March 24, 2016

The Termination of Power Purchase Arrangements in Alberta: What is the Legal Position and What are the Implications of Termination?

By: Nigel Bankes

Case Commented On: The decisions of various buyers to "terminate" their interests in power purchase arrangements (PPAs)

In December 2015, Enmax announced that it was "terminating" its interest in a power purchase arrangement (PPA) with the owner of the Battle River 5 coal plant subject to the PPA (see Enmax terminates unprofitable-coal-fired electricity contract). That was followed this month (March 2016) with announcements from TransCanada Energy and ASTC Power Partnership (a partnership of Trans Canada Energy and AltaGas Pipelines) that they too had given notice to terminate and would be walking away from their obligations as buyers under PPAs relating to Sheerness and Sundance A and B. In announcing its decision, TransCanada indicated that it was doing so because "Unprofitable market conditions are expected to continue as costs related to CO_2 emissions have increased and they are forecast to continue to increase over the remaining term of the PPA agreements." It is generally understood that reference to "costs related to CO_2 emissions" is a reference to the emissions penalty imposed by the *Specified Gas Emitter Regulation* (*SGER*), Alta Reg 139/2007. This Regulation, first introduced in 2007, requires regulated emitters (including owners of coal fired generating plants) to achieve improvements in emissions intensity at their facilities (or purchase offsets or emissions performance credits) failing which these emitters must pay into the Climate Change and Emission Management Fund. The emissions intensity target was originally set at 12% over the original baseline for the facility and the fund contribution at $15 a tonne (payable only for emissions in excess of the emissions intensity target for the facility). While the previous government dithered and procrastinated on changes to the intensity target and changes to the level of fund contribution (indeed the previous government extended the sunset provision in the regulation twice), the Notley government grasped the nettle, and, in June 2015 announced, as an interim step in the development of a more comprehensive climate change policy, that regulated emitters will be required to achieve an emissions intensity target of 15% in 2016 and 20% in 2017, while the compliance price for excess emissions will rise from $20 per tonne in 2016 to $30 per tonne in 2017. Those developments are discussed in an earlier post here.

There has been considerable coverage of PPA termination matters in the media and in law firm blogs (see Osler here). I discussed these issues with my Energy Law class this term and it seems useful to share the analysis that we developed. We can anticipate that various parties, including buyers under PPAs, the province's Department of Energy, and the Balancing Pool (see further discussion of the Balancing Pool below and see Darcy Henton, Calgary Herald, March 19, 2016, "Balancing Pool to investigate impact of PPAs") have already commissioned or will be commissioning detailed legal opinions on the issues surrounding termination, but it seems unlikely that those opinions will see the light of day. Hence, with a view to informing and stimulating more public debate on these issues, here are some of the elements of our discussion, principally presented in a Q & A format and with hyperlinks to some additional relevant sources.

What is a power purchase arrangement and why were they created?

PPAs were developed as part of the Province's strategy to introduce competition into the generation sector of the electricity industry. Prior to 1995 the electricity sector in Alberta was subject to cost-based utility regulation. Coal generation was the dominant form of generation. Facilities were owned by one of the three main utilities – Edmonton Power (subsequently EPCOR and then publicly traded as Capital Power), Alberta Power (subsequently ATCO) or TransAlta (TAU). The generating facilities were part of the rate base and the cost of coal was recovered as an operating cost. Cost-based rates were approved by the Public Utilities Board (now the Alberta Utilities Commission (AUC)): see for example, *Alberta Power Limited et al v Alberta Public Utilities Board* (1990), 72 Alta LR (2d) 269 (CA).

A market dominated by three incumbent generators is not a competitive market (and will not attract new entrants because new entrants will worry about the market power that the incumbents may exercise). Hence, the province needed to come up with a strategy for limiting the market power of the incumbents. One option would be to force the incumbents to sell generation assets. There is little doubt that the province could do this (constitutionally) but it was not a politically attractive option. Instead, the province opted for "virtual divestiture" through the mechanism of the PPAs. The Court of Appeal summarized the position in *ATCO Electric Limited v Alberta (Energy and Utilities Board)*, 2004 ABCA 215 as follows (at para 18):

> The theory was that by compelling this generation capacity of the Alberta power producers to be disposed of under PPAs, it would increase the number of parties selling electricity which would, in turn, increase competition and result in lower prices for electricity. … PPAs cover the electrical output of most regulated plants (those in existence prior to the *1995 Act*) from January 1, 2001 until December 31, 2020. … Viewed in this light, PPAs represent an example of the government's attempts, on restructuring, to increase competition and promote a more balanced relationship, in terms of bargaining power, between utilities and their customers.

A PPA separates two things: (1) ownership and operation of the plant, and (2) the right to bid generation from the plant into the power pool (the market for generation). The incumbents continue to own and operate the facility but the buyer under the PPA decides at what price to bid generation into the pool. As the Minister of Energy (Dr. West) explained to the Legislature (and as quoted in AUC Decision, *MSA v TAU, Nathan Kaiser and Scott Connelly*, Decision 3110-D01-215 at para 545:

> The power purchase agreements will remove control over around 7,500 megawatts, and that's about what we have in the system today. It will remove control over around that much generation from the utilities and transfer them to new players. This will definitely address the market power concerns.

Under the terms of the PPA, the buyer compensates the owner for its fixed and variable costs on the basis of a formula which is intended to mimic the compensation that the owners would receive under traditional cost of service regulation. The evident purpose of this method of compensation is to ensure that the incumbents are made whole. The owners continue to receive a return of, and a return on, capital much as they would prior to the introduction of competition. There is no interference with their investment-backed expectations. The buyer takes the market risk. To the extent that pool prices generally exceed the fixed and variable costs that the buyer must pay the owner, the buyer will be in the money. To the extent that the pool price consistently falls below these costs the buyer will be under water. Buyers however did not, as we shall see, assume any risk for change of law – and neither did the owners. The same is true of the risk of *force majeure*: *TransAlta Generation Partnership v. Balancing Pool*, 2012 ABQB 2. These risks are borne by the ratepayers on the system.

Once the PPA comes to an end, offer control reverts to the owner but the expectation was that, by that time, additional parties would have entered the market such that the old incumbents would no longer have a dominant market share. The most recent report of the Market Surveillance Administrator (MSA) on market share (June 2015), Report on Market Share Offer Control records the following (at 1): ENMAX, 17%, TransCanada, 16.5%, TransAlta, 14%, Capital Power, 10.9%, ATCO, 10.5%, other 28.7%. Clearly these figures will need restating in light of the PPA terminations. Section 5(5) of the *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009 (*FEOC Regulation*) provides that a market participant may not hold offer control in excess of 30% of the maximum capability of generating units in Alberta (18,855 MW according to the same MSA report).

The acquisition of a PPA

PPAs were auctioned in what turned out to be a series of rounds. The theory was that the auction price should serve to capture at least some of the upside potential that the buyers might anticipate earning on the difference between payments to the owner and the pool price. As it happened the first sale was far from successful. Of the 12 PPAs offered for sale in that auction only 8 were sold and only $1.1 billion received (for 4,249 MW of approximately 6,400 MW). The unsold PPAs were assigned to the Balancing Pool. The Balancing Pool subsequently conducted a series of additional sales between 2000 and 2006 (some of the details of the sales are discussed in AESO, *Path to Transformation* 2006, at 12 – 13). Most commentators consider that the auctions failed to capture the upside potential and that the buyers obtained significant windfall rents until the market started to soften in the last few years. According to AESO, data average hourly pool prices between 2000 and 2013 have ranged from $133.33/MWh in 2000 to $43.93/MWh in 2002; from 2010 to 2013 the average prices were $50.88, $76.22, $64.32 and $80.19/MWh).

What is the legal status of a PPA?

The proper name of these instruments is “Power Purchase *Arrangements*”. The use of the term “arrangements” rather than agreements must be taken to be deliberate. They are not contracts, or at least contract law cannot adequately describe or comprehend these instruments. The AUC put the point this way in AUC Decision, *MSA v TAU, Nathan Kaiser and Scott Connelly*, Decision 3110-D01-215 at para 289:

> The Commission finds, for the reasons that follow, that the PPAs are a component of a comprehensive statutory scheme enacted to ensure the fair, efficient and openly competitive operation of the electricity market in Alberta. The Commission finds that neither the historical record nor the nature of the PPAs themselves support TransAlta’s assertion that the PPAs should be treated as commercial contracts that are immune from Commission review or interpretation. The IAT itself addressed the proper characterization of the PPAs in its August 1999 report to the EUB in which it stated:

> The IAT has elected to proceed on the basis that the PPAs will not be agreements. It is proposed that the PPAs be specifically authorized and implemented in accordance with the legislation and the regulations which will specify that a particular arrangement attached by reference will operate as between the named Owner and successful bidder at the PPA auction(s)…
>
> As a general rule, the IAT has drafted the PPAs to be as close to a contractual form as possible recognizing the limitations involved. There are recitals but they do not record any agreement as between the parties. Certain other clauses to contracts have been left out and, finally, there is no provision for the document to be executed since it will be in effect by virtue of the legislation and the regulations.

Are PPAs public documents?

Yes. The PPAs are public documents but they are not readily available. Here is the PPA for Sheerness. I understand that, with the exception of the TAU hydro PPA, the other PPAs (the thermal PPAs) take a standard form: see AUC Decision, *MSA v TAU, Nathan Kaiser and Scott Connelly*, Decision 3110-D01-215 at para 273. For a list of thermal PPAs see the MSA's, Alberta Wholesale Market, "A description of basic structural features undertaken as part of the 2012 State of the Market Report", August 2012 at 4.

The PPAs were ultimately approved and scheduled to *Power Purchase Arrangements Determination Regulation*, Alta Reg 175/2000, as amended by Alta Reg 215/2001 – but this regulation was never published in the *Alberta Gazette* due to its size and complexity: *Dispensing with Publication Regulation*, Alta Reg 201/2000 and they are not on CanLII. The regulation is available for purchase from the Alberta Queen's Printer at $265. Alternatively you may access it through one of two subscription services, the QP Source Professional database, or Quicklaw/Lexis Advance Quicklaw (search under legislation). To find the PPAs through QP Source, click on "Non-Electronic Legislation" on the left-hand side of the screen then "Power Purchase Arrangements Determination Regulation." You will find a list of each PPA, with a link to a Word document or Excel file for each section, schedule, table, or appendix. I am grateful to Nadine Hoffman, Natural Resources, Energy & Environmental Law Librarian, Bennett Jones Law Library, University of Calgary for providing text for this paragraph.

Does the buyer under a PPA have the right to terminate a PPA, and if so, on what grounds?

A buyer under a PPA may terminate a PPA under either Article 4.3 on the grounds of a "change of law" or under Article 17.4 "specific termination by the buyer". The principal difference is that termination under Article 4.3 is without liability to the buyer whereas termination under Article 17.4 requires the buyer to make a payment to the Balancing Pool in accordance with a schedule to the PPA. I take it that this payment essentially covers the undepreciated value of the generation asset over the balance of the PPA.

What must a buyer establish in order to allow it to terminate the PPA on the basis of a change in law?

Section 4.3(j) of the PPA provides that

> 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, nor entitled to any Termination Payment.

It is important to construe this paragraph in the context of the entire section 4.3. The overall intent of s.4.3 is to hold the *owner* harmless from the consequences of any change of law. In order to achieve this, the buyer is responsible for covering any incremental costs incurred by the owner as a result of the change of law. At this point paragraph (j) is triggered so as to allow the *buyer* to escape the terms of the arrangement if having "given effect" to the principle of holding the owner harmless it concludes that its continued performance as the buyer would be unprofitable.

In sum, in order to be able to terminate the buyer must be able to establish that: (1) there was a change of law, (2) the change of law resulted in the owner being able to pass along to the buyer incremental costs, and (3) the buyer having covered those costs ("to the extent that") formed the "reasonable expectation" that continued performance for the balance of the PPA would be unprofitable.

Do the amendments to the *SGER* constitute a change of law? The answer must be yes. The PPAs define change in law as follows:

> "Change in Law" means
>
> (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 applicable Laws;

It is hard to overestimate the breadth of this definition and the scope of the protection it offers an owner. The *SGER* amendments would seem to fall within either (a)(i)A (any charge or tax related to the use of consumption of fossil fuels – and I note here that I have not worked through Article C5 of Schedule C) or (a)(i)(D) (a law pertaining to the environment including an environmental tax).

Have these costs been incurred by the owner and has the owner been able to pass these costs on to the seller? I assume this to be the case.

Did the assumption of these costs by the buyer lead to a reasonable expectation that performance over the balance of the term would be unprofitable? This is a much more difficult question to answer. In order to rely on this part of the clause it seems that the buyer must be able to establish that it is its obligation to meet the cost of giving effect to the change of law that is the proximate cause of the unprofitability. This follows from the language of "to the extent that", "giving effect thereto" and the word "render", all of which seem to import some degree of causality. If the proximate cause of unprofitability is something else then the buyer should not be able to trigger termination under this provision of the PPA.

From the buyer's perspective the PPA will be unprofitable over the balance of the term if it forms the reasonable view (the test would seem to be an objective test and not a subjective test) that pool prices will, on average, not allow it to cover the payments that it must make to the owner over the balance of the term. The variables here include not only the costs that the buyer must cover but also the pool price. If the market is flooded with power, pool prices will drop. If that is the proximate cause of the unprofitability there is good reason for thinking that the clause as written will not allow a buyer to escape its liabilities. Current pool prices are weak. The MSA's most recent quarterly report (Q4, 2015) notes that "Average wholesale electricity prices in Q4/15 set yet another all-time low. The pool price for the quarter averaged $21.19/MWh." This is due to a number of factors including the low cost of natural gas, the amount of cogeneration that has been built in the province in recent years, a slowing in growth in demand due to overall economic conditions, and other capacity additions including wind generation and ENMAX's 800 MW Shepard facility. It is not clear what the future holds except a high degree of uncertainty which is an inevitable consequence of the phase-out of coal fired generation under the terms of the province's Climate Leadership Plan and the addition of natural gas and renewable capacity. The latter issue is currently being examined by the Alberta Electric System Operator.

However, there is a complicating factor in all of this. In the course of finalizing the terms of the PPAs, potentially interested buyers and others posed a number of queries to the Independent Assessment Team. One such query, query 8, related to the meaning of s.4.3(j) of the PPAs. The query and the IAT's response were as follows (this material is from the record in AEUB Proceeding 990277; this was the AEUB Proceeding to review the terms of the PPAs, and the text is available here):

> Query 8 <u>PPA Section 4.3(j) - Unprofitability of the PPA Due to Change in Law</u>
>
> Clarification is required of the phrase "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…"
>
> A literal interpretation of this clause could result in a Buyer being precluded from exercising its right to terminate the PPA pursuant to Section 4.3(j) because the Change in Law did not "render" the PPA "unprofitable" where the PPA was already "unprofitable" prior to the Change in Law.
>
> It is proposed that Section 4.3(j) of the PPAs be clarified in a manner that makes it clear the Buyer shall be entitled to terminate the PPA and shall not be liable for, nor entitled to any Termination Payment if a Change in Law renders the PPA unprofitable, <u>or more unprofitable</u>.
>
> Response:
>
> The IAT has reviewed PPA Section 4.3(j) and confirms that the intention was to provide and (*sic*) exit provision with no right to or liability for a Termination Payment in the event that a Change of Law rendered a PPA unprofitable ***or more unprofitable.*** This intention would be made more clear in the PPAs with the insertion of the following (in bold italics) at S4.3(j) of the PPAs:
>
> "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, ***or more 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, nor entitled to any Termination Payment."

The IAT provided this and other clarifications to Mr. Charach, Director of the Electricity Branch of the Department of Energy under cover of a letter dated 31 July 2000. In that letter the IAT stated that "The responses clarify what we believe to have been <u>the obvious intent of PPAs as originally filed</u>. We believe this responds to all additional queries which have been raised. The errata sheet should be considered as being attached to and forming part of each PPA, as applicable." (emphasis added).

It is evident that this clarification which was "attached to and forming part of each PPA" considerably enhances the power of the buyer to terminate without liability. On its face it seems to suggest that even if market conditions are the principal cause for the unprofitability of the PPA from the buyer's perspective, then any change of law, however small, which makes the PPA just that bit more unprofitable allows the buyer to terminate. This hardly seems to be a commercially reasonable conclusion – let alone the "obvious" intent of all of those interested in the structure of the PPAs. Nevertheless, the AEUB under the terms of Order U2000-190 did endorse the IAT's conclusions.

Does termination really mean termination?

Termination by the buyer on the grounds of change of law does not in fact or in law terminate the PPA. Termination is a misnomer. Termination by the buyer merely serves to effect a statutory assignment of the buyer's rights and liabilities under the PPA to the Balancing Pool. This follows from s.96(3) of the *Electric Utilities Act*, SA 2003, c. E-5.1 which provides that:

> A power purchase arrangement, other than a power purchase arrangement held by the Balancing Pool, that is terminated other than under section 15.2 of the power purchase arrangement
>
> (a) is deemed to have been sold to the Balancing Pool, and
>
> (b) is to be held by the Balancing Pool in the capacity of a buyer for all purposes of this Act, the regulations and the power purchase arrangement.

Who or what is the Balancing Pool?

It is clear from what I have written so far that the Balancing Pool (BP) plays a central role in these arrangements to introduce a competitive electricity market – so what is this entity? Its name certainly does not leave many readers any the wiser – neither does the BP's website.

The BP is established (or now continued) by the *Energy Utilities Act (EUA)*. In general one can say that the BP is an essential component in making sure that the PPAs deliver on their promise of holding owners harmless from any changes brought about by the introduction of competition into the generation sector through the PPAs. Section 85 provides a statement of the BP's duties. To summarize that lengthy section so far as relevant here, the BP is responsible for exercising the buyer's rights under a PPA where those rights have come into the hands of the Power Pool either because nobody bid to acquire the PPA at the auction, or because the buyer has terminated the PPA as described in the previous section. For so long as the BP holds the PPA it may exercise the right to bid the generation into the power pool (s.85(1)(b)) and thus bears the market risk as described above. Thus, at any one time, it may be in the money or under water. In either case the BP must balance its accounts (and that I think is the source of the name – only an accountant could give us that!) as instructed by s.85(1)(h) of the *EUA* which provides that any net amounts greater or less than $0 must be included in the ISO tariff. The ISO tariff is the tariff that must be filed by the Independent System Operator under s.30 and Part 9 of the *EUA*. The ISO (also known as the Alberta Electric System Operator (AESO)) is responsible for the Power Pool and for providing system access to the transmission system. The implication of this pass-through of costs and liabilities into the ISO's tariff is that any such gains or losses are passed on to all electricity customers in Alberta through the transmission tariff on their bill.

What options are open to the Balancing Pool when a buyer terminates a PPA?

As noted above, termination by a buyer serves to assign the PPA to the BP. What options does the BP have when it receives such an assignment? I think that the *EUA* gives the BP three options (see also [BP Press Release, February 24, 2016, Battle River 5 PPA - Buyer Termination]).

The first option, as noted above, is to manage the PPA much as the former buyer did and bid the generation into the pool "in a commercial manner" (s.85(1)(a)) and in a manner (s.86) which is "responsible and efficient" and, since the BP is a "market participant" within the meaning of the *EUA*, in accordance with the general obligation to conduct itself (s.6) in "a manner that supports the fair, efficient and openly competitive operation of the market" (the FEOC Principle, and see the FEOC Regulation, above). What does all of this mean? Given the nature of the assets (coal-fired base loads plants) which cannot readily be turned on and off it means that the BP will likely follow a strategy of bidding into the pool at a price which ensures dispatch. In return, the BP will receive the hourly pool price which may or may not cover the fixed and variable costs that the BP now owes the owner of the plant. This may be an appropriate short-term commercial strategy. It becomes more suspect (commercially and politically) if this means (which will depend on pool prices) that the BP continues to operate these assets at a loss.

While the BP's operations must always be a wash, with profits and losses passed on to consumers, the BP likely has an obligation to protect the interests of those consumers so as to minimize the losses that consumers must bear. The *EUA* perhaps has less to say about this than one might expect but s.85(1)(g) does indicate that the BP must "manage risk prudently" and s.83(1) requires the BP to follow prudent investment standards in "managing the balancing pool accounts" – and perhaps this imports a quasi-fiduciary obligation to protect the interests of those ultimately responsible for paying the bill (see s.83(2) & 85(h) & (j)).

A second option (s.85(1)(d)) is to sell the PPA "when, in the opinion of the Balancing Pool, market conditions are such that a competitive sale of the [PPA] will result in the Balancing Pool receiving fair market value for the [PPA]." Given that TransCanada and other commercial parties have formed the view that the PPAs are currently "under water" it seems unlikely that the BP would attract any bidders.

The third option is to terminate the PPA under s.97 of the *EUA* "notwithstanding anything in the terms of the PPA". Unlike termination by a buyer this really is termination! In order to exercise this option the BP must: (1) consult with representatives of customers and the Minister "about the reasonableness of the termination", (2) give the owner six months' notice of its intention to terminate (unless the owner agrees to a lesser period), and (3) pay the owner or ensure "that the owner receives an amount equal to the remaining closing net book value of the generating unit, determined in accordance with the power purchase arrangement, as if the generating unit had been destroyed, less any insurance proceeds."

These are the only options listed in the Act (and see also *Balancing Pool Regulation*, [Alta Reg 158/2003], ss.2(1)(h)(i) & (j)). The BP may have a fourth option, which is to contest the validity of the termination. The BP is in a positon to do this since, while it is not a party to the PPA, the PPA affords the BP access to the dispute settlement provisions of the PPA.

The BP can contest the validity of the termination of a PPA

It seems obvious that the *owner* may contest the validity of the buyer's right to terminate the PPA. However, the owner may have little incentive to do so. After all, the owner will be held harmless since the BP steps into the shoes of the buyer and assumes the obligations of the buyer. The owner doesn't really care if the PPA is managed by the buyer or the BP. It is also conceivable that a *buyer* might seek judicial confirmation that it has successfully triggered termination under Article 4.3(j). I understand that ENMAX PPA Management Inc has made such can application (here) for such a declaration in relation to its Battle River Unit 5 PPA, which it claimed to have terminated in December 2015, effective January 1, 2016.

As noted above, the PPA provides the BP with access to the dispute resolution provisions of the PPA in the following terms (s.21.8):

> In any instance where the Balancing Pool may be required to make a payment to either Party, the Party which may receive such payment shall promptly inform the Balancing Pool of the circumstances which may give rise to any such payment. With respect to any such payments and the surrounding circumstances as well as any matter requiring the agreement, confirmation or determination of the Balancing Pool, it shall, with respect to the settlement of disputes that arise between it and the Owner or the Buyer, have rights and obligations under Article 19 [Dispute Settlement Procedure] as if it were a party to this Arrangement.

The dispute resolution procedure contemplates binding dispute settlement by either litigation (s.19.3) or by arbitration (s.19.4). While arbitration has apparently been the preferred option for resolving disputes over PPAs (and with a very mixed record of success, see for example the recitation of previous and conflicting arbitration awards in *Enmax Energy Corporation v TransAlta Generation Partnership*, 2015 ABCA 383) litigation is certainly possible.

Can anybody else contest the validity of a buyer's decision to terminate?

In general one would think that only the parties to the contract (plus in this case the BP for reasons just discussed) could raise this issue in a court. But there is some reason for thinking that an interested third party (e.g. a tariff customer or a party representing the interests of tariff customers generally such as the Utilities Consumer Advocate) might be able to do so indirectly. The argument here might go as follows. The BP is a statutory body which is in principle amenable to judicial review: *TransAlta Generation Partnership v. Balancing Pool*, 2012 ABQB 2. A decision of the BP to accept the validity of a buyer's decision to terminate is a statutory decision which may be judicially reviewed. Such an application would clearly be unusual. A court would likely not hear the application if any of the more interested parties were seeking a determination of the issue either through litigation or arbitration (see *Independent Power Producers' Society of Alberta v Independent System Operator (Alberta Electric System Operator)*, 2016 ABQB 133 and the post on that decision here and *TransAlta v Balancing Pool*, above); and if such a determination had actually been obtained then any effort by a stranger to the relationship to seek judicial review of the BP's decision would undoubtedly be an impermissible collateral attack. But if none of the above "more interested" parties had raised the issue then I do not think that we could rule out the possibility that the UCA or a consumer group might have standing to raise the issue given the statutory flavor of these PPAs.