

2003 BCSECCOM 841

Headnote

Mutual Reliance Review System for Exemptive Relief Application - relief from registration and prospectus requirements granted for issuance of units of the Applicant under a distribution reinvestment plan, subject to certain conditions - first trade relief granted, subject to certain conditions

Applicable British Columbia Provisions

Securities Act, R.S.B.C.1996, c. 418, ss. 48 and 76

Multilateral Instrument 45-102 *Resale of Securities*

IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, NEW BRUNSWICK, NOVA SCOTIA, NEWFOUNDLAND AND LABRADOR AND PRINCE EDWARD ISLAND

AND

IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS

AND

IN THE MATTER OF TRANSALTA POWER L.P.

MRRS DECISION DOCUMENT

1. WHEREAS the local securities regulatory authority or regulator (the Decision Maker) in each of British Columbia, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the Jurisdictions) has received an application from TransAlta Power L.P. (TransAlta Power) for a decision, pursuant to the securities legislation of the Jurisdictions (the “Legislation”), that the requirements contained in the Legislation to be registered to trade in a security and to file a preliminary prospectus and a final prospectus and obtain receipts therefor (the Registration and Prospectus Requirement) shall not apply to the distribution of units of TransAlta Power (Units) issued pursuant to a premium distribution, distribution reinvestment and optional unit purchase plan (the Premium DRIP);
2. AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the System), the Ontario Securities Commission is the principal regulator for this application;

2003 BCSECCOM 841

3. AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions* or in Québec Commission Notice 14-101;
4. AND WHEREAS TransAlta Power has represented to the Decision Makers that:
 - 4.1 TransAlta Power is a limited partnership formed pursuant to a limited partnership agreement (the Partnership Agreement) dated as of December 16, 1997, as amended and restated. On December 22, 1997, TransAlta Power was registered as a limited partnership under the laws of the Province of Ontario and was subsequently registered or extra-provincially registered, as the case may be, in all other provinces of Canada. The business and affairs of TransAlta Power are managed by TransAlta Power Ltd. (the General Partner) pursuant to the Partnership Agreement. TransAlta Energy Corporation (TransAlta Energy) has contracted with the General Partner pursuant to a management agreement dated April 12, 1998, as amended (the Management Agreement) to provide TransAlta Power with certain management, administrative and other services. TransAlta Energy relies on its own resources in providing such services to TransAlta Power.
 - 4.2 The head and principal office of the general partner of TransAlta Power is located at 110 – 12th Avenue S.W., Calgary, Alberta T2R 0G7.
 - 4.3 The business of TransAlta Power consists solely of activities directly or indirectly related to the energy supply industry and the holding of investments in other entities which are primarily engaged in that industry.
 - 4.4 TransAlta Power owns a 49.99% indirect interest in power plants located in Mississauga, Ottawa and Windsor, Ontario and related assets and interests (collectively, the Ontario Power Plants), a 29.99% indirect interest in a power plant located in Fort Saskatchewan, Alberta and related assets and interests (the Dow Power Plant) and a 24.995% indirect interest in a power plant located near Hanna, Alberta (the Sheerness Generating Station). These indirect interests are held by TransAlta Power through its ownership of a 49.99% partnership interest in TransAlta Cogeneration, L.P. (TA Cogen). In turn, TA Cogen owns a 100% interest in the Ontario Power Plants, a 60% interest in the Dow Power Plant and a 50% interest in the Sheerness Generating Station.

2003 BCSECCOM 841

- 4.5 TransAlta Power is a reporting issuer or the equivalent thereof in each of the provinces of Canada and has been so since March 1998.
- 4.6 TransAlta Power is a “qualifying issuer” within the meaning of Multilateral Instrument 45-102 *Resale of Securities* and, to the best of its knowledge, is not in default of any requirements of the Legislation.
- 4.7 TransAlta Power is authorized under the Partnership Agreement to issue an unlimited number of Units.
- 4.8 As of September 30, 2003, 69,487,700 Units were issued and outstanding, and there were 17,097,650 outstanding warrants to purchase Units on a one-for-one basis.
- 4.9 The Units are listed and posted for trading on the Toronto Stock Exchange (the TSX).
- 4.10 The Partnership Agreement provides that no Units may be owned by or transferred to, among other things, a person who is a “non-resident” of Canada, a person in which an interest would be a “tax shelter investment” or a partnership which is not a “Canadian partnership” for the purposes of the *Income Tax Act* (Canada).
- 4.11 According to the Partnership Agreement, the General Partner shall, to the extent that it has cash available to do so, make monthly distributions of the distributable cash (if any) (Distributable Cash) of TransAlta Power to holders of units (Unitholders).
- 4.12 The Partnership Agreement defines Distributable Cash for any particular period as the amount by which TransAlta Power’s cash on hand or to be received in respect of that period exceeds: (i) unpaid administrative expenses of TransAlta Power, (ii) amounts required for the business and operations of TransAlta Power during such period (including fees and expenses payable to TransAlta Energy under the Management Agreement); and (iii) any cash reserve that the board of directors of the General Partner in its discretion determines is necessary to satisfy TransAlta Power’s current and anticipated obligations and liabilities and to comply with applicable law.
- 4.13 TransAlta Power is not a “mutual fund” as defined in the Legislation because the Unitholders are not entitled to receive on demand an amount computed by reference to the value of a proportionate interest in the

2003 BCSECCOM 841

whole or in part of the net assets of TransAlta Power as contemplated by the definition of “mutual fund” contained in the Legislation.

- 4.14 TransAlta Power intends to establish the Premium DRIP pursuant to which eligible Unitholders may direct that cash distributions paid by TransAlta Power in respect of their existing Units (Cash Distributions) be applied to the purchase of additional Units (DRIP Units) and, at their option, either (i) direct that the DRIP Units be held for their account (the Reinvestment Option) or (ii) authorize and direct the trust company that is appointed as plan agent under the Premium DRIP (the Plan Agent) to pre-sell, through a designated broker (the Plan Broker), for the account of such Unitholders so electing, that number of Units approximately equal to the number of DRIP Units issuable on such reinvestment of Cash Distributions and to settle such pre-sales with the DRIP Units issued on the applicable distribution payment date in exchange for a cash payment for the account of such Unitholders equal to 102% of the reinvested Cash Distributions (the Premium Distribution Option). The Plan Broker will be entitled to retain for its own account the difference between the proceeds realized in connection with the pre-sales of Units and the cash payment to the Plan Agent in an amount equal to 102% of the reinvested Cash Distributions.
- 4.15 Eligible Unitholders that have elected to have their Cash Distributions reinvested in DRIP Units under either the Reinvestment Option or Premium Distribution Option (Participants) may also purchase additional Units under the Premium DRIP by making optional cash payments (Optional Cash Payments) within certain established limits (the Cash Payment Option). TransAlta Power shall have the right to determine from time to time whether the Cash Payment Option will be available.
- 4.16 All DRIP Units purchased under the Premium DRIP will be purchased by the Plan Agent directly from TransAlta Power on the relevant distribution payment date at a price determined by reference to the Average Market Price (defined in the Premium DRIP as the arithmetic average of the daily volume weighted average trading prices of the Units on the TSX for a defined period not exceeding 20 trading days preceding the applicable distribution payment date).
- 4.17 DRIP Units purchased under the Reinvestment Option or the Premium Distribution Option will be purchased at a 5% discount to the Average Market Price. DRIP Units purchased under the Cash Payment Option will also be purchased at a 5% discount to the Average Market Price.

2003 BCSECCOM 841

- 4.18 The Plan Broker's *prima facie* return under the Premium Distribution Option will be approximately 3% of the reinvested Cash Distributions (based on pre-sales of DRIP Units having a market value of approximately 105% of the reinvested Cash Distributions and a fixed cash payment to the Plan Agent, for the account of applicable Participants, of an amount equal to 102% of the reinvested Cash Distributions). The Plan Broker may, however, realize more or less than this *prima facie* amount, as the actual return will vary according to the prices the Plan Broker is able to realize on the pre-sales of DRIP Units. The Plan Broker bears the entire price risk of pre-sales in the market, as Participants who have elected the Premium Distribution Option are entitled to a cash payment equal to 102% of the reinvested Cash Distributions.
- 4.19 All activities of the Plan Broker on behalf of the Plan Agent that relate to pre-sales of DRIP Units for the account of Participants who elect the Premium Distribution Option will be in compliance with applicable Legislation and the rules and policies of the TSX (subject to any exemptive relief granted). The Plan Broker will also be a member of the Investment Dealers Association of Canada, and will be registered under the Legislation of any Jurisdiction where the first trade in DRIP Units pursuant to the Premium Distribution Option makes such registration necessary.
- 4.20 The Premium DRIP will only be available to Unitholders who are residents of Canada and who are otherwise permitted by the Partnership Agreement to hold Units.
- 4.21 Participants who choose to participate in the Premium DRIP are free to terminate their participation under either the Reinvestment Option or the Premium Distribution Option and to change their election as between the Reinvestment Option and the Premium Distribution Option, in each such case, by providing written notice thereof to the Plan Agent. A notice of termination or change of election received on or after a distribution record date will become effective after the distribution payment date to which such record date relates.
- 4.22 Under the Reinvestment Option, Cash Distributions will be paid to the Plan Agent and applied by the Plan Agent to the purchase of DRIP Units, which will be credited to the account of the appropriate Participants who have elected to participate in that component of the Premium DRIP through The Canadian Depository of Securities Limited.

2003 BCSECCOM 841

- 4.23 Under the Premium Distribution Option, Cash Distributions will be paid to the Plan Agent and applied by the Plan Agent to the purchase of DRIP Units for the account of the appropriate Participants who have elected to participate in that component of the Premium DRIP, but the DRIP Units purchased thereby will be automatically transferred to the Plan Broker to settle pre-sales of Units made by the Plan Broker on behalf of the Plan Agent for the account of such Participants in exchange for a cash payment equal to 102% of the reinvested Cash Distributions.
- 4.24 Under the Cash Payment Option, a Participant may, through the Plan Agent, purchase DRIP Units subject to a maximum amount per remittance of \$5,000 and a minimum amount per remittance of \$500. The aggregate number of DRIP Units that may be purchased under the Cash Payment Option by all Participants in any financial year of TransAlta Power will be limited to a maximum of 2% of the number of Units issued and outstanding at the start of the financial year.
- 4.25 No brokerage fees or service charges will be payable by Participants in connection with the purchase of DRIP Units under the Premium DRIP.
- 4.26 All Cash Distributions on Units enrolled in the Premium DRIP will be automatically reinvested in DRIP Units under the Reinvestment Option or exchanged for a cash payment under the Premium Distribution Option, as applicable, in accordance with the terms of the Premium DRIP and the current election of the applicable Participant.
- 4.27 The Premium DRIP permits full investment of reinvested Cash Distributions and Optional Cash Payments because fractions of Units, as well as whole Units, may be credited to Participants' accounts (although, in the case of beneficial Unitholders, the crediting of fractional Units may depend on the policies of a Participant's broker, investment dealer, financial institution or other nominee through which the Participant holds Units).
- 4.28 TransAlta Power reserves the right to determine for any distribution payment date how many DRIP Units will be available for purchase under the Premium DRIP.
- 4.29 If, in respect of any distribution payment date, fulfilling all of the elections under the Premium DRIP would result in TransAlta Power exceeding either the limit on DRIP Units set by TransAlta Power or the aggregate annual limit on DRIP Units issuable pursuant to the Cash Payment Option, then elections for the purchase of DRIP Units on the

2003 BCSECCOM 841

next distribution payment date will be accepted: (i) first, from Participants electing the Reinvestment Option; (ii) second, from Participants electing the Premium Distribution Option; and (iii) third, from Participants electing the Cash Payment Option. If TransAlta Power is not able to accept all elections in a particular category, then purchases of DRIP Units on the next distribution payment date will be pro-rated among all Participants in that category according to the number of DRIP Units sought to be purchased.

- 4.30 If TransAlta Power determines that no DRIP Units will be available for purchase under the Premium DRIP for a particular distribution payment date, then all Participants will receive the Cash Distribution announced by TransAlta Power for that distribution payment date.
 - 4.31 TransAlta Power reserves the right to amend, suspend or terminate the Premium DRIP at any time, provided that such action shall not have a retroactive effect which would prejudice the interests of Participants. TransAlta Power will notify Unitholders of any such amendment, suspension or termination in accordance with the Premium DRIP and applicable securities law requirements.
 - 4.32 Legislation in the Jurisdictions provides exemptions from the Registration and Prospectus Requirement for reinvestment plans. Such exemptions are not available to TransAlta Power in the Jurisdictions, however, because such exemptions are generally limited to plans that provide for the reinvestment of one or more of (i) dividends; (ii) interest; (iii) capital gains; or (iv) earnings or surplus. In contrast, the distributions that are paid to the Unitholders are distributions of cash which may not fall within such categories.
 - 4.33 In addition, Legislation in certain of the Jurisdictions provides exemptions from the Registration and Prospectus Requirement for reinvestment plans of mutual funds. Such exemptions are unavailable to TransAlta Power since it is a limited partnership and, therefore, not within the definition of “mutual fund” contained in the Legislation of the relevant Jurisdictions.
- 5. AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the Decision);
 - 6. AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met;

2003 BCSECCOM 841

7. THE DECISION of the Decision Makers pursuant to the Legislation is that:

- 7.1 the Registration and Prospectus Requirement contained in the Legislation shall not apply to distributions by TransAlta Power of DRIP Units for the account of Participants pursuant to the Premium DRIP, provided that:
 - 7.1.1 at the time of the trade TransAlta Power is a reporting issuer or the equivalent in a jurisdiction listed in Appendix B of MI 45-102 and is not in default of any requirements of the Legislation;
 - 7.1.2 no sales charge is payable by Unitholders in respect of the trade;
 - 7.1.3 TransAlta Power has caused to be sent to the person or company to whom the DRIP Units are traded, not more than 12 months before the trade, a statement describing:
 - 7.1.3.1 their right to withdraw from the Premium DRIP and to make an election to receive Cash Distributions instead of DRIP Units on the applicable distribution payment date (the Withdrawal Right); and
 - 7.1.3.2 instructions on how to exercise the Withdrawal Right;
 - 7.1.4 the aggregate number of DRIP Units issued under the Cash Payment Option of the Premium DRIP in any financial year of TransAlta Power shall not exceed 2% of the aggregate number of Units outstanding at the start of that financial year;
 - 7.1.5 the first trade of DRIP Units shall be deemed to be a distribution or a primary distribution to the public under the Legislation unless:
 - 7.1.5.1 except in Québec, the conditions in subsections (3) of Section 2.6 of MI 45-102 are satisfied; and
 - 7.1.5.2 in Québec:
 - 7.1.5.2.1 TransAlta Power is a reporting issuer in Québec and has been a reporting issuer in Québec for the 12 months preceding the trade;

2003 BCSECCOM 841

- 7.1.5.2.2 no unusual effort is made to prepare the market or to create a demand for the DRIP Units that are the subject of the trade;
- 7.1.5.2.3 no extraordinary commission or other consideration is paid to a person or company in respect of the trade; and
- 7.1.5.2.4 if the selling security holder of the DRIP Units is an insider or officer of TransAlta Power, the selling security holder has no reasonable grounds to believe that TransAlta Power is in default of Québec securities legislation.

DATED this 5th day of December, 2003.

Paul M. Moore

Wendell S. Wigle