAT considered that this section of the EUA required the IAT to determine a PPA that gave a reasonable level of protection to the Owner against the impact of costs, or its ability to recover costs, that were out of its control. One important aspect of this is the additional costs (or losses in revenue) that the Owner might suffer because of a change in law.

Section 4.3 of the thermal PPA provides for the Owner's economic position to be unaffected by changes in law which affect the Owner's costs or revenues associated with the provision of Generation Services. Any change to such costs or revenues is to be passed on to the Buyer. The IAT is of the view that in a cost-based PPA, the Owner is not able to recover any losses arising from such changes, and that the Buyer is better situated to manage such risk (as it stands a good chance of being able [to] pass on such costs to consumers through its sale of electricity).

Included in the definition of 'Law' are requirements imposed on the Owner with respect to interconnection standards, tariff requirements and industry reliability standards which are required under agreements which the Owner is required to enter into with respect to the delivery of electricity and system support services into the IES. The IAT included these requirements because, while they are not commonly found in a definition of 'Law', they have a similar effect in this situation. The IAT did not give change in law protection for certain tax rates because an imputed amount is calculated for them in the calculation of the monthly Capacity Charge.

The Owner is required to advise the Buyer of any material effect of a change in law. The buyer is given the opportunity to review the Owner's books to verify the effect of a change in law. As well, the parties are given the right to amend the schedules to the PPA to account for any change in law. Without this right, the parties would be unable to deal effectively with a change in law.

In order to minimize the impact of the flow-through nature of costs arising from a change in law, the PPA requires the Owner (with the agreement of the Buyer, and at the Buyer's expense) to take all reasonable steps to mitigate the effect of the change in law. It should also be noted that the Buyer is to receive the benefit of any change in law which lowers the Owner's costs or increases its revenues in respect of generation from the Units covered by the PPA.

The Buyer is further protected, as the Owner is restricted in its ability to recover losses arising from a change in law to those items provided for under the PPA. The cost structure set out in a particular PPA is based upon efficiency levels which the IAT views as being attainable by the Owners. If, however, an Owner were to fail to achieve or maintain such a level without the use of

B. Enron's Real Concern

[28] The *real* concern that brought Enron before this Board[18] was that, pursuant to the "Change in Law" provision of the PPA, TransAlta is claiming that Enron is responsible for a

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additional inputs of labour or fuel, for example, additional costs arising from a change in law would, with respect to such additional inputs, not be recoverable from the Buyer.

There are currently a number of meters associated with units that are not in compliance with the current requirements of the law. The IAT understands that these laws have not been enforced with respect to these meters but this policy may be about to change. Further, the cost of compliance with these laws could be very substantial, and the IAT notes that the Buyer will receive compensation in accordance with the regulations for such compliance costs.

As well, in the event that a change in law is reasonably expected to make continued performance by the Buyer unprofitable, the Buyer is given the ability to exit the PPA without receiving or paying a termination payment.

In the event that either party is unable to perform its obligations under the PPA as a result of a change in law, such party may claim force majeure."

[17] In the Notice of Appeal, Enron stated that the details of the decision to which it objected were:

"1. The Appellant [Enron] seeks clarification that:

a) the WLWTP [Wabamun Lake Water Treatment Plant] Approval which was issued as a result of conditions imposed by Alberta Environment in Approval #10323-02-00 (the 'Wabamun Power Plant Approval') does not amend the Sundance Approval so as to impose rights and obligations over and above those which existed when the Sundance Approval was issued; and

b) section 2.1.5 of the WLWTP Approval operates to preclude the imposition of any additional rights and obligations under the Sundance Approval.

2. The Appellant seeks a review of the requirement for the WLWTP expansion as approved, on the grounds set out below…."

[18] See: Notice of Appeal filed by Enron, dated August 30, 2001:

"The relief which the Appellants [(Enron)] request is as follows: … The Appellant [(Enron)] requests that the Board:

(a) amend the WLWTP [Wabamun Lake Water Treatment Plant] Approval so as to clarify that compliance with the WLWTP Approval, while required for the continued operation of the Wabamun Power Plant Approval, is not required for the continued operations of the Sundance Approval;

(b) (b) confirm that WLWTP Approval operates to preclude the imposition of rights and obligations on the Sundance Power Plant over and above those which existed when the Sundance Approval was issued; [and]

(c) (c) review the WLWTP Approval based on the foregoing concerns and determine regarding whether the WLWTP Approval should be granted…."

See Letter from Enron dated January 24, 2002:

"The relief being sought is very narrow. Enron Power simply seeks clarity as to the scope, nature, and effect of the … [Water Treatment Plant] Approval, and more particularly the impact of the … [Water Treatment Plant] Approval on the Sundance Approval."

significant portion of the costs associated with the Water Treatment Plant.[19] The Water Treatment Plant – the Approval that is before the Board – is being constructed to mitigate the impact of all of TransAlta's operations at Lake Wabamun, including what is referred to as the "historical debt."[20] The Sundance Power Plant – the plant with respect to which Enron and TransAlta have the PPA – is one of TransAlta's operations at Lake Wabamun, and it is on this basis that TransAlta has advised Enron that it is responsible for these costs under the PPA.[21]

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[19] As stated by Enron in its Statement of Concern, dated May 16, 2001:

"…TransAlta asserts that Enron, as holder of the Sundance B PPA, is responsible for a significant portion of costs associated with the … [Water Treatment Plant.]"

As stated by Enron in its Notice of Appeal, dated August 30, 2001:

"TransAlta has asserted that Enron, as holder of the Sundance 'B' PPA, is responsible for a significant portion of the costs associated with the … [Water Treatment Plant.]"

[20] See: Enron's submission, dated November 5, 2001, at paragraphs 10-11:

"10. The Wabamun Power Plant Approval, as renewed, and as a condition for the continued operation of the Wabamun Power Plant (as distinct from the Sundance Approval for the continued operation of the Sundance Power Plant, which, as mentioned above, is separately permitted through to May 31, 2006), contains a specific provision relating to the offset of the impact from TransAlta's operations on the water levels in Wabamun Lake by December 31, 2006. Section 4.3.27 provides in part, as follows:

> 4.3.27 The approval holder shall make all necessary applications such that…
>
> (c) no later that [sic] December 31, 2001, the approval holder shall have pumped sufficient water into the lake to off-set the historical debt (51.1 million cubic meters as of December 31, 1999) of TransAlta Utilities Corporation Operations on lake level and ongoing impacts from all TransAlta Utilities Corporation Operations, unless the lake levels surpasses the elevation of 724.55 meters (outlet control weir);
>
> (d) after December 31, 2006, the approval holder shall operate the Wabamun Lake Water Treatment Plant at sufficient capacity to offset ongoing impacts to the lake level from all TransAlta Utilities Corporation operations, which is forecasted to be 9 million cubic meters annually, or as otherwise authorized in writing by the Director based on the annual report submitted under the Water Act licence 12086, unless the lake level surpasses the elevation of the outlet control weir.

11. As a result of the conditions imposed by subsections 4.3.27(c) and (d) of the renewal of the Wabamun Power Plant Approval, TransAlta sought and obtained renewal of the WLWTP Approval for the WLWTP."

[21] As stated by TransAlta in a letter dated April 11, 2001, to Enron:

"It is TransAlta's position that the Approval constitutes a Change in Law as the term is defined in the PPA. As the … [Water Treatment Plant] is listed in Article A 3.1 of the PPA as an 'Associated Facility' of the Sundance plant a share of the costs is attributable to Enron as a holder of one or more of the Sundance PPAs. …[The Water Treatment Plant] is also an 'Associated Facility' of the Wabamun and Keephills Plants so the holder of those PPAs will also share in the costs to implement Alberta Environment's order to expand output." (See Tab 6 of Enron's Initial Submission, dated November 5, 2001.)

[29] Enron objected to the position being taken by TransAlta and requested that the Board amend the Water Treatment Plant Approval to make it clear the Water Treatment Plant Approval does not impose obligations on the Sundance Power Plant. The purpose of this request is to prevent TransAlta from passing on the costs associated with the Water Treatment Plant to Enron.[22]

[30] Enron presented a number of legal arguments[23] to support its position, but it turns to TransAlta who believes the Water Treatment Plant Approval imposes rights and obligations under the Sundance Approval, and that this allows costs associated with the Water Treatment Plant to be passed on to Enron pursuant to the PPA.[24] Thus, in reality, what Enron was asking the Board to adjudicate on was fundamentally, if not solely, the economic interaction between two approvals.

[31] The question that was before the Board was whether the interest claimed by Enron and the concerns that it expressed were sufficient to allow Enron's appeal to proceed.

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22 In its Notice of Appeal, Enron requested that the Board:

"…amend the …[Water Treatment Plant] Approval so as to clarify that compliance with the …[Water Treatment Plant] Approval, while required for the continued operations of the Wabamun Power Plant Approval, is not required for the continued operations of the Sundance Approval…. [and confirm that the Water Treatment Plant] Approval operates to preclude the imposition of rights and obligations on the Sundance Power Plant over and above those which existed when the Sundance Approval was issued…."

23 In its Notice of Appeal, Enron advised that:

"The Sundance Approval was issued by Alberta Environment in May 1996 for a period of ten years. Pursuant to the terms of the Sundance Approval, the Sundance Power Plant is permitted through to May 2006. …[Further, when] Enron purchased the Sundance B PPA, it was entitled to, and in fact did rely upon the terms of the Sundance Approval which provided that the Sundance Power Plant was permitted through to May 31, 20066."

Enron continued:

"In November 2000, Approval #10323 (the 'Wabamun Power Plant Approval') was renewed on the conditions set out in sections 4.3.27(c) and (d) respecting the historical debt of all of TransAlta's operations on Wabamun Lake be repaid by December 31, 2006. Notwithstanding that the Sundance Approval was not amended in November 2000, TransAlta takes the position that 4.3.27(c) and (d) and the … [Water Treatment Plant Approval] imposes rights and obligations over and above those which existed when the Sundance Approval was issued."

24 As stated by Enron in its Statement of Concern, dated May 16, 2001:

"…TransAlta asserts that Enron, as holder of the Sundance B PPA, is responsible for a significant portion of costs associated with the … [Water Treatment Plant]."

See also the letter from TransAlta to Enron dated April 11, 2001, (Tab 6 of Enron's Initial Submission dated November 5, 2001) as cited in note 21 above.

C. Arguments

[32] For its part, Enron argued that its appeal should proceed; that the AEUB did not hold a review or hearing that would cause the Board to question its jurisdiction;[25] that the sale of the PPA makes no difference at all; that Enron has the same interest after the sale of the PPA as it did before the sale, and on this basis distinguishes *Westridge #2*;[26] and Enron claimed it sold its interest, so according to Enron, *Westridge #2* is different than this case. In the critical *standing* issue, Enron claimed that it is directly affected because (a) the "Change in Law" provision directly affects it;[27] (b) the purpose of EPEA supports it regarding economics and sustainable development provisions;[28] and (c) finally, because Enron has some concern for environmental matters as well.[29]

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[25] Section 95(5)(b)(i) of EPEA requires the Board to dismiss an appeal where

> "…the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under … any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with …."

[26] In *Westridge Water Supply #2* v. *Director, Bow Region, Natural Resources Service, Alberta Environment* (May 10, 2001), E.A.B. Appeal No. 00-059-ID, the appellant, Westridge Water, sold its rights under the Preliminary Certificate to Westridge Utilities. The appellant requested that it be allowed to continue with the appeal, irrespective of the fact that it no longer had rights or obligations under the Preliminary Certificate. The Board determined that Westridge Utilities, as the new Preliminary Certificate holder, met the standing requirement as it had "legitimate business reasons with genuine commercial interests being at stake." The Board stated "it would deny an appeal transfer request by a new Preliminary Certificate holder only under unique circumstances, for example, if the transfer gained an unfair strategic advantage over the Director." Therefore, the Board substituted Westridge Utilities for Westridge Water as the sole appellant, and Westridge Water was allowed to participate as a party.

In its submission, Enron distinguished Westridge on the grounds that the appellant in Westridge sold all of its interests to a third party, whereas Enron claimed that the "…provisions of the Sundance 'B' PPA Purchase and Sale Agreement clearly entrench and preserve Enron's position and standing in the within Appeal." (Enron supplemental submission, dated February 8, 2002, at paragraph 17.)

[27] See: Enron's rebuttal submission, dated November 21, 2001, which states, at paragraph 3:

> "As a result of the fact that the 'Change in Law' provisions of the Sundance 'B' PPA afford TransAlta the right to pass through certain costs it incurs to its PPA Buyer counterpart, Enron has a direct economic and environmental interest that will be impacted by the WLWTP Approval and the Wabamun Power Plant Approval to the extent the form of these approvals purport to impose new obligations on the Sundance Power Plant. Although its interest may be more directly economic than environmental in nature, that does not preclude the finding that Enron is directly affected within the meaning of the Act. Rather, those two interests are inextricably bound and reflect the broad range of environmental and economic policies underlying the Act."

See also the provisions in the PPA regarding a "Change in Law" as cited in note 16 above.

[28] Section 2 of EPEA requires the Board to balance environmental concerns with economic concerns and provides:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;…

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual action…."

29 In the Notice of Appeal, Enron stated at pages 2-3:

"(c) The Director gave insufficient consideration to and had inadequate information relating to the environmental concerns raised by Enron in its Statements of Concern including:

(i) the capacity of the proposed Wabamun Lake Water Treatment Plant (the 'WLWTP') is in excess of what is required to restore the historic debt of TransAlta's operations on Lake Wabamun by the end of 2006;

(ii) the addition of tube settlers, instead of the significantly more extensive addition of ballasted flocculation plant as approved by the WLWTP Approval, to the existing up-flow clarifier could increase the clarifying capacity of the WLWTP by twenty percent or three million cubic meters per annum, resulting in the need for a smaller WLWTP Addition;

(iii) TransAlta's rationale for increasing the magnitude of the proposed WLWTP Addition to 8 million cubic metres of water per year is questionable. Based on the calculations found in Table 5.5.5.5 of TransAlta's original application for the WLWTP Approval, there is a margin of 10.45 million cubic metres which, over the projected full capacity operation of the new plant from 2002 through to 2006, amounts to approximately 2.5 million cubic metres of capacity per year more than what is required;

(iv) The WLWTP Approval does not provide nor make reference to any environmental assessment of the proposed additional diversion from the North Saskatchewan River. Decreasing the proposed diversion amount would reduce the impact on the North Saskatchewan River;

(v) TransAlta's application to amend the WLWTP Approval did not provide any rationale for why the waste stream from the proposed WLWTP Addition could not be directed to one of the existing Sundance Power Plant ash settling ponds and dredged and disposed of in the Highvale Mine in the same manner as the waste stream from the existing plant. It is not necessary to add new settling ponds to the Sundance Approval because the settling ponds are intended strictly as an operational entity associated with the WLWTP Addition and, if necessary, it is possible and appropriate to add ground water monitoring requirements to the WLWTP Approval rather than to amend the Sundance Approval;

(vi) TransAlta has an excessive safety margin of 39.4% based on its assumption of a minimum of twenty million cubic meters of treated water production. As Actiflow unit with an annual production of three million cubic meters or less would be more than adequate to off-set the historical debt of TransAlta's operations on Lake Wabamun by no later than December 31, 2006; and

(vii) If the WLWTP Addition and associated facilities were kept to a minimum, they would reduce the actual remediation work required at the end of the life of the WLWTP."

[33] The Director disagreed with Enron on almost every point. Regarding the effect of Enron's sale to the ASTC Power Partnership on December 31, 2002, the Director stated that the sale directly brings this appeal under the scope of the Board's previous decision, *Westridge #2*. In other words, by purchasing the PPA, ASTC stepped into Enron's shoes to assume the standing of Enron (whatever it was before the sale). Since the rights that are challenged are ASTC's, as an appellant, and since ASTC made it clear that it will not prosecute the appeal, the Director argued that Enron's claim must fail.[30]

[34] In addition, the Director claimed that the PPA, including its alternative dispute resolution provisions,[31] deal primarily, if not exclusively, with financial matters – not

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[30] In his Supplemental Submission dated February 7, 2002, the Director stated:

> "In *Westridge* [*#2*], the appellant preliminary certificate holder appealed the conditions of the preliminary certificate. After the appeal had been filed, the appellant vendor sold all its assets, including its rights under the Preliminary Certificate, to a successor company, the purchaser, and the Director formally transferred the Preliminary Certificate to the purchaser.
>
> It is submitted, that following the Board's findings in *Westridge* [*#2*], [(see paragraphs 25, 26, and 28)] if Enron had the status to commence an appeal, the equities would weigh in favour of the Board transferring the appeal to the purchaser, upon request, provided that transfer provided no unfair strategic advantage over the Director or the approval holder. Therefore, the purchaser would step in[to] the shoes of Enron to assume the same standing as Enron possessed prior to the sale.
>
> The Board held in *Westridge* [*#2*] that, under s.115(1) of the *Water Act*, it retained discretion to dismiss an appeal if an appellant loses standing after an appeal is commenced. In exercising that discretion, the Board in *Westridge* [*#2*] found that the vendor (the original appellant) should not be allowed to remain as an appellant because it was no longer the preliminary certificate holder, and there was no other compelling reason why the vendor should be allowed to maintain the appeal [(see paragraph 17)]. Again, it is the Director's submission that the situation with the vendor Enron, and the purchaser, ASTC Power Partnership is analogous to that in *Westridge* [*#2*]."

The Director further stated that Enron can be a witness for ASTC, but again that is pointless because ASTC had decided not to proceed with the appeal. (See letter from ASTC, dated January 25, 2002.)

[31] See: PPA Agreement, Enron's submission, dated November 5, 2001, Tab 17:

> "**19.1 Dispute or Failure to Agree**
>
> Where this Arrangement requires the Parties to come to an agreement with respect to any matter, the failure of the parties to come to such agreement within the time specified. Or if no time is specified within a reasonable period, shall be deemed to be a dispute between the parties which shall be resolved in accordance with the provisions of this Article 19.
>
> **19.2 Submission to Senior Management**
>
> In the event of a dispute relating to this Arrangement arising, the Parties shall promptly enter into discussions and use reasonable efforts in good faith to reach a reasonable and equitable resolution of the dispute. If the Parties are unable to resolve the dispute within five (5) Business Days of commencing such discussions, the matter shall be promptly referred to a member of senior management of each of the Parties for resolution, who shall negotiate in good faith to reach a reasonable and equitable resolution of the issue. If such members of senior management of the Parties are unable to resolve the dispute

environmental - and therefore the Board, the Director, (and the Minister) have no jurisdiction over Enron's claim on appeal. This argument would be an alternative option upon which to dismiss the standing matter.

[35] The Director could only see one potential environmental effect included in Enron's submission, and that was the reduced remediation work if the plant's capacity was limited as Enron suggested.[32] Beyond that, the Director took no position on the AEUB issue, but did say that the essence of Enron's case is a financial adjustment squarely between Enron and TransAlta Utilities, and as such, there would be no decision this Board could make to address Enron's real complaint, which is financial.

[36] TransAlta's arguments were succinct. TransAlta claimed Enron's appeal should be dismissed because:

1. Enron is here for financial/commercial reasons only;
2. Enron has no specific environmental interest;
3. Enron is *not* accountable under TransAlta's licence for operational difficulties and enforcement (but TransAlta is);
4. Enron is not directly affected and any filing of its Statement of Concern goes to the issue of reducing costs only; Enron has never raised concerns with weeds, etc. like the other parties;

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within five (5) Business Days of referral to them or such further time as the Parties may agree, the Parties shall resolve the dispute in accordance with the remaining provisions of this Article 19.

19.3 Litigation

Either Party may commence litigation with respect to any question of law or the recovery of any liquidated damages arising in relation to this Arrangement, within the limitation periods set out in the *Limitation of Actions Act* (Alberta), and any successor or replacement legislation.

19.4 Submission to Arbitration

Subject to Section 19.3, all disputes with respect to this Arrangement shall, after the provisions of Section 19.2 have been followed, be forwarded to and resolved by binding arbitration in accordance with the *Arbitration Act* S.A. 1991, c.A-43.1 (the 'Arbitration Act'), by a board of arbitrators in accordance with the following provisions…."

[32] In the oral submissions presented at the Preliminary Meeting on February 15, 2002, the Director stated:

"It is the Director's observation that in the entirety of Enron's submissions, there is only one environmental effect alleged, namely the reduced remediation work for an expansion that is kept to a minimum. There is the inference that a particular expansion capacity leads to a larger footprint than a smaller expansion capacity. Now this environmental effect is not unique or personal to Enron. No environmental effect unique to Enron was cited throughout the … submissions."

5. Enron is in the wrong forum; the PPA has a clear alternative dispute resolution mechanism to resolve its disputes; and

6. Whatever standing Enron had in this appeal, Enron lost such standing upon the sale of the PPA to the ASTC.

[37] Mr. Doull also argued that Enron's appeal should be dismissed. Like the other Parties, Mr. Doull argued that Enron has no real environmental interest, only a financial interest, and this appeal should be dismissed.

[38] LWEPA argued that the Board should dismiss Enron's appeal. LWEPA summarized Enron's case by suggesting that Enron wants money back and is using the Board to deal with a commercial matter under the guise of environmental protection. And, if Enron does care about the environment, LWEPA claimed it is only because of the costs associated with the PPA, *not* the Approval under appeal.

[39] In reply, Enron agued that it has a vested right, and that it is directly affected because economic interests are relevant.[33] Eventually, though, Enron admitted that its main concern is economic.[34]

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[33] See: Enron's rebuttal submission at paragraphs 9-10, where it stated:

"The interests of Enron relate to and otherwise reflect the broad range of environmental and economic policies underlying the Act. It should be noted that for every environmental interest sought to be protected in respect of the WLWTP Approval and Wabamun Power Plant Approval, there is a corresponding economic impact, with the result that the two are inextricably intertwined. The fact that Enron's direct interest may be directly economic than environmental in nature is not dispositive of the issues…."

[34] In oral submissions presented at the Preliminary Meeting on February 15, 2002, Enron stated:

"True, our main concern is economic in nature."

IV. ANALYSIS AND DECISION

[40] The Board has jurisdiction over these appeals pursuant to section 91 of EPEA.[35] Like any appeal before the Board, the burden of proof is on the Appellant – here Enron – to demonstrate on a balance of the evidence that they have standing;[36] and in this case the Board believes that Enron has not succeeded in proving that it is properly before the Board.

[41] First, different Parties before us argued the application or non-application of *Westridge #2* for different reasons.[37] The Board finds that *Westridge #2* applies, and on that basis, the appeal should be dismissed. *Westridge #2* cannot be used to support Enron's claims, because in *Westridge #2*, the purchaser of the assets, the successor in appeal, pressed the Board to continue with the appeal. However, in the appeal now before us, the purchaser of all of Enron's interest – the ASTC Power Partnership – does *not* want to participate in the appeal.[38] Therefore, the Board does not have to decide whether or not Enron has standing before us as

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[35] The relevant section of section 91 of EPEA provides:

> "(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
>
> (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
>
> (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or
>
> (ii) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3)…."

[36] The onus is on an appellant to prove that they are directly affected. As stated in *Paron et al*. v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), E.A.B. Appeal Nos. 01-045, 01-046, and 01-047-D at paragraph 24:

> "Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected."

[37] As stated, Enron submitted that *Westridge #2* does not apply; the other parties disagreed.

[38] See: Letter from ASTC, dated January 25, 2002, which states:

> "After conferring with our business partner AltaGas Services Inc. we confirm that the ASTC Power Partnership will not be participating in the appeal that is currently before the Board…."

Enron sold its "entire" interest to ASTC, who subsequently declined the opportunity to participate in our appeal process.

[42] Second, Enron claimed the Board's jurisdiction can include economic interests. We agree. However, in the history of the Board thus far, the economic interest has always been *tied to environmental interests as a matter of both fact and law*. While the bottle depot cases, which no longer come before this Board, clearly dealt with economic interests, the foundation of these economic interests was created environmentally from a factual and regulatory perspective. The economic protections afforded by the policy established by Alberta Environment that creates certain geographical monopolies for bottle depot operators, were intended to ensure that there were a sufficient number of economically viable bottle depot operators to effectively collect beverage containers for recycling, thereby preventing them from ending up in our landfills or elsewhere in the environment. While the issue was economic in nature, its purpose was clearly environmental. This is not the case here. While Enron has tried to present an environmental case, Enron's purpose is primarily, if not exclusively, economic. The Board does not believe that Enron really had any environmental interest in mind when arguing that the Water Treatment Plant should be smaller than proposed.[39]

[43] As for the Sundance Plant, which Enron linked to the Water Treatment Plant Approval, we have no jurisdiction because that approval is not at issue before us.[40]

[44] However, in the remedies that Enron requested, environmental concerns were conspicuously absent, and it is clear that Enron's concern related primarily, if not entirely, to the interaction between the Water Treatment Plant Approval and the Sundance Approval and the associated financial implications that result. The remedies that Enron requested in its Notice of Appeal, at page 5, were:

> "…(a) amend the WLWTP Approval so as to clarify that compliance with the WLWTP Approval, while required for continued operations of the Wabamun Power Plant Approval, is not required for the continued operations of the Sundance Approval;
> (b) confirm that section 2.1.5 of the WLWTP Approval operates to preclude

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[39] The Board notes that Enron purported to raise environmental concerns about the size of the Water Treatment Plant in their Notice of Appeal as cited in note 29 above.

[40] See: Enron's submission, dated November 5, 2001, at para. 15.

the imposition of rights and obligations on the Sundance Power Plant over and above those which existed when the Sundance Approval was issued;

(c) review the WLWTP Approval based on the foregoing concerns and determine regarding whether the WLWTP Approval should be granted; and

(d) such further and other relief as this Honourable Board may deem appropriate and necessary."

The remedies that Enron requested *do not* reflect an environmental concern about the size of the Water Treatment Plant.

[45] Alternatively, the Board dismisses the appeal because Enron does not challenge a specific term or condition in the Director's decision. Again, the Board is convinced, based on the arguments before it, that Enron's primary – if not total – interest is financial; and unless the interest is linked clearly and directly to the Approval, usually through a factual pattern and procedural history of raising concerns regarding environmental matters which are *in* the Director's jurisdiction, the Board is bound to dismiss the appeal. The Board agrees with the Approval Holder where it stated that "…there is absolutely no environmental component to this dispute to trigger the jurisdiction of the Board nor is it appropriate for this Board to arbitrate a commercial dispute."[41]

[46] Taking into account the foregoing, Enron's appeal is dismissed pursuant to section 95[42] of EPEA for the following reasons which are provided in the alternative:

1. Enron has sold "all of its interests" in the PPA to ASTC, who has decided *not* to appeal; or

2. Enron's financial and economic interests, which we find to be the *major* basis of Enron's appeal arguments, are not sufficient on the facts of this case to establish that Enron is directly affected; or

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41 See: Approval Holder's submission, dated November 16, 2001, at para. 30.

42 Section 95 of EPEA provides in part:

"The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit, …

(ii) the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,

(iii) for any other reason the Board considers that the notice of appeal is not properly before it…"

3. Enron's real challenge is not aimed at the decision of the Director, but at a commercial dispute with TransAlta, and as such, there is nothing claimed as against the Director upon which we should decide.

[47] Having decided that Enron is not directly affected and that Enron's appeal is not otherwise properly before the Board, the Board need not address the question of whether this matter has been previously addressed by the AEUB.

Dated on June 26, 2002, at Edmonton, Alberta.

"original signed by"
William A. Tilleman, Q.C.
Chair

"original signed by"
Dr. John P. Ogilvie

"original signed by"
Mr. Ron Hierath