



**MSA  
NOTICE OF APPLICATION  
AND DECISION**

Application No. 2004 - 00101  
Aquila Networks Canada (Alberta)  
Ltd.  
Request for Exemption Under Certain  
Provisions of the  
Code of Conduct Regulation  
AR 160/2003

---

12 February, 2004

# TABLE OF CONTENTS

	<b>PAGE</b>
<b>1 Introduction.....</b>	<b>1</b>
1.1 Application and Process	1
1.1.1 Application.....	1
1.1.2 Process .....	1
1.2 Background	1
<b>2 Exemption Application.....</b>	<b>2</b>
<b>3 Views of the MSA.....</b>	<b>3</b>
3.1 Jurisdiction	3
<b>4 Interim Approval .....</b>	<b>4</b>
<b>5 MSA Decision .....</b>	<b>5</b>

APPENDIX A - Letter dated January 15, 2004 from Mr. Bryan Curtis, Aquila Networks Canada addressed to Mr. Wayne Silk, Market Surveillance Administrator.

## MARKET SURVEILLANCE ADMINISTRATOR

### **Aquila Networks Canada (Alberta) Ltd.**

### **Request for Exemption under Certain Provisions of the *Code of Conduct Regulation*, AR 160/2003**

#### **1 Introduction**

The Market Surveillance Administrator (MSA) received a request for exemption (the Application) under the *Code of Conduct Regulation* AR 160/2003 (the Code), by letter dated January 15, 2004 from Aquila Networks Canada (Alberta) Ltd. (ANCA).

The Code is enacted pursuant to the *Electric Utilities Act* SA 2003 cE – 5.1 (EUA).

#### **1.1 Application and Process**

##### **1.1.1 Application**

In its letter, ANCA requested that the MSA grant an exemption from Section 2(2)(c) of the Code, in respect of the definition of affiliated retailer. ANCA stated its view that an exemption from this element of the Code would cause other requirements, for example, with respect to a compliance plan and audit per Sections 31 – 41 to consequently not apply.

ANCA also stated its view that many other terms of the Code would be unaffected, and therefore ANCA's obligations under such other sections would remain regardless of the exemption.

Coincident with the Application, ANCA requested that the MSA extend the interim approval granted to ANCA by the MSA in December, 2003, in relation to the compliance filing of ANCA. The MSA will discuss the interim approval and the request for extension below in Part 4.

A copy of the ANCA letter is attached hereto as Appendix A.

##### **1.1.2 Process**

After due consideration, the MSA came to the conclusion that the Application should be handled through a concurrent Notice of Application and Decision. The basis for this approach is that the MSA concluded that it does not have the jurisdiction or power under the Code to grant the exemption brought by ANCA and therefore would not need to conduct a broad inquiry into the submissions of ANCA. This conclusion is discussed further below in Part 3.1.

#### **1.2 Background**

The basis for the Application is founded in a number of key provisions in the Code. Some of these are excerpted below for reference.

As noted, the definition of affiliated retailer is set in Section 2(2)(c) of the Code.

*Definition of affiliated retailer*

*2(1) For the purposes of the Act and regulations made under the Act, "affiliated retailer" means a retailer that is an affiliate of an owner.*

*(2) For the purposes of the Act and the regulations made under the Act, a retailer is an affiliate of an owner.*

*(c) if the retailer is a regulated rate provider authorized by that owner.*

A related definition, for regulated rate provider, is set out in Section 1(j) of the Code.

*1(j) "regulated rate provider" means a retailer authorized by the owner that provides electricity services to eligible customers in the owner's service area under a regulated rate tariff;*

As noted in the Application, ANCA is considered to have an affiliated retailer (as defined) by virtue of its arrangements with EPCOR Energy Services (Alberta) Inc. (EESAI).

According to the materials filed as part of the Application, ANCA, as a wire owner, has authorized EESAI to be its regulated rate provider. ANCA acknowledges that the literal interpretation of Section 2(2)(c) of the Code means that EESAI is therefore the affiliated retailer of ANCA. In its letter, ANCA also makes reference to the view of the MSA in this regard; specifically, based upon the information made available, the MSA agreed that EESAI is an affiliated retailer of ANCA, according to the Code.

## **2 Exemption Application**

Section 43 of the Code allows the certain powers in relation to the approval of an exemption or alternate compliance plan. Section 43 is set out below, for reference.

*Alternative compliance arrangements*

*43(1) An owner or affiliated retailer may apply to the Market Surveillance Administrator*

*(a) for an exemption from all or any provision of this Regulation,*

*(b) for approval of an alternative compliance plan that meets the objectives of this Regulation but in a way that is different from the requirements of this Regulation, or*

*(c) an exemption from some provisions of this Regulation and an alternative compliance plan for others.*

- (2) *The Market Surveillance Administrator must not approve an exemption or an alternative compliance plan unless the Market Surveillance Administrator is satisfied that it is in the public interest to do so and*
- (a) *any exemption does not significantly affect the obligations of the applicant or that the obligations can be or will be met in other ways,*  
*and*
- (b) *any alternative compliance plan*
- (i) *contains overall, requirements and responsibilities that are at least as stringent as this Regulation,*
- (ii) *is enforceable,*
- (iii) *is in the best interests of customers, and*
- (iv) *would not have any appreciable anti-competitive effects.*
- (3) *The Market Surveillance Administrator may approve an exemption or alternative compliance plan with or without changes and with or without conditions, and the exemption or alternative compliance plan remains in effect for the period of time specified by, or until revoked by, the Market Surveillance Administrator.*

### **3 Views of the MSA**

#### **3.1 Jurisdiction**

The MSA understands from the wording of the Application, and from the submissions of ANCA offered in support of the Application, that ANCA is requesting that the definition of affiliated retailer in Section 2(2)(c) be eliminated for ANCA's purposes.

Accordingly, such an exemption would then leave ANCA as an owner without an affiliated retailer. The reason for this being that it is by virtue of Section 2(2)(c) that ANCA is deemed to have an affiliated retailer.

The Application is made pursuant to Section 43 of the Code. Although not expressly stated, it appears to be made specifically pursuant to Section 43(1)(a). That is, ANCA seeks an exemption from a specific provision of the Code, Section 2(2)(c).

The views of the MSA are set in respect of Section 43 overall.

In the view of the MSA, while Section 43 allows the MSA to approve an exemption from all or any provision of the Code, the MSA is not granted any jurisdiction or power to eliminate a provision of the Code. There is a key distinction to be made and respected here.

In the view of the MSA, there is a difference between eliminating part or all of a definition vs. acknowledging the definition but then granting relief from the effect of the definition. Put another way here, the latter would entail recognizing that ANCA has an affiliated retailer in EESAI but then perhaps exempt ANCA from the filing of a compliance plan, for example.

The Code was enacted by the Alberta legislature, as was the EUA. The MSA was created pursuant to the EUA, and receives powers and jurisdiction pursuant to such legislation and regulation. As with the Code, the EUA does not grant to the MSA the jurisdiction or power to eliminate a definition enacted within a regulation.

The Application by ANCA seeks to eliminate Section 2(2)(c) for ANCA's purposes and thereby treat ANCA as if it had no affiliated retailer. The view of the MSA is that it cannot do this.

#### **4 Interim Approval**

As noted in the Application, in December, 2003 the MSA granted an interim approval to ANCA in respect of the requirement to file and receive an approval for its compliance plan pursuant to Section 31 of the Code.

The interim approval treated the filing by ANCA at that point as an interim compliance plan, and gave interim approval on that basis pursuant to Section 32 of the Code. Terms and conditions were attached to the interim approval, including that ANCA must file a comprehensive compliance plan for review by the MSA not later than January 15, 2004.

The MSA notes that similar interim approvals were granted upon request to other parties, including some facing a deadline pursuant to Section 45(3) of the Code.

The interim approval granted to ANCA is not relevant to the Application itself, except that in order to meet the terms and conditions of the interim approval ANCA needed to address the January 15, 2004 filing deadline. It did so by filing the Application and requesting an extension to the interim approval to allow for consideration of the Application.

In light of this Application, the MSA relaxed the condition of the interim approval which required the filing of a comprehensive compliance plan by January 15, 2004. The interim approval was thus extended by the MSA, such that no new compliance plan filing would be required while the Application was under review. The MSA confirmed this extension to ANCA by written correspondence dated January 23, 2004.

## **5 MSA Decision**

The MSA does not approve the exemption sought by ANCA in its Application, for the reasons set out above. Thus, subject to further written communications on these matters, ANCA is bound to meet all applicable compliance requirements as set out in the Code.

Given that the MSA has not granted its approval to this Application, the MSA will be notifying ANCA as to a new deadline for the filing of a comprehensive compliance plan. This will be done by separate communication to ANCA.

Dated at Calgary, Alberta on February 12, 2004.

**MARKET SURVEILLANCE ADMINISTRATOR**

*“Original signed by”*

Martin J. Merritt  
Market Surveillance Administrator

## APPENDIX A



**Aquila Networks Canada (Alberta) Ltd.**

#700, 801 – 7th Avenue SW  
**Calgary, AB T2G 3P7**

Phone: (403) 514-4000  
Fax: (403) 514-4001

Bryan Curtis  
Direct Line: (403) 514-4030  
E-mail: bryan.curtis@aquila.com

Via e-mail and Hard Copy

January 15, 2004

To: Wayne Silk  
(wayne.silk@albertamsa.ca)  
Vice President, C.O.O.  
Market Surveillance Administrator

**Re: Aquila Networks Canada (Alberta) Ltd. - Request for Exemption from Section 2(2)(c) of the Code of Conduct Regulation (A.R. 160/2003)**

Dear Mr. Silk:

Pursuant to Section 43 of the Code of Conduct Regulation (A.R. 160/2003) (the “Code”), Aquila Networks Canada (Alberta) Ltd. (“ANCA”) hereby requests the Market Surveillance Administrator (“MSA”) grant ANCA an exemption from Section 2(2)(c) of the Code, in respect of the definition of affiliated retailer. An exemption from this element of the code would cause other requirements, for example, with respect to a compliance plan and audit per Sections 31-41 to consequently not apply, while many of the other terms of the Code would be unaffected, and therefore ANCA’s obligations under such other sections would remain regardless of the exemption. The grounds for the exemption are detailed in the later sections of this application.

### Background to the Exemption

ANCA sought confirmation from the MSA of its interpretation of the applicability of the Code in respect of Section 2(2)(c) and the requirement for a compliance plan under Section 31 in a letter dated December 2, 2003, in which ANCA concluded it would not have to file a compliance plan. ANCA based this largely on its understanding of the definition of the term “retailer” as per the Electric Utilities Act (“EUA”), and that it was inconsistent with the use of the term in the Code. ANCA maintains the definitions are inconsistent and that its interpretation was correct. Notwithstanding, given the MSA’s reply dated December 16, 2003 indicating its disagreement with ANCA’s interpretation, ANCA hereby applies for the noted exemption.

In a letter dated January 8, 2004, the MSA established a filing date of January 15, 2004 for any exemption application ANCA wished to make pursuant to Section 43 of the Code. In a letter dated December 16, 2003, the MSA granted interim approval to ANCA in respect of its compliance plan requirements, and also directed ANCA to submit a compliance plan to the MSA by January 15, 2004 unless otherwise agreed to by the MSA. Based on the January 8



# Aquila

correspondence from the MSA, ANCA considers the MSA to have agreed that ANCA need not file a compliance plan by January 15, 2004, as long as both of the following conditions are met:

1. ANCA files with the MSA the exemption application pursuant to Section 43, in respect of compliance plan Requirements (per Section 32) by January 15, 2004; and
2. The MSA extends the interim approval provided in the December 16, 2003 letter, until such time the determination in respect of this exemption application is made.

Thus, as part of this application, ANCA requests the MSA extend the interim approval granted by way of the December 16, 2003 correspondence.

## Submissions

The subsequent sections provide ANCA's submissions in respect of the exemption it is seeking and the grounds for doing so.

## Background

Section 2(2) of the Code states:

*(2) For the purposes of the Act and the regulations made under the Act, a retailer is an affiliate of an owner*

....

*(c) if the retailer is a regulated rate provider authorized by that owner.*

ANCA, as a wire owner, has authorized EPCOR Energy Services ('EESAI') to be its regulated rate provider. Under the literal interpretation of Section 2(2)(c) of the Code, EESAI may therefore be affiliated with ANCA and thus, among other things, a compliance plan as between EESAI and ANCA would be required pursuant to Section 31.

ANCA requests it be granted an exemption from Section 2(2)(c) of the Code. With such exemption, ANCA would be subject to the Code as though it did not contain Section 2(2)(c), but all else remained as it is.

ANCA's understanding of the intention of the Code is that it is primarily to protect customers from having their information disclosed inappropriately, and to ensure some retailers (e.g. retailers affiliated to regulated utilities) are not afforded advantages over others through either the obtaining of privileged information from or through cost transfers to their regulated affiliates. In ANCA's submission, there is no possibility of violation of these principles,



# Aquila

regardless of whether EESAI and ANCA are technically considered affiliated under the Code, and therefore the exemption would not alter the effectiveness of the Code.

ANCA submits the requested exemption would not in actual fact reduce ANCA's obligations under the Code as they bear on ensuring consumers and retailers are treated fairly and consistently. The exemption has the effect of eliminating the applicability of certain specific sections only, and in ANCA's submission, only those that are not efficacious in ensuring the intent of the Code is met in any case, given the actual nature of the relationship between ANCA and EESAI as its authorized regulated rate provider, and the attributes of both entities.

Such exemption would therefore not adversely affect customers, other industry participants, nor the ability of the MSA to ensure the necessary compliance with the Code. Conversely, not granting this exemption would require incremental and redundant oversight and reporting without any incremental value, resulting in an unduly costly and inefficient regulatory regime. ANCA submits that not granting the exemption would be contrary to the public interest, as not only would there be no positive effect for consumers, but there would be additional costs to be recovered that otherwise would not exist.

## Basis for Exemption

The following demonstrates that the definition of affiliated retailer per Section 2(2)(c) as it applies to ANCA may be eliminated without impeding the ability of the MSA to ensure the Code is otherwise complied with to the fullest extent in accordance with its intended purpose.

Elimination of the definition in Section 2(2)(c) for ANCA's purposes affects only certain sections of the Code. The remaining sections, namely those that specify conditions on "owners and retailers...", "owners or retailers", "neither owners nor retailers", "owner or regulated rate provider" are unaffected and apply just the same to EESAI and ANCA, regardless of whether the definition of affiliated retailer per Section 2(2)(c) exists or not, given they clearly oblige ANCA as owner, or EESAI as retailer and/or regulated rate provider to meet certain requirements. In other words, where no mention of affiliated retailer is made, the exemption clearly would have no effect. Therefore such sections need not be considered in the MSA's determination of the requested exemption. The sections remaining are: 4, 6, 7, 15(a), 19(1), 20(1), 22, 23, 24, 27(1), 28, 29, 30, 31-41, 42, 43, 45-49.

After providing some general background information in the next section that is relevant to the relationship between ANCA and EESAI, ANCA will address each of these sections and how they would be affected were the definition of affiliated retailer treated as per the requested exemption for the purposes of ANCA's obligations under the Code. Based on this, it will be apparent that the exemption would have no negative impact on fairness to consumers and retailers, since in practical terms, nothing will actually be different than without the exemption, given the fact that EESAI and ANCA are two independently owned and operated companies and



# Aquila

are not affiliated in the normal sense. This, along with the fact the exemption would not alter ANCA's obligations resulting from the remaining elements of the Code, confirms that it would be sensible and in the public interest to grant the exemption.

## General Information

ANCA is a distribution wires owner, and only a distribution wires owner in the province of Alberta. ANCA has no operating affiliates in Alberta, and provides no retail services, regulated or otherwise. ANCA is regulated by the Alberta Energy and Utilities Board ("EUB").

It is ANCA's understanding that EESAI provides:

1. Regulated Rate Option ("RRO"), Transition Rate, Regulated Default Supply ("RDS") to eligible customers in ANCA's service area;
2. Default Supply to non-eligible customers in ANCA's service area.

ANCA understands that EESAI has other affiliates under the EPCOR umbrella, some of which are engaged in competitive retail electricity services. ANCA also understands the relationship in respect of information and resource sharing among those affiliates is or will be governed by a code of conduct that is subject to approval by the EUB, and is also subject to the Code requirements.

Given that default supply is a retail service, EESAI is providing retail services and is therefore a retailer for the purposes of the Code, and is treated as such in ANCA's requested exemption. This accords with the letter from the MSA dated December 16, 2003, which indicates, "...EESAI is a retailer providing regulated electricity services in addition to retail electricity services."

ANCA submits there is no possibility for ANCA to give preferential treatment to EESAI in its capacity as retailer providing regulated and non-regulated services, over other retailers.

With respect to information sharing, ANCA and EESAI do not make use of common information systems. ANCA provides RRO customer data to EESAI, in order that EESAI can fulfill its role as RRO Provider. Similarly, ANCA provides customer data for default supply sites to EESAI. ANCA also provides customer data to various competitive retailers serving sites in ANCA's service area. All of this is in accordance with the regulations and ANCA's regulated tariff. If EESAI inappropriately passes any of the information it receives along to one of its affiliates providing competitive retail services, thereby affording such affiliate unfair competitive advantages, this is an issue that must be dealt with between EESAI and that affiliate (i.e. internal to EPCOR), which is addressed by way of EPCOR's affiliate code of conduct and its compliance plan pursuant to the Code. This matter could not be assisted or addressed in any



# Aquila

way by a compliance plan as between ANCA and EESAI, as the concerns raised relate solely to the conduct of EPCOR affiliates.

Respecting costs, given ANCA shares no systems, office space, or other resources with EESAI, there exists a *de facto* separation of accounts between not only regulated and non-regulated services, but also between distribution wires versus regulated rate services. There is no possibility that any costs of providing non-regulated services (e.g. default supply or other) can be inappropriately included in the costs of providing regulated distribution services. Moreover, ANCA's Distribution Tariff is subject to EUB approval that ensures only appropriate costs are recovered in ANCA's rates, as is EESAI's RRO Tariff. As both services are regulated by the EUB, no cost advantage can be gained by EESAI or ANCA. Again, assuming EESAI allows resource sharing between regulated and non-regulated entities, the only possibility of preferential treatment with respect to non-regulated or competitive retail services is within EESAI, or between EESAI and one of its affiliates. And again, this would be addressed by the codes of conduct governing the affiliated EPCOR entities.

Given there is no possibility of preference (unless EESAI, in breach of the applicable codes of conduct, shares information with a competitive affiliate), and as ANCA understands it, this is what the Code is primarily intended to protect against, ANCA submits it would be inefficient, unnecessary, and onerous to require a compliance plan, along with the reporting activities associated with it, since, as explained above, this would be to no effect considering the purposes underlying the Code.

The following provides the impact on each section of the Code that refers to "affiliated retailer" were the definition in Section 2(2)(c) eliminated for ANCA's purposes, and the rationale as to why there would be no adverse public interest effect or other downside to granting the exemption in each case.

#### Section 4

This applies to an owner even if it has no affiliated retailer, and therefore would still apply to ANCA. It also indicates "any other retailer" which would include EESAI, given EESAI is a retailer as noted above. Therefore this section would continue to be applicable to ANCA and is unaffected by the exemption.

#### Section 6

This applies to an owner even if it has no affiliated retailer, and therefore would still apply to ANCA. It also indicates "customers of any retailer" which would include EESAI, since EESAI is a retailer. Therefore this section would continue to be applicable to ANCA and is unaffected by the exemption.



# Aquila

## Section 7

This section would not apply, regardless of whether the exemption is granted. ANCA and EESAI are clearly separate entities, with distinct names and logos.

## Section 15(a)

With the exemption, part (a) would not apply, leaving only part (b). Given EESAI is considered a retailer, EESAI would be captured under part (b) and therefore the effect of this section would be unchanged relative to if EESAI was considered an affiliated retailer as it would be without the exemption.

## Section 19(1)

Given that ANCA is subject to EUB regulation with respect to cost recovery, as is EESAI with respect to the regulated rate, there is no opportunity for any costs to be transferred inappropriately between the regulated and non-regulated entities. In any event, if the MSA is not convinced that the EUB's governance will ensure there is no opportunity for a competitive advantage to be realized, then it should be noted the only potential interface where this could occur is between the regulated and non-regulated parts of EESAI. Such intra-EESAI or intra-EPCOR interface is subject to all conditions that apply to "affiliated retailers" since they are clearly affiliated in accordance with the definition under part 2(2)(a) and (b) of the code. This would be governed in any event, by the EPCOR codes of conduct as they apply across the EPCOR family of companies.

## Sections 20(1)

ANCA as owner provides EESAI, in its capacity as the regulated rate provider and the default supplier, the necessary customer information to carry out these functions. Of concern could then be what EESAI does with this information with respect to its competitive retail operations. ANCA submits that again, this is governed by the codes of conduct applicable to the EPCOR entities, rather than to the relationship between ANCA and EESAI. There is simply no opportunity or possibility that ANCA could, because of its authorization to allow EESAI to be its regulated rate provider, disclose information inappropriately which would directly cause a competitive advantage to EESAI or one of its affiliates.

## Sections 22, 24

Given that EESAI and ANCA are two distinct legal entities with no affiliation in the normal sense of the word (or in accordance with Section 2(2)(a) and (b) of the Code), there is no possibility that the scenarios addressed in these sections would ever occur. However, if the MSA believes such a possibility exists, then it must be recognized again that cost recovery for ANCA is regulated by the EUB, as are the costs of EESAI's regulated rate function, and therefore neither could inappropriately absorb costs related to any competitive activity of any other affiliated or non-affiliated entity. If EESAI and any of its EPCOR affiliates pursue transactions as contemplated in this section, in addition to the EUB's regulation of the regulated



# Aquila

component, they would be governed by the codes of conduct applicable to the EPCOR family of companies. Thus these sections have no practical effect, with or without the exemption.

## Section 23

Similarly, this section has no practical effect on ANCA, in any case, since its tariff is regulated by the EUB, whereby recoverable costs are established in consideration of fair market value where appropriate.

## Sections 27(1), 30

Again, given ANCA and EESAI are distinct corporate entities, their records and accounts are *de facto* separate. Moreover, ANCA is regulated by the EUB which ensures only appropriate costs are captured in any of ANCA's accounts. The exemption would therefore not change the manner in which ANCA manages its records and accounts.

## Sections 28, 29

Similarly, this section has no practical effect on ANCA, in any case, since its tariff is regulated by the EUB, whereby recoverable costs are established in consideration of costs incurred regardless of the source. The distribution wires service provided to EESAI is provided at rates and terms approved by the EUB, just as such service is provided to any other retailer.

## Sections 31-41

The requested exemption would render these sections inapplicable. Given there is either no practical effect of any of the sections, or the required conditions are governed by the EUB, ANCA submits that a compliance plan and is not required. A compliance plan addressing compliance with the Code, in respect of ANCA's authorization of EESAI to be its regulated rate provider, constitutes an ineffectual, extraneous tool to ensure the intent of the Code is met. The EUB regulates the aspects of the Code that the compliance plan relates to, and thus duplication of the reporting, auditing and governance functions (occurring in the absence of the exemption) would result, and consequently there would be an unwarranted increase in regulatory oversight and costs. This is contrary to the public interest.

## Sections 42-49

These sections deal with general matters, and the exemption would not affect how they apply to ANCA, and would not cause preferential treatment to any retailers or harm to consumers.

## Conclusion

ANCA submits that compliance with the Code, in the absence of the requested exemption, results in unintended and unnecessary duplication of regulatory oversight. The objectives of the Code will be met with or without the exemption, however with the exemption, regulatory costs will be reduced as a result of the avoided incremental regulatory burden that would otherwise be created. There is simply no advantage to be gained by anyone in the industry (e.g. consumers,



# Aquila

retailers, the EUB, the MSA, and owners) if the exemption is not granted for ANCA's purposes. For these reasons, ANCA requests the MSA approve it be exempt from Section 2(2)(c) of the Code of Conduct Regulation.

Until such time the MSA makes a determination in regard to the exemption application, ANCA also requests the MSA approve an extension of the interim approval granted in the MSA's correspondence of December 16, 2003.

If you have any questions, please do not hesitate to contact me or Heidi Kirrmaier at (403) 5144051.

Sincerely,

*(Original Signed by)*

Bryan Curtis  
Vice President, Regulatory Affairs

Copy via e-mail to: Douglas Wilson, Legal Counsel  
Market Surveillance Administrator  
([douglas.wilson@albertamsa.ca](mailto:douglas.wilson@albertamsa.ca))