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MSA REPORT

MSA Investigation Procedures

DRAFT

05 March, 2008

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INTERPRETATION

References to “AESO” mean the Alberta Electric System Operator, also referred to as the Independent System Operator, established pursuant to the EUA.

References to “AUCA” mean the *Alberta Utilities Commission Act SA 2007 cA – 37.2*, including as amended from time to time.

References to “Commission” mean the Alberta Utilities Commission, established pursuant to the AUCA.

References to “Court” mean any court of competent and relevant jurisdiction.

References to “EUA” mean the Alberta *Electric Utilities Act SA 2003 cE – 5.1*, including as amended from time to time.

References to “information” mean information in any form, and should be understood in the same fashion as the term “record”, defined at AUCA s. 31(2)(i).

References to “ISO rules” mean the rules established by the AESO.

References to “MSA” mean the Market Surveillance Administrator.

References to “MSR” mean the *Market Surveillance Regulation AR 266/2007*, enacted pursuant to the AUCA, including as amended from time to time.

References to “Specified Penalty” mean a penalty that has been specified by the Commission in respect of a contravention of an ISO rule, pursuant to AUCA s. 52.

1 INTRODUCTION

In accordance with applicable enactments, the MSA has established a generalized set of Investigation Procedures which it utilizes in carrying out investigations, particularly with regard to its interactions with market participants and other relevant stakeholders. Such interactions may, for example, include written or verbal communications designed to elicit information (written interrogatories, interviews, meetings) or to inform particular parties and the market at large about the status of an investigation (notices, reports).

The intention of this document is to describe the Investigation Procedures in sufficient detail that complainants, persons referring matters to the MSA, parties under investigation, other market participants and the general public will generally know what to expect before or during an investigation, as applicable, once a matter has come to the attention of the MSA.

1.1 Mandate of the MSA

The mandate of the MSA is established under Part 5 of the AUCA, and includes surveillance, investigation and enforcement regarding the conduct of market participants in the Alberta electricity and natural gas markets. [Reference AUCA s. 39(1)]

In carrying out its mandate the MSA must, among other things, assess whether the conduct of market participants supports the *fair, efficient, and openly competitive* operation of the market, and whether the conduct is compliant with the market framework established by the relevant enactments and rules. For the purposes of these Investigation Procedures, the relevant enactments and rules include the AUCA, the EUA and related regulations, the ISO rules, Part 2.1 of the Alberta *Gas Utilities Act* and related regulations, and the decisions, orders or rules of the Commission. [Reference AUCA s. 39(3)]

The MSA is required by law to carry out its mandate in a fair and responsible manner. [Reference AUCA s. 40]

Toward meeting this duty, among other things, the MSA attempts in its Investigation Procedures to ensure that any market participant or other person(s) under investigation understands the opportunities for interaction with the MSA during the investigation process. Further, the MSA strives to ensure that a person bringing a complaint or referral to the MSA is also accorded a fair process.

1.2 Changes to Investigation Procedures

In accordance with the relevant enactments, the MSA reserves the right and discretion to vary these procedures where circumstances warrant, and will in such case take steps to help ensure that the changes are understood by the parties directly impacted.

1.3 Scope and application of Investigation Procedures

The mandate of the MSA gives it the authority and responsibility to review and inquire into a wide range of matters affecting or potentially affecting the Alberta electricity and retail natural gas markets. The MSA may, for example, look into the conduct of market participants. It may also look into structural or other issues affecting the market.

Generally speaking, the Investigation Procedures will only apply where the MSA is looking into a matter pertaining to specific conduct which may amount to a contravention of relevant enactments and rules, and as such where the party which engaged in the conduct may face enforcement action by the MSA or by another body. [Reference AUCA s. 39(1)(b)]

1.4 Expedited process re: ISO rules

In the case of compliance with the ISO rules and the Specified Penalties established by the Commission for rule contraventions, the MSA has created the opportunity for an expedited investigation process which utilizes the assistance of the AESO for the purposes of issue identification, information gathering and issue assessment. This process is further described in Appendix A below. [Reference AUCA s. 52]

2 ISSUE IDENTIFICATION

2.1 Matters to be investigated

By virtue of its ongoing surveillance activities, the MSA will become aware of issues or potential issues which may merit greater scrutiny. The MSA may also have matters brought to its attention by market participants or other parties, and will then similarly make an assessment regarding whether an investigation is warranted. An investigation may lead to enforcement action or other steps taken to address a matter at issue (or, indeed, the MSA may conclude that no further action is warranted).

In all cases, the identification of an issue or potential issue is the starting point for the Investigation Procedures.

2.2 External complaints/referrals

Any person may submit a complaint or refer a matter to the MSA. [Reference AUCA s. 41]

The legislation specifies that a complaint must be in writing and include the following information: (a) the name and address of the person making it; (b) the particulars of the complaint; (c) any information or facts supporting the complaint; and (d) the signature of the individual or authorized representative of the person making the complaint. [Reference AUCA s. 41(3)]

The AUCA contemplates that the MSA may have matters referred to it by the AESO or the Commission, as well as other persons. The legislative scheme involving the three agencies contemplates that the MSA will carry out investigation and enforcement activities on behalf of all three agencies. In the case of the AESO, for example, suspected breaches of the ISO rules will be referred to the MSA. [Reference AUCA s. 51, s. 52]

2.3 Self-reporting of issue

An issue self-reported by a market participant (ie. reporting as to their own conduct) will be treated by the MSA as a referral. As set out in Appendix A, in the case of a market participant seeking to self-report a (potential) contravention of an ISO rule, the first point of contact should be the AESO. The AESO will, in due course, bring the matter to the attention of the MSA.

2.4 Difference between a complaint and referral

Both a complaint and a referral will bring matters to the attention of the MSA. The AUCA requires that a complaint must include the prescribed content, and is therefore a more formal means to trigger an MSA inquiry. Similarly, matters referred by the AESO and Commission will typically be documented in writing, including relevant and material information.

From the perspective of the MSA, it is a reasonable expectation that a person wishing to have the MSA look into a particular issue will provide relevant supporting information where reasonably available to that person.

2.5 What happens if ‘formal’ complaint or referral is not made?

The MSA may decline to investigate any complaint or referral or discontinue an investigation if the MSA is satisfied that the complaint or referral is frivolous, vexatious or trivial or otherwise does not warrant investigation.

The existence or lack of a formal complaint will be a consideration. Similarly, the existence or lack of information supporting the complaint or referral will be a consideration. [Reference AUCA s. 43(1)]

2.6 MSA contact

Any person wishing to make a complaint or refer a matter to the MSA should, at first instance, direct their communications (including any supporting information) to the Manager, Investigations. For the purpose of documenting the matter, written communication is preferred.

2.7 Communications regarding complaint or referral

Upon receipt of a complaint or referral, the MSA will respond to the initiating party with a confirmation that it is considering the matter. The MSA may, at its discretion, also request further information in support of the complaint/referral.

2.8 Confidentiality of communications

As a matter of practice, the MSA will generally not make public communications or other information received from a complainant or person making a referral, unless in the view of the MSA such disclosure is necessary as part of the evidence put forward by the MSA in respect of an enforcement proceeding. An overriding consideration is a desire by the MSA to help ensure that anyone will feel free to raise concerns with the MSA. The legislative scheme provides protection regarding such information, consistent with the practice of the MSA. [Reference MSR s. 6(12)(b)]

3 ISSUE ASSESSMENT

3.1 MSA assessment of issue

In considering how to address (potential) issues brought to its attention, the MSA will assess:

- Whether the MSA has jurisdiction over the issue;
- Whether the issue is frivolous, vexatious or trivial or otherwise does not warrant investigation; and
- Whether the issue should proceed to an investigation or be handled through some other means.

3.2 Relevant information regarding issue

Apart from information provided by the complainant or person making referral, and information readily available to the MSA through active data links with the AESO or other sources, the MSA may request information from other relevant persons, including any market participant.

3.3 Notice to person(s) whose conduct may be at issue

In all cases, when the MSA requests relevant information (through written information request, interview or other means) from a party whose conduct is at issue, the MSA will advise that party of the issue under review. This includes requests for information during the assessment phase prior to the commencement of an investigation.

3.4 Communication with person making complaint or referral

The MSA will notify the person initiating the complaint or referral of a decision by the MSA not to investigate a matter. [Reference AUCA s. 43(2)]

3.5 Commencement of investigation

Based upon its assessment of the relevant information and circumstances, the MSA may commence an investigation.

4 INVESTIGATION

4.1 Notice of Investigation

At the outset of an investigation into the conduct of a party, the MSA will provide to them written notification of the investigation (“Notice of Investigation”).

The Notice of Investigation will describe in general terms the scope of the investigation, and will include contact information for the MSA staff person(s) designated for the purposes of communications to the MSA. Other procedural matters may also be addressed, including a request regarding the contact person(s) to be designated on behalf of the party under investigation, including legal counsel as applicable.

4.2 Communications regarding Notice of Investigation

The MSA will provide a reasonable opportunity for the party under investigation to communicate with the MSA at the commencement of the investigation, for the purposes of the MSA providing to that party clarification about the scope of the investigation and the investigation process, and for the party under investigation to provide to the MSA whatever information they may consider relevant.

At the discretion of the MSA, the communications with the party under investigation may take place in person, verbally, in writing or electronically, or through a combination thereof.

4.3 Right to provide additional information

At any time during the information gathering phase of an investigation, a party under investigation can of their own accord provide to the MSA information considered by the party to be relevant to the investigation. Generally speaking, such information is expected to be documented and delivered in written or electronic form. Further, all such information will be considered by the MSA to be on the record, unless otherwise agreed.

4.4 Communication with person who made complaint or referral

At its discretion and in accordance with the relevant enactments, the MSA may provide information regarding the status or progress of an investigation to the party who made the related complaint or referral.

The MSA will notify the person initiating the complaint or referral of a decision by the MSA to discontinue an investigation. Similarly, where the MSA has completed an investigation, the MSA will provide written notification of the results of the investigation to the person who made the initial complaint or referral. [Reference AUCA s. 42(2), s. 43(2)]

4.5 Notice to market regarding investigation

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)]

As a matter of practice, during the course of an investigation the MSA will generally not identify by name any party whose conduct is under investigation. Exceptions to this general practice include disclosure which occurs pursuant to a proceeding before a Court or the Commission, or as required under the Commission rules, or where the MSA considers that, on balance, the naming of the party is warranted. Unless disclosure of the name of the party is permitted or required under the rules of the Commission or the Court, before naming the party the MSA will advise them of the planned disclosure and will provide an opportunity for that party to bring forward any concerns. [Reference MSR s. 6]

4.6 Access to information

The MSA considers that reasonable and timely access to information is a fundamental requirement for the MSA to be able to fulfill its mandate. Accordingly, as a general practice, the MSA will be diligent in seeking to ensure that its legitimate information needs are not thwarted. [Reference AUCA s. 46, MSR s. 3]

The MSA will, where appropriate, discuss with the party under investigation mutually agreeable arrangements for access to and transfer of information for the purposes of the investigation. Subject to relevant enactments, including the obligation placed on the MSA to act in a fair and responsible manner, the MSA reserves the right to act unilaterally and without notice to the other party where circumstances warrant. [Reference AUCA s. 40, s. 46, s. 47]

4.7 No fee payable by MSA for information

No fee is payable by the MSA for access to or transfer to it of any information necessary for the purposes of the MSA mandate, including for the preparation of a record containing the information. [Reference MSR s. 4]

The MSA is not required to obtain the consent of a market participant before using information obtained from that person for the purposes of the mandate of the MSA. [Reference MSR s. 5(2)]

4.8 Information requests

For the purpose of obtaining information which is or may be relevant to the investigation, the MSA may issue written requests for information. The information requests will attempt to be sufficiently clear and targeted so as to foster an efficient and effective investigation. [Reference AUCA s. 46]

The information request will, taking into account the scope and nature of the information requested and other considerations, set an expected response time. The MSA will, where it considers it reasonable and productive to do so, engage in a discussion with the party receiving the information request in order to address concerns about clarity or response time.

As a matter of practice, the MSA will generally request that responses to information requests be provided in electronic form if reasonably possible.

4.9 Request for extension

Any request for additional response time must be received by the MSA in writing, including reasons why the additional time is needed, at least two business days prior to the existing response deadline.

Any amendments to an information request for which the information response is outstanding must, from the perspective of the MSA, be confirmed and documented in written or electronic form by the MSA in order to have effect.

4.10 Interviews

The MSA may for the purposes of an investigation carry out interviews of existing or previous employees and contractors of a party under investigation. As a matter of practice such interviews will be carried out under oath, using a court reporter, and a transcript of the interview will be made available to the party under investigation and the person being interviewed. [Reference AUCA s. 46(1)(b)]

The MSA may, at its discretion, use legal counsel to carry out the interviews. The MSA will, as applicable and in accordance with the relevant enactments, make reasonable efforts to accommodate the scheduling and other requests of the parties being interviewed and their legal counsel.

4.11 Computer searches

The MSA may carry out searches of computer systems within the possession or control of the party under investigation, for the purpose of gathering information which is or may be relevant to the investigation. [Reference AUCA s. 46(1)(f)]

4.12 Other searches

The MSA may, at a reasonable time taking into account relevant circumstances, enter and inspect the business premises of the party under investigation and request and remove information stored (electronically or otherwise) or accessible on the premises. [Reference AUCA s. 46]

4.13 Court orders

In furtherance of its access to information and other matters relevant to its mandate, the MSA will where necessary and at its discretion seek the assistance of the Court. This includes circumstances where it appears to the MSA that a party under investigation is obstructing or will obstruct access to information, including any failure to respond to requests for information, interviews or access to systems or premises. [Reference AUCA s. 47]

In accordance with relevant enactments and applicable rules, the MSA may for the purposes of a Court proceeding disclose information obtained during an investigation and may also disclose the name(s) of the party or parties involved. [Reference MSR s. 6]

4.14 Use of external resources

For the purposes of its mandate, including information gathering during investigations, the MSA may enlist outside resources such as forensic auditors or legal counsel. Such person(s) will be identified by the MSA to the party being investigated where interactions with that party occur. [Reference AUCA s. 46(1), s. 46(6)]

4.15 Privilege or privacy claims

The MSA will seek to resolve issues associated with privilege and privacy claims in an efficient and practical manner. In appropriate circumstances, the MSA may establish and implement with the party raising such claim(s) a protocol designed to address the issues. The MSA reserves the right to invoke a Court or other process to resolve the issues. [Reference AUCA s. 50]

4.16 Use of information obtained during investigation

Consistent with relevant enactments and these Investigation Procedures, information obtained by the MSA during an investigation will be available for use by the MSA in furtherance of its mandate. This includes the possibility that the MSA may, at its discretion, use the information for that investigation, any related enforcement proceeding, or another matter arising pursuant to the mandate of the MSA. [Reference MSR s. 5(1)]

Information provided to or obtained by the MSA during an investigation will be kept confidential, except to the extent that disclosure is permitted or required by the AUCA, MSR or another enactment, or by the Court or the Commission, or where the information has otherwise been made public. [Reference MSR s. 6(1)]

4.17 Response to investigation findings

In circumstances where the MSA is considering taking enforcement action in relation to the conduct at issue, the MSA will before taking such action provide to the relevant party under investigation a summary of the MSA findings and a reasonable opportunity to provide feedback in respect of those findings.

4.18 Return of information

Where during an investigation the MSA has obtained original records containing information, the MSA will in accordance with relevant enactments make copies of the records/information and return the original records within a reasonable time. In the case of original records/information seized under a Court order, the MSA will return the originals (after copying) upon request of the party from whom they were seized; where no such request is made the original records will be returned within 60 days after the conclusion of the investigation that gave rise to the seizure (including any related hearing or appeal). [Reference AUCA s. 46(3), s. 49]

4.19 Internal MSA records not disclosed

As a matter of practice, and consistent with the applicable legislative scheme, the MSA will hold confidential all records created by the MSA for its internal use in carrying out its mandate, including any communication, report or memorandum relating to the deliberations of the MSA. [Reference MSR s. 6(12)(a)]

4.20 Discontinuance of investigation

The MSA may, at its discretion and in accordance with the relevant enactments, discontinue an investigation at any time. In such case the MSA will provide written notice to the party under investigation confirming that the file has been closed.

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.

4.21 Referral of matters to another body

Should the MSA determine during an investigation that a matter is within the jurisdiction of another body, it will notify that body of the matter and may make available to that body information in the possession of the MSA which is seen by the MSA to be relevant to the matter. [Reference AUCA s. 45(1)]

Notwithstanding such a notification to another body, the MSA may, at its discretion, continue or discontinue its investigation, and may collaborate with the other body. [Reference AUCA s. 45(2)]

The MSA will not necessarily advise the party under investigation of the fact that the MSA has communicated with the other body regarding the matters at issue. Further, as a matter of practice and consistent with protection granted under applicable laws and enactments, the specific communications between the MSA and that other body will not be disclosed by the MSA. [Reference MSR s. 6(12)(b)]

4.22 Conclusion of investigation

The MSA will, in accordance with the relevant enactments, determine the appropriate steps to be taken at the conclusion of the investigation – see Outcomes section below.

5 OUTCOMES

5.1 Outcomes following investigation

Where, based upon its investigation, the MSA has concluded that the conduct at issue amounts to a contravention of relevant enactments or rules, the MSA may at its discretion take enforcement action.

Under certain circumstances, the MSA can choose to refrain from taking direct enforcement action notwithstanding its finding that there has been a contravention. [Reference AUCA s. 57]

Where the circumstances do not warrant the exercise of forbearance, the specific form of enforcement action is at the discretion of the MSA, including that the MSA may negotiate a settlement agreement, seek a Commission hearing, or issue a Notice of Specified Penalty. [Reference AUCA s. 44, s. 51, s. 52 – see also Appendix A below]

The MSA will necessarily be in communication with the person(s) against whom the MSA will take enforcement action. In the case of a request for a hearing or other proceeding before the Commission, and similarly in respect of a breach of an ISO rule for which the MSA will seek a Specified Penalty, the MSA will serve notice in accordance with applicable Commission rules. [Reference AUCA s. 51(3), s. 52(1) – see also Appendix A below]

To the extent that enforcement action undertaken by the MSA is not otherwise already public, the MSA will at its discretion and in accordance with the relevant enactments and rules, including the rules of the Commission, communicate with the market and the general public about the matter. [Reference AUCA s. 38, MSR s. 6]

Appendix A

Special case – ISO rules

The AESO is required under the EUA to monitor the compliance of market participants with the ISO rules. [Reference EUA s. 17(1.1)]

Given that the mandate of the MSA includes surveillance, investigation and enforcement in relation to contraventions of the ISO rules, the AESO and the MSA will work together to address compliance with those rules. Such a working relationship can achieve efficiencies for not only the AESO and the MSA, but also for market participants whose compliance with the rules may be at issue.

AESO will be initial point of contact

Given its monitoring duties, the AESO will typically be the initial point of contact for market participants in respect of the ISO rules. The AESO will identify potential compliance issues and will notify the MSA of the matter(s). [Reference EUA s. 21.1]

Self-reporting

A market participant seeking to self-report a (potential) contravention of the ISO rules should contact the AESO. The AESO will, at the appropriate point, notify the MSA of the matter.

Referral of ISO rules compliance issue

The notification by the AESO to the MSA will operate as a referral of the matter from the perspective of the MSA and its Investigation Procedures. However, in such a case the AESO will continue to be directly involved as the MSA assesses the relevant circumstances and information toward determining whether enforcement action is appropriate.

Notice to market participant(s)

Where the AESO has identified a potential ISO rules compliance issue and opened a related file, the AESO will notify the relevant market participant(s) whose conduct is at issue. As the lead contact on the file, the AESO will gather relevant information from the market participant(s) and from other sources for the purposes of assessing the potential compliance issue, and will share that information with the MSA. The market participant(s) will not typically deal directly with the MSA during this phase insofar as the ISO rules issue.

Where MSA will take enforcement action

If, based upon the information obtained by the AESO, the MSA determines that it should take enforcement action in respect of the specific compliance issue, the relevant market participant(s) will be notified and the MSA will take the lead contact role on the file from that point forward. The MSA will use the information obtained from the AESO in support of its enforcement action.

Notice of Specified Penalty

Where the MSA is satisfied that a person has contravened an ISO rule for which a penalty has been specified by the Commission, the MSA may issue a Notice of Specified Penalty in accordance with the relevant Commission rules. [Reference AUCA s. 52(1)]

Failure or refusal to pay specified penalty

Where the person fails or refuses to pay the Specified Penalty in accordance with the Notice of Specified Penalty issued by the MSA, the MSA will commence an enforcement action before the Commission. [Reference AUCA s. 52(2)]

Additional information gathering by MSA

Toward seeking efficiency in the investigation process leading to the issuance of a Notice of Specified Penalty, the MSA may choose to rely upon information obtained from the AESO. However, the MSA reserves the right and discretion to seek additional information in furtherance of its mandate.

Where a person fails or refuses to pay a Specified Penalty in accordance with the related Notice the MSA may, prior to commencing a related hearing before the Commission, seek additional information related to the alleged contravention of the ISO rules.

Notice of Specified Penalty made public

In accordance with the relevant enactments and rules, the MSA may make public any notice of specified penalty issued by the MSA. [Reference MSR S. 6]