



20 February 2008

Market Surveillance Administrator  
#500, 400 – 5<sup>th</sup> Avenue S.W.  
Calgary, AB T2P 0L6

Via email only

**RE: IPPSA's Response to MSA Investigation Procedures, Strawdog Draft**

Dear Sir/Madam:

The Independent Power Producers Society of Alberta (IPPSA) appreciates the opportunity to comment on the Market Surveillance Administrator's (MSA) Draft Revised Investigation Procedures document. We provide the following recommendations:

1. At a high level, we found the Draft Revised Investigation Procedures to be somewhat generalized, and are comprised to a great extent by provisions that merely paraphrase or summarize existing statutory or regulatory provisions. From IPPSA's perspective, it is important that the Draft Revised Investigation Procedures include much more detail on the manner in which the MSA will undertake its surveillance, investigation, and enforcement activities.
2. IPPSA is uncomfortable with the MSA's proposed discretion in S. 1.2 to vary its investigative procedures. A transparently understood and stable set of procedures is important to ensuring due process and investor confidence in Alberta's market. Furthermore, it is not enough for the directly impact party to understand the changes to the process that the MSA proposes. Any change to process should be understood and vetted by all market participants. To this end, we urge the MSA to reconsider section 1.2.
3. The Draft Revised Investigation Procedures do not contain any level of detail as to the nature of the internal processes to be followed by, and the kinds of internal records to be prepared by, the MSA in the course of its activities. These activities include identifying the issue at hand, setting the project charter to be followed, gathering the information necessary, and considering the appropriate steps to be taken. We note that the October 5, 2006 MSA Investigation Procedures (the "Existing Procedures") contains information about these processes that has not been included in the Draft Revised Investigation Procedures. For instance, the Existing Procedures state:

*The MSA believes that consistent and transparent issue assessment and investigation procedures are essential to ensure due process.*

IPPSA supports this goal and recommends that a number of steps defined in the Existing Procedures be carried forward into the revised version. That includes a significant proportion of the Existing Procedures, such as Table 1 and Sections 2.2, 2.3.1, 2.3.2, 2.4, 2.5, and 2.6 of the Existing Procedures.

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4. Especially problematic from the perspective of IPPSA is the deletion of Section 2.3.2 of the Existing Procedures, entitled "Investigation Considerations".

The Existing Procedures stipulated that the MSA's investigation procedures would focus around "four key areas; namely, intent, materiality, sustainability, and repeatability of a participant's conduct." That section of the Existing Procedures continued by explaining in some detail the matters that the MSA would consider in respect of each of the four key areas, and included sample questions related to each key area.

IPPSA holds the strong view that, especially given the lack of clarity of Section 6 of the *Electric Utilities Act*, it is imperative that market participants are made aware of the investigation considerations that the MSA views as key. This is important so that market participants are able to better assess whether certain conduct is likely to be considered onside or offside. It is also important from the perspective of accountability of the MSA. To this end, the MSA could adopt the definition of FEOC as proposed by the Electric Utilities Act S.6 Committee, as part of its guiding criteria for how it will conduct its investigations.

A particularly topical example is that IPPSA has had recent discussions with the Minister in respect of, among other things, the greatly increased maximum penalties available under the *Alberta Utilities Commission Act*. During these discussions, the Minister indicated that it is the perspective of The Department of Energy that intent is a requisite element of the contraventions and offences that could lead to sanctions of the significance now prescribed. Accordingly, the deletion of the MSA "Investigation Considerations" from the Existing Procedures (including consideration of whether a market participant intended to violate the applicable principles, rules and arrangements) would appear to run counter to the Minister's understanding of this critical issue.

In addition, IPPSA provides certain specific comments:

5. The Existing Procedures stipulated that the MSA would attempt to expedite its investigations within 75 business days. We would appreciate this same time frame reflected in the Draft Revised Investigation Procedures.
6. Section 4.5 of the Draft Revised Investigation Procedures states:

In accordance with the AUCA and MSR, the MSA may at its discretion publish a notice to inform the market and public at large as to the commencement, progress or completion of an investigation. [Reference MSR s. 6(2)]

Section 6 of the MSR does not provide the MSA with a "discretion" to publish such information. As a result, to eliminate this inconsistency, IPPSA requests that the phrase "at its discretion" be deleted from Section 4.5 of the Draft Revised Investigation Procedures. In addition, the phrase "but subject to the limits set out in the MSR," should be inserted in Section 4.5 of the Draft Revised Investigation Procedures, after the phrase "In accordance with the AUCA and MSR,".

7. Section 4.10 of the Draft Revised Investigation Procedures states that, for interviews conducted by the MSA, the transcript resulting from the review will be made available to the party under investigation and the person being interviewed "by agreement". There is no indication as to whose agreement would be required. However, in any event, IPPSA submits that the party under

investigation and the person being interviewed should be entitled to the transcript as a matter of course, without any restrictions. The phrase "by agreement" should therefore be deleted.

8. IPPSA strongly objects to Section 4.20 of the Draft Revised Investigation Procedures, which states:

*The MSA will generally not share specific investigation findings with the party under investigation unless the MSA is considering taking enforcement action in relation to the conduct at issue.*

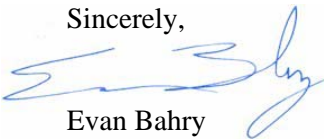
This section of the Draft Revised Investigation Procedures relates to what the MSA intends to do upon the discontinuance of an investigation.

It is understood that the Department of Energy, its various implementing agencies, and market participants all recognize the lack of clarity in respect of certain key aspects of the ground rules for the electricity industry in Alberta, including the core benchmark of "fair, efficient and openly competitive" set out in Section 6 of the *Electric Utilities Act*. It is submitted that the MSA's role in providing guidance and clarity to the electricity industry would be greatly enhanced if the MSA were to share its specific investigation findings, reasons, and conclusions upon the discontinuance of its investigations. While there are legitimate confidentiality concerns that may well militate against sharing such information generally, these limitations would of course not apply to the party under investigation. Given the significant costs to a party under investigation (including lost internal time, lost opportunities, and legal fees) and other reasons set out above, we recommend that the MSA share such information with the party under investigation at the conclusion of the investigation.

Related to the sharing of its findings is the suggestion in 4.21 that the MSA will retain discretion as to informing a participant that it has communicated with another body pertaining to the investigation of that participant. To the contrary, we believe it is important for the MSA to share any such communication with the directly affected party.

IPPSA appreciates this opportunity to comment on the Draft Revised Investigation Procedures. Should you have any questions, do not hesitate to contact me.

Sincerely,



Evan Bahry  
Executive Director