

April 2, 2004

Notice to Market Participants

RE: TPG/IDP INITIATIVES - COMMENTS

Introduction

As you may be aware, the Market Surveillance Administrator (MSA) has been discussing with stakeholders various issues relating to the sharing and use of confidential information. The discussions have been ongoing for well over a year, including workshops which were held in April and May, 2003.

On February 18, 2004 the MSA issued a report setting out a Trading Practices Guideline (TPG). A follow up report issued March 2, 2004 dealt with Information Disclosure Procedures (Interim IDP and a proposed ongoing IDP).

The MSA requested feedback on those matters. Further, to allow affected parties to address implementation issues, the MSA revised the original implementation schedule. The revised schedule would see the Interim IDP become effective April 5, 2004, at which time the MSA would also commence active monitoring for compliance with the TPG.

The MSA received written submissions from various market participants, and has summarized those communications by subject matter into a comment matrix. The comment matrix is intended to be a reference tool for interested parties. The comments of the MSA in respect of specific submissions are also included.

All of the communications referenced here can be found on the MSA website, including copies of the written submissions received from market participants and the comment matrix developed from those submissions. The comment matrix can be accessed directly through the following link: <http://www.albertamsa.ca/files/TPG-IDPCommentMatrix033104.pdf>.

As can be seen by a review of the comment matrix, and of the written submissions which underlay the comment matrix, there is a divergence of views on the TPG and IDP matters. Given what is at stake, this was expected. Coincidentally, the range of opposing viewpoints is similar to that of the comments expressed during workshops held by the MSA in 2003 to discuss PPA information sharing issues. That said, the feedback received has raised important considerations which need to be addressed directly.

Further to our letter dated March 31, 2004 and the comment matrix, this letter is intended to: (i) provide a more detailed response to certain comments, and (ii) set out the process for dealing with trading practices and disclosure mechanisms going forward.

Summary

The discussion below in this letter will reflect the following:

- A number of bona fide concerns around points of clarity have been raised by market participants. The MSA will continue its efforts to obtain a reasonable degree of clarity through continued consultations, including workshops.
- The view of the MSA regarding trading on non-public outage information has not changed. During the planned consultation period the MSA will not actively target trading practices for monitoring and enforcement, although the MSA will respond to matters brought to our attention by complaint or referral. The enforcement approach of the MSA will, in all cases, be sensitive to outstanding issues of clarity.
- The disclosure mechanism contemplated in the Interim IDP will not become effective on April 5th as proposed. Given the requests received for further consultation, the MSA will hold off on implementation of a broad based disclosure mechanism until after the planned workshops take place. However, to facilitate additional comment and discussion, the MSA will publish some aggregated data for testing purposes, during the weeks of April 5th and April 12th. The format of the published information will take into account modifications suggested in the feedback received to date.
- The MSA will schedule one or more multilateral workshops to address outstanding issues after the close of the April 30 comment period, adding to the already lengthy consultations on information related matters.

Support for the TPG and IDP

There is clearly a constituency which wholeheartedly supports the TPG and IDP initiatives, and recognizes the seriousness of the information asymmetry concerns sought to be addressed. That said, the TPG and IDP initiatives have not received universal or unqualified support to date.

The MSA noted that the comments which directionally opposed the TPG and IDP did not seek to defend the practice of trading on non-public outage information in general. No one suggested that this is not an issue, or that the practice is acceptable. Some comments did, however, seek to allow such trading in specific circumstances; for example, where market power is not being exercised or where a market participant would trade to cover a short position.

Jurisdiction Issues

Certain participants raised the issue of the MSA's jurisdiction to issue the TPG. In particular, some participants took the view that the TPG is a form of rule, law or regulation which is beyond the authority of the MSA.

Obviously, the mandate and jurisdiction of the MSA are foundational matters to consider in respect of any initiative undertaken. The concerns raised about MSA jurisdiction here are based upon a misunderstanding of the TPG, and are therefore off target.

The jurisdiction and mandate of the MSA are entrenched within the *Electric Utilities Act* (EUA). Among other things, section 49(2) of the EUA empowers the MSA to conduct surveillance and investigation into the conduct of market participants. Section 49(3) requires the MSA to assess whether the conduct of market participants is consistent with the fair, efficient and openly competitive operation of the market. Section 49(4) empowers the MSA to establish guidelines to further the fair, efficient and openly competitive operation of the market.

The EUA establishes a tribunal mechanism to deal with matters brought by the MSA in the course of its mandate. Section 67(2) states that the tribunal may take into consideration any guidelines established by the MSA under section 49(4). Among other things, section 67(3) states that the tribunal may make an order if it is of the opinion that a market participant has engaged in conduct that is not in accordance with the fair, efficient and openly competitive operation of the market.

The TPG is not a rule. Clearly, it is also not a law or regulation. Rather, the TPG sets out the view of the MSA that trading on non-public outage information is not consistent with the fair, efficient and openly competitive operation of the market. The use of the guideline power for this aim is entirely appropriate. The intent and nature of the TPG is to provide guidance to market participants, in furtherance of the operation of the market.

The fact that the TPG report references the enforcement mechanisms within the EUA does not change the guideline into a rule. Further, a challenge to the TPG does not preclude the MSA from going forward with a prosecution against trading on outage information – the jurisdiction of the MSA in that regard is well founded.

It is very clear that the MSA can challenge trading on outage information even in the absence of the TPG or other such guideline. The EUA makes it clear that the MSA can look at conduct such as trading practices in the forward market (and, in fact, this was not contested by any party). The MSA is required to assess such conduct against the criteria of fair, efficient and openly competitive. Where appropriate, the MSA can request a tribunal to deal with conduct considered to be offside those criteria.

If one considers a hypothetical situation involving trading on outage information, the tribunal would be asked to consider whether such conduct was not in accordance with the fair, efficient and openly competitive operation of the market. The TPG would be relevant to the proceeding, particularly to the extent that the guideline signaled the view of the MSA in relation to the conduct at issue. However, successful prosecution would not rest solely on the TPG; indeed, such a prosecution could occur even in the absence of the TPG.

Our intent is that the TPG will serve to notify market participants of the MSA's view in this important area. Trading on non-public outage information is not seen to be acceptable conduct, and the MSA will make this point to a tribunal as necessary.

The hope of the MSA is that a tribunal proceeding will not be necessary; that market participants will align their behaviour to avoid trading on non-public outage information.

Process Issues

Concerns have been raised about the extent of process to date. Specifically, some parties have said that they did not feel that sufficient discussion was undertaken prior to the rolling out of the TPG and IDP initiatives. One participant characterized this as a failure by the MSA to act in a fair and responsible manner. Other parties, however, gave recognition to previous signals and discussions by the MSA in respect of information issues.

The submissions have set out valid questions as to the application of the TPG to particular circumstances (for example, as to the meaning of "operational strategy"). Other questions remain as to implementation of the disclosure mechanism, despite the efforts of the MSA to date to provide clarification.

While we acknowledge that more effort to ensure clarity is appropriate, it seems fair to note that the history of consultation on information issues goes back more than a year prior to the publication of the TPG. Further, as is set out in the comment matrix, the TPG actually reflects comments received by the MSA in those consultations (including previous feedback from parties now purporting to raise a concern as to process). Previous consultations also made it clear that gaps existed between the various camps on the information sharing issues being discussed. The MSA thus saw the need to clarify its view on trading practices through the guideline vehicle.

The MSA plans to provide further opportunity for discussion of these matters, as is set out below.

Confidentiality Issues

One party raised the possibility that disclosure of outage information could breach the terms and conditions of the PPA. A second concern raised pertains to the right of the MSA to publish information received from market participants (through the AESO or directly).

On the PPA concern, the MSA does not agree that Article 20 precludes disclosure as contended. In fact, Owner and Buyer parties are already subject to disclosure requirements pursuant to the PPA and to the ISO rules.

Neither the TPG nor the proposed disclosure mechanism mandates the disclosure of information. Rather, disclosure is contemplated as a natural means to meet the spirit and intent of the view expressed in the TPG (that is, as means to avoid conduct considered inconsistent with the fair, efficient and openly competitive operation of the market).

The disclosure mechanism, as proposed, would leverage off of the existing disclosure of information to the AESO, in part because of the view that this approach would not create any material incremental burden for participants.

Whether a different disclosure mechanism is adopted will remain to be determined through consultations involving market participants and other stakeholders, as contemplated in other communications on these matters.

On the second concern, the MSA acknowledges the requirement and responsibility to use confidential information appropriately. The *Market Surveillance Regulation* states that the MSA is entitled to use such information for the purposes of its mandate.

In our view, the publication of outage information is related to the mandate of the MSA. As discussed in previous communications, such disclosure would facilitate the ability of the MSA and the market to monitor for inappropriate conduct. The manner and extent of the disclosure contemplated by the suggested disclosure mechanism aligns with the approach frequently taken in the industry – aggregation. This approach balances the rights of individual participants against the rights of the market at large, and fosters a fair, efficient and openly competitive market.

The MSA will further test the proposed disclosure mechanism during the consultation period. Specifically, the MSA will post aggregated outage information to its website for a limited period, beginning April 5th and continuing during the two weeks thereafter. The intent is to test the adequacy of the aggregation techniques which might be used for a disclosure mechanism, and also to test the usefulness of the information presented. Additional feedback from market participants on the suggested format is requested.

As will be seen from the information to be published on a test basis, the format is designed around products that would trade. The aggregated information would be published on a schedule that supports trading norms. Ultimately, in addition to facilitating the ability of the market to self monitor, the format is intended to allow the market to fairly assess the supply/demand balance while not unduly disadvantaging any specific participant by identification.

The presentation format has been adjusted to incorporate as much of the feedback received as possible. It may be adjusted further, in accordance with any subsequent feedback received. The MSA has carefully assessed the format against concerns raised about confidentiality – in particular, the possibility that unit specific information could accurately be divined from the aggregated information – we are confident that the format adequately protects confidentiality. Again, however, feedback on these matters will be welcomed.

Liability Issues

Concerns have been raised as to the possibility that a participant will face liability for disclosure of information. The liability might conceivably stem from various sources, including, but not limited to, changing information, inaccurate reporting, negligent or intentional misrepresentation, and lack of timely disclosure.

As a starting point, the suggested disclosure mechanism is structured to rely upon information disclosure already required by the AESO. Such information is provided by market participants in accordance with rules established in that regard (ISO rules). Standards around the quality of the information are set out in the ISO rules, and are not contingent upon publication of the information.

The disclosure mechanism contemplates that the outage information would be published in aggregate format, to meet concerns around confidentiality. As discussed in the FAQs previously issued by the MSA, reliance upon the published information will through a disclaimer clearly be made subject to the possibility of error or change due to uncertainty. The combination of those two measures, aggregation and disclaimer, seems to the MSA to sufficiently address liability concerns.

Further, the MSA does not agree that market participants should necessarily be free of responsibility for incorrect or incomplete information which they are required to provide, particularly where the error or inaccuracy is caused by negligent or intentional misrepresentation. Participants should seek to ensure that, at a reasonable level, they are providing good information.

The MSA would not be providing any warranty in respect of the quality of aggregated outage information published by the MSA. The quality of any published information would be reliant upon the quality of the underlying information. To that end, the MSA will continue to be keenly interested in the quality of the information provided to the AESO, and will encourage participants to provide the best and most timely information available.

Additional Clarity

As noted above in comments around process issues, there appear to be genuine questions which go to the clarity of the TPG or of the suggested disclosure mechanism. To address concerns in this regard, the MSA will augment the consultations already planned and will take other reasonable steps to further clarify these matters.

The disclosure mechanism contemplated in the Interim IDP will not become effective on April 5th as proposed. Given the requests received for further consultation, the MSA will hold off on implementation of a broad based disclosure mechanism until after the workshops take place. However, to facilitate discussion, the MSA will publish some aggregated data for testing purposes, beginning April 5th. The format of the published information will take into account modifications suggested in the feedback received to date.

Parties currently obliged to provide outage information to the AESO, including generation owners and PPA buyers, should continue to provide outage information to the AESO as required by the PPAs and ISO rules. The MSA will for the purposes of limited testing (as set out above) publish the outage information in an aggregated format. The MSA will continue to monitor both the aggregated information and the underlying information for completeness, accuracy and timeliness. To this end, the MSA will work with the AESO and market participants toward addressing any concerns about the quality of the information, methods of aggregation or the mechanics of providing the information.

Other than during the brief test period, until a regular disclosure mechanism is implemented there will be no ready vehicle by which disclosure of outage information to the market will be deemed to have occurred. The MSA recognizes that this may leave market participants with a degree of uncertainty in relation to the TPG and their trading practices. Specifically, participants will need to find other means to ensure that they are not trading on non-public outage information, until such time as a suitable disclosure mechanism is finalized. As noted above, the MSA will continue to work diligently with market participants on these implementation issues.

In addition to bilateral discussions with market participants during the consultation period, the MSA will schedule one or more workshops. The workshops are anticipated to occur after the period for written submissions on matters pertaining to the proposed disclosure mechanism. As set out in previous communications, written submissions are requested to be received by April 30th. Further information in relation to the workshops will be provided in due course.

Monitoring

The view set out in the TPG will be enforced on a ‘complaint basis’ beginning April 5th, and until further notice. That is, while the MSA will not be actively targeting trading practices in its regular monitoring and enforcement, the MSA will not overlook actual or potential trading on non-public outage information which comes to our attention. Given the view of the MSA that such conduct is not consistent with the fair, efficient and openly competitive operation of the market, we will look to market participants to avoid such practices.

The enforcement approach will be tempered during the consultation period. The MSA will exercise its discretion to take into account legitimate concerns as to clarity. For example, there may arguably be issues of clarity regarding whether a particular operational strategy is inconsistent with the fair, efficient and openly competitive operation of the market. As the clarity grows, so then will the stringency of enforcement by the MSA. Obviously, conduct which is flagrantly offside the view expressed in the TPG will be treated accordingly.

When the MSA is convinced that sufficient opportunity for clarity has been given in relation to these matters, and upon notice to market participants in that regard, the MSA will move to an active enforcement regime in relation to the trading practices addressed in the TPG. Active enforcement will assume that all market participants have received adequate notice and clarity as to the view of the MSA in relation to trading on non-public outage information.

We would note that the approach to monitoring and enforcement described here not new; it accords with previous statements by the MSA in this regard. Nevertheless, the MSA considers it very important to give comfort and clarity to the market on these matters.

Going Forward

The MSA is going forward with these initiatives, taking into account the legitimate concerns of market participants.

We believe that the TPG provides appropriate guidance to the market on matters pertaining to use of outage information. We are also convinced, as before, that issues around possible misuse of such information are real and pressing.

At this time, it appears that the proposed steps would occur on the following approximate timeline:

April 5:	Testing of disclosure mechanism format(s);
April 30:	Due date for additional written comments prior to workshops;
May:	Workshops and follow up discussions;
June:	Next steps, including notice of any changes to monitoring and enforcement approach, as applicable.

Implementation steps after workshops will be discussed and set during the consultations described above.

We hope and intend to work with market participants toward the goals expressed here and in other communications. Again, please feel free to contact us as needed. Thanks for your cooperation, assistance and support.

Yours truly,

“Original signed”

Robert F. Spragins,
Manager, Investigations
Market Surveillance Administrator.