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MSA NOTICE OF APPLICATION AND DECISION

Application No. 2004 - 00103
Direct Energy Marketing Limited
Request for Exemption under Certain
Provisions of the
Code of Conduct Regulation
AR 160/2003

23 April, 2004

MARKET SURVEILLANCE
ADMINISTRATOR

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MARKET SURVEILLANCE ADMINISTRATOR

Application 2004 - 00103

Direct Energy Marketing Limited

**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 April 12, 2004 from Direct Energy Marketing Limited (DEML). 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

By letter dated April 12, 2004, DEML requested relief pursuant to section 43(1)(a) of the Code. The request was assigned Application # 2004 – 00103.

The Application states, in part, that in conjunction with the sale of the ATCO Group's retail assets to DEML, ATCO Electric Limited ("ATCO Electric") will transfer to either an affiliate or a business unit of DEML all rights and obligations to perform the regulated rate tariff ("RRT") function for Rural Electrification Associations ("REAs") with whom ATCO Electric has entered into arrangements ("REA RRT Function"), and which consent to such transfer to DEML.

The Application states that the proforma agreement between ATCO Electric and DEML related to the transfer of the REA RRT Function was included in filings made with the Alberta Energy and Utilities Board in the Application by the ATCO Group for approval of the transfer of certain retail assets to DEML, which led to the Board's approval of the transaction in Decision 2003-98.

The Application states that subject to the consent of applicable REAs ("Consenting REAs"), DEML proposes that the REA RRT Function might be performed by its unregulated retailer, Direct Energy Partnership ("DEP"), rather than DEML's business unit, Direct Energy Regulated Services. Given the REA customers are not regulated by the EUB, the primary benefit of this structure is to provide a clear distinction within the DEML entities between EUB regulated customers and other customers.

The Application states that in the event that DEP performs the REA RRT Function, DEP, in relation to each Consenting REA, would fall within the definition of "regulated rate provider" under section 1(j) of the Code, as meaning "a retailer authorized by the owner that provides electricity services to eligible customers in the owner's service area under a regulated rate tariff". This, in turn, would establish an affiliation between the REA and DEP as each Consenting REA would fall within the definition of "owner" under section 1(g) of the Code.

The Application states the view of the applicant that due to the deemed affiliate relationship between DEP and each Consenting REA, both DEP and the Consenting REA would be required to comply with the compliance plan, audit and other obligations imposed in the Code. Further, as a result of the arrangements between ATCO Electric and DEML, it could be construed that ATCO Electric would also be required to fulfill the obligations imposed in Part 4 of the Code.

The Application goes on to set out specific measures which DEP would undertake in order to support the granting of exemptions from compliance plan obligations for the various parties, and requests the MSA accordingly exempt DEP, ATCO Electric, and any Consenting REAs from any requirement to file a compliance plan in accordance with section 31 of the Code, as a result of DEP performing the REA RRT Function.

A copy of the letter received by the MSA from DEML is attached as Appendix A.

1.1.2 Process

After due consideration of the circumstances, and for the reasons set out below, the MSA came to the conclusion that the Application should be handled through a concurrent Notice of Application and Decision.

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

Pursuant to section 43(1)(a) of the Code, an owner or affiliated retailer may apply to the MSA for an exemption from all or any provision of the regulation. Section 43 goes on to allow the MSA to approve an exemption where certain criteria are met; those criteria are set out in section 43(2).

The Application is signed by a representative of DEML, although the request for the exemption relief is made by DEP, which is stated to be the unregulated retailer of DEML. The Application requests that DEP, ATCO Electric, and any Consenting REAs be exempt from any requirement to file a compliance plan in accordance with section 31 of the Code as a result of DEP performing the REA RRT Function. The request for exemption is therefore apparently made by DEML on behalf of DEP, ATCO Electric and any relevant Consenting REAs. The Application does not specify who those Consenting REAs are.

The MSA is of the view that an application for exemption or other relief pursuant to section 43 must be made by the party in relation to which the relief is sought, and to whom the relief would apply. Thus, an application under section 43 cannot be brought by one party on behalf of another.

Conceptually, this is distinct from a situation wherein one party may act on behalf of itself and others in a proceeding, but where each is a party to the proceeding.

In the view of the MSA, the language of section 43(1) does not contemplate that an owner or affiliated retailer can bring an application through another party. Section 43(1) states that “*An owner or an affiliated retailer may apply...*”.

The MSA also notes section 43(2)(a), which requires that any exemption “*does not significantly affect the obligations of the applicant or that the obligations can be or will be met in other ways*”. In the view of the MSA, this implies that the exemption will go to the obligations of the applicant, not of another party.

Thus, the MSA is of the view that the Application is not brought in accordance with section 43.

Further, in respect of any exemption from the requirement for DEP to file a compliance plan as a result of DEP performing the REA RRT Function, the Application notes that a compliance plan has already been approved by the MSA.

The Application goes on to propose as one of the suggested measures supporting the request for exemption that the compliance plan would be amended to apply to the REA RRT Function.

The obligation for DEP to have an approved compliance plan is not, at first instance, contingent upon the provision of the REA RRT Function.

Further, the MSA notes section 33(1) of the Code, which states:

33(1) Each owner and affiliated retailer must keep its respective compliance plan up to date and must make changes to the compliance plan to reflect changes in circumstances and changes to this Regulation.

In the view of the MSA, the Code requires that DEP will amend its existing compliance plan (and obtain MSA approval for same) before it undertakes the REA RRT Function for any Consenting REA, in accordance with section 33. Under these circumstances, the Code does not require that DEP would file a separate compliance plan pursuant to section 31.

The request that DEP be exempt from any requirement to file a compliance plan in accordance with section 31 of the Code as a result of DEP performing the REA RRT Function is therefore moot in any event.

4 MSA DECISION

The MSA thus gives notice that the within Application is refused, for the reasons set out above.

Dated at Calgary, Alberta on April 23, 2004.

MARKET SURVEILLANCE ADMINISTRATOR

“Original signed by W. W. (Wayne) Silk on behalf of”

Martin J. Merritt
Market Surveillance Administrator

Appendix A

April 12, 2004

Market Surveillance Administrator
#500, 400 - 5th Avenue S.W.
Calgary, Alberta T2P 0L6

Attention: Martin J. Merritt

Dear Mr. Merritt:

**Re: Application for Exemption
Pursuant to Section 43
Code of Conduct Regulation**

In conjunction with the sale of the ATCO Group's retail assets to Direct Energy Marketing Limited ("DEML"), ATCO Electric Limited ("ATCO Electric") will transfer to either an affiliate or a business unit of DEML all rights and obligations to perform the regulated rate tariff ("RRT") function for Rural Electrification Associations ("REAs") with whom ATCO Electric has entered into arrangements ("REA RRT Function"), and which consent to such transfer to DEML. The proforma agreement between ATCO Electric and DEML related to the transfer of the REA RRT Function was included in filings made with the Alberta Energy and Utilities Board in the Application by the ATCO Group for approval of the transfer of certain retail assets to DEML, which led to the Board's approval of the transaction in Decision 2003-98.

Subject to the consent of applicable REAs ("Consenting REAs"), DEML proposes that the REA RRT Function be performed by its unregulated retailer, Direct Energy Partnership ("DEP"), rather than DEML's business unit, Direct Energy Regulated Services. Given the REA customers are not regulated by the EUB, the primary benefit of this structure is to provide a clear distinction within the DEML entities between EUB regulated customers and other customers.

DEP would fall within the definition of "regulated rate provider". In the event that DEP performs the REA RRT Function, DEP, in relation to each Consenting REA, would fall within the definition of "regulated rate provider" under section 1(j) of the Code of Conduct Regulation, AR 160/203 ("CCR") as meaning "a retailer authorized by the owner that provides electricity services to eligible customers in the owner's service area under a regulated rate tariff. This, in turn, would establish an affiliation between the REA and DEP as each Consenting REA would fall within the definition of "owner" under section 1(g) of the CCR as meaning "the owner of an electric distribution system" and section 2(2)(c) of the CCR provides:

2(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.

Due to the deemed affiliate relationship between DEP and each Consenting REA, both DEP and each Consenting REA would be required to comply with the obligations imposed in Part 4 of

the CCR, including preparing and seeking approval of compliance plans, the filing of quarterly and annual compliance reports and the conducting of annual compliance audits.

Further, as a result of the arrangements between ATCO Electric and DEML, it could be construed that ATCO Electric would also be required to fulfill the obligations imposed in Part 4 of the CCR. In that regulation, the definition of "owner" includes a person with whom the owner of an electric distribution system has made arrangements to perform any or all of the duties or functions of the owner of the electric distribution system. The existing arrangements between the Consenting REAs and ATCO Electric could result in ATCO Electric being considered an "owner" under the CCR and thus, resulting in a deemed affiliate relationship between it and DEP.

Although the commercial arrangements described in this letter may result in deemed affiliate relationships that trigger the requirements of Part 4 of the CCR, it is the view of DEP that the described arrangements should not give rise to the type of market concerns that Part 4 was intended to address, provided that the following measures were adopted:

1. Without subsequent approval of the Market Surveillance Administrator, DEP would not provide "retail electricity services" to REA customers in the service area of any Consenting REA where DEP would perform the REA RRT Function.
2. The DEP Compliance Plan, approved by the Market Surveillance Administrator on February 27, 2004, would be applied in respect of DEP's performance of the REA RRT Function and the DEP Compliance Plan would be amended to reflect these explicit measures.
3. In accordance with section 34 of the CCR, DEP would include in the quarterly report filed under the DEP Compliance Plan details of any issues related to the REA RRT Function.

Based on DEP providing a written undertaking to the Market Surveillance Administrator in which it would undertake to comply with measures 1-3 described above, DEP respectfully requests the Market Surveillance Administrator, pursuant to its authority under section 43(1)(a) of the CCR, exempt DEP, ATCO Electric, and any Consenting REAs from any requirement to file a compliance plan in accordance with section 31 of the CCR, as a result of DEP performing the REA RRT Function.

In the future, if DEP establishes systems and protocols that would enable it to segregate REA RRT customer information such that DEP staff who perform sales or marketing functions would not have access to such information, DEP may choose to apply to the Market Surveillance Administrator for approval to offer unregulated retail electricity services to the customers of Consenting REAs for which it performs the REA RRT Function.

Should you have any questions arising out of this letter, I would be pleased to discuss them at your convenience.

Yours truly,

A handwritten signature in black ink, appearing to read 'R. Hemstock', with a large, sweeping initial 'R'.

Robert Hemstock
Vice-President, Regulatory Affairs,
Western Region
Direct Energy Marketing Limited

cc: Market Surveillance Administrator
Attention: Douglas Wilson