

Investigation Procedures

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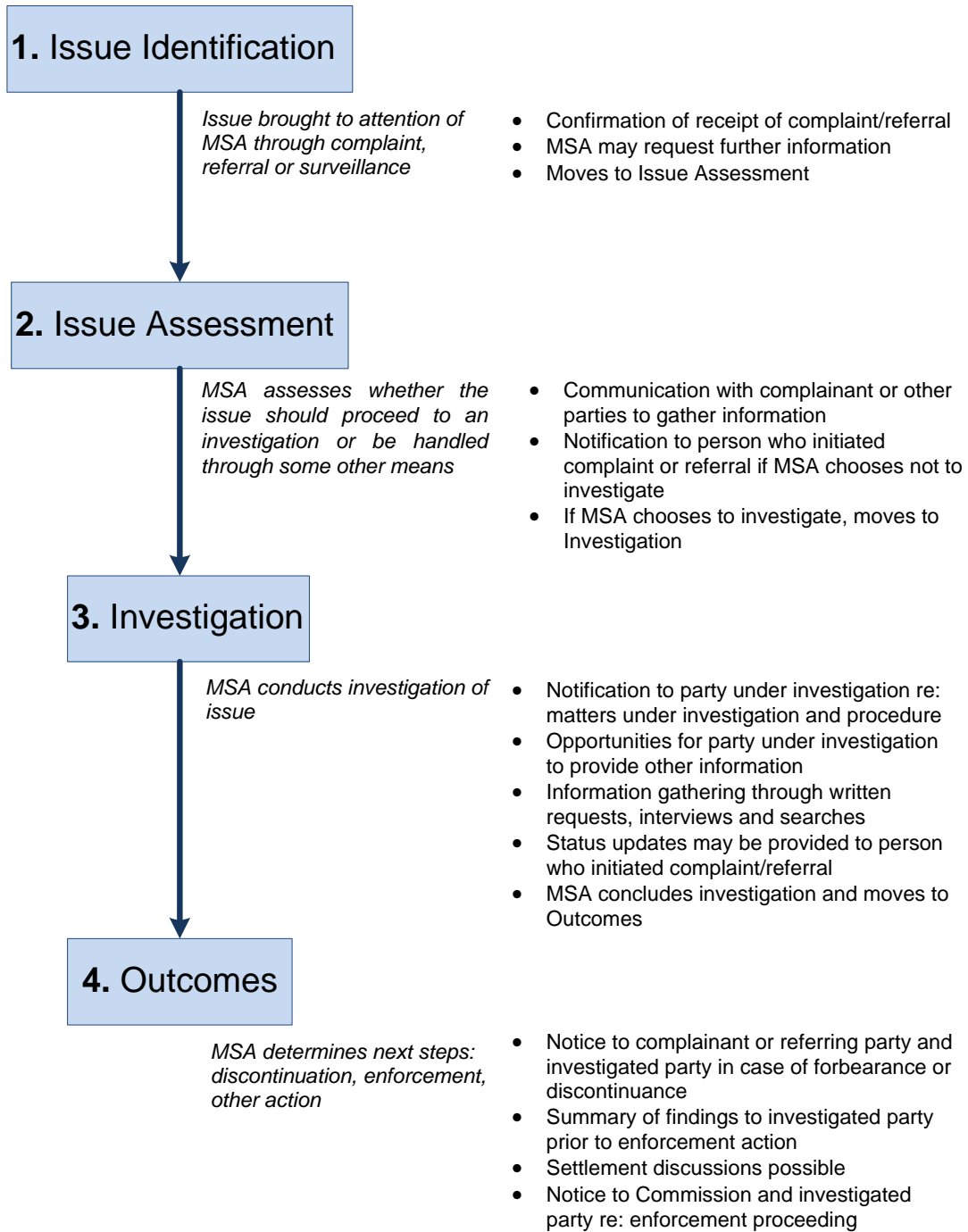
Taking action to promote effective competition and a culture of compliance and accountability in Alberta's electricity and retail natural gas markets

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Investigation Procedures Summary



Note: graphic is for illustration purposes only – reader should refer to body of document for complete process

1 Introduction

In accordance with section 7 of the *Market Surveillance Regulation* (“MSR”), this document sets out a generalized set of Investigation Procedures that the MSA will use in carrying out investigations. These procedures specifically address interactions that may occur with market participants during an investigation, including written or verbal communications (written information requests, interviews, meetings) or communications to inform particular parties and the market at large about the status of an investigation (notices, reports).

The Investigation Procedures provide an overview of the process the MSA will follow once an issue has come to its attention so that parties with an interest in an investigation or a potential investigation will know what to expect in terms of communications and process.

1.1 Mandate of the MSA

The mandate of the MSA is established under Part 5 of the *Alberta Utilities Commission Act* (“AUCA”), and includes surveillance, investigation and enforcement regarding the conduct of market participants in the Alberta electricity and natural gas markets [AUCA s. 39(1) and s.39(2)].

In carrying out its mandate the MSA must 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 and related regulations; the *Electric Utilities Act* (“EUA”) and related regulations; the *Gas Utilities Act* and related regulations; and relevant jurisprudence including the decisions, orders or rules of the Alberta Utilities Commission (“Commission”) and any court of competent and relevant jurisdiction (“Court”) [AUCA s. 39(3)].

The MSA is required by law to carry out its mandate in a fair and responsible manner [AUCA s. 40]. This is, in part, achieved through the Investigation Procedures, which provide market participants with an overview of how the MSA will strive to conduct its investigations, including the opportunities that the person under investigation will have to interact with the MSA.

1.2 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 participants in the Alberta wholesale electricity markets and retail electricity and natural gas markets. The MSA may, for example, look into the conduct of market participants or structural issues affecting the markets.

These Investigation Procedures apply where the MSA is examining conduct which may contravene relevant enactments and rules [AUCA s. 39(1)(b)].

The MSA reserves the right to vary these procedures at any time. In the case of a deviation from these procedures which is only applicable to a specific investigation, the MSA will discuss the change with the party under investigation. In the case of a material change that will have

general impact, the MSA will consult with market participants on the proposed change. The MSA may update this document without consultation for non-material changes.

1.3 Confidentiality of Communications

The MSR obligates the MSA to maintain confidentiality of records which have been provided to or obtained by the MSA [MSR s.6(1)]. However, certain statutes and regulations, including the *Freedom of Information and Protection of Privacy Act* (“FOIP”), may require disclosure of information provided to the MSA by participants.

The MSA has an obligation under FOIP to disclose records requested under FOIP, subject to certain exceptions. The MSA will assert all appropriate exemptions when it believes information is exempt from disclosure under FOIP.¹ In the absence of a FOIP request for relevant records, the MSA will not make public communications or other information received from a market participant, unless such disclosure is necessary as part of an enforcement proceeding. If FOIP does not apply, the MSR protects against disclosure of certain information during an enforcement proceeding [MSR s. 6(12)(b)].

1.4 ISO Rules and Reliability Standards

The mandate of the MSA includes compliance enforcement in regard to ISO rules and reliability standards [AUCA s. 52]. The MSA’s procedures for investigation and enforcement of these matters are described separately in the [MSA Compliance Process](#).

2 Issue Identification

2.1 Issue Origin

The MSA generally becomes aware of issues warranting scrutiny through its ongoing surveillance activities or communications with market participants or other parties. The identification of an issue is the starting point for the Investigation Procedures [AUCA s. 42]. In the case of a complaint, self-report or referral, the MSA encourages the originating party to provide any relevant supporting information that will assist the MSA in assessing the issue.

2.2 Complaints

Any person may submit a complaint to the MSA [AUCA s. 41]. The legislation specifies that a complaint must be in writing and must include the following information [AUCA s. 41(3)]:

- (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.

¹ These include sections 17(4)(b) and 20(1) of FOIP.

2.3 Referrals and Self-Reports

Any person may refer a matter to the MSA. The AUCA explicitly states that the AESO or the Commission may refer a matter to the MSA [AUCA s. 41(2)].

Any issue submitted to the MSA by a market participant related to its own conduct (self-report) will be treated as a referral. Self-reports should be in the format described in section 2.2 above.

Market participants wishing to self-report violations of the ISO Rules or reliability standards should refer to the [MSA Compliance Process](#).

2.4 Communications with MSA

A person wishing to make a complaint or refer a matter to the MSA should address their communications to the individual appointed as the Market Surveillance Administrator under the AUCA. All initial communications should be in writing [AUCA s. 41(3)].

The MSA will provide confirmation that a complaint or referral has been received. The MSA may request further information in support of the complaint/referral.

3 Issue Assessment

3.1 Assessment of Issue

In considering how to address issues brought to its attention, the MSA will assess whether:

- the MSA has jurisdiction over the issue;
- the issue is frivolous, vexatious or trivial or otherwise does not warrant investigation; and
- the issue should proceed to an investigation or be handled through some other means [AUCA s. 43(1)].

3.2 Information Gathering

The MSA may request information relevant to an issue assessment from any market participant and other relevant persons. The MSA may request information through a written information request, an interview or other means.

If the MSA requests information from a party whose conduct is at issue, the MSA will advise that party of the issue being assessed.

3.3 Decision to Investigate

Based upon its assessment of the issue, the MSA may commence an investigation [AUCA s. 42]. If the MSA declines to investigate it will notify the person who made the complaint or referral [AUCA s. 43(2)].

4 Investigation

4.1 Notice of Investigation

If the MSA commences an investigation, it will provide the party under investigation with written notification of the investigation (“Notice of Investigation”). The Notice of Investigation will describe the conduct under investigation and will include appropriate contact information for the MSA. Other procedural matters may also be addressed. Should the MSA expand the investigation to involve another party, the MSA will provide notice to the additional party.

The MSA will provide reasonable opportunity for the party under investigation to make inquiries of the MSA regarding the scope of the investigation and the investigation process. At the discretion of the MSA, communications with the party under investigation may take place in person, verbally, in writing or electronically, or through a combination thereof.

The MSA may issue a public notice regarding the commencement, progress or completion of an investigation [MSR s. 6(2)(b)].

4.2 Communication with Person who Made Complaint or Referral

At its discretion the MSA may provide information regarding the status or progress of an investigation to the person who made the complaint or referral.

When the MSA has completed an investigation, the MSA will notify the person who made the initial complaint or referral of the results of the investigation [AUCA s. 42(2)]. Similarly, if the MSA decides to discontinue an investigation it will provide written notice to the person who made the complaint or referral [AUCA s. 43(2)].

4.3 Use of External Resources

For the purposes of its mandate, including information gathering during issue assessments or investigations, the MSA may enlist the resources of external consultants. These persons will be clearly identified as representatives or contractors of the MSA in interactions with the party under investigation [AUCA s. 46(1), s. 46(6)].

4.4 Information Gathering

At any time, a party under investigation may provide the MSA with information it considers to be relevant to the investigation. Generally speaking such information should be delivered in electronic form. All voluntarily produced information will be considered to be on the record, unless otherwise agreed to by the MSA.

The MSA will make reasonable efforts to reach mutually agreeable arrangements to gather information from parties under investigation. However, the MSA has the authority to act unilaterally and without notice to gather information where circumstances warrant [MSR s. 3, AUCA s. 46, s. 47].

The MSA may also request or demand information related to an investigation from parties not under investigation [AUCA s. 46, MSR s. 3].

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

4.4.1 Information Requests

The MSA may issue written requests to obtain information which may be relevant to an investigation. Responses to information requests should generally be provided in electronic form.

Information requests will set an expected response time which will take into account the scope and nature of the information requested. The MSA may discuss clarity or response time concerns with the party receiving the information request.

Any request for additional response time must include reasons why the additional time is needed. Requests must be received by the MSA in writing at least two business days prior to the existing deadline. Any amendments to the content or deadline of an information request must be confirmed by the MSA in writing to have effect.

4.4.2 Interviews

The MSA may carry out interviews of current or former employees and contractors of a party under investigation. The MSA may require information be provided under oath [AUCA s. 46(1)(b)]. Interviews may be recorded by the MSA using a recording device or by a court reporter. The party being interviewed will not be permitted to record the interview. If the MSA records an interview, it will provide a copy of the recording or transcript to the relevant parties prior to or concurrent with giving written notice to the Commission requesting a hearing or other proceeding under s. 51 of the AUCA.

The MSA may use staff or legal counsel to carry out interviews. The MSA will make reasonable efforts to accommodate scheduling and other requests of the parties being interviewed.

4.4.3 Searches

The MSA may enter and inspect the business premises of a party under investigation and request and remove information stored or accessible on the premises [AUCA s. 46].

The MSA may request access to computer systems within the possession or control of the party under investigation and carry out searches to gather information which may be relevant to the investigation [AUCA s. 46(1)(f)].

4.4.4 Court Orders

At its discretion, MSA may seek the assistance of the Court to obtain information. This includes circumstances where it appears that a party under investigation hinders, obstructs or impedes the MSA or refuses to respond to inquiries, produce records or provide access to computer systems in response to a request from the MSA or if the MSA has reason to believe that requesting access to the premises or computer systems or requesting the production of records may result in the destruction of evidence [AUCA s. 47].

4.5 Privilege or Privacy Claims

The MSA will seek to resolve issues associated with privilege and privacy claims in an efficient and practical manner. The MSA may establish a protocol designed to resolve any privilege disputes in consultation with the party raising such claims. In those situations, the MSA may invoke a Court or other process to resolve the issues. In the case of record examination or seizure, Section 50 of the AUCA outlines a Court process to determine privilege where privilege claims are made.

4.6 Use of Information Obtained During Investigation

Information obtained by the MSA during an investigation will be available for use by the MSA in furtherance of its mandate. The MSA may use the information for that investigation, a related enforcement proceeding, or any other matter related to its mandate [MSR s. 5].

Information obtained by the MSA during an investigation will be kept confidential unless disclosure is permitted or required by legislation, the Court or the Commission, or where the information has otherwise been made public.

4.7 Return of Information

Where the MSA has obtained original records, the MSA will make copies of the records and return the original records within a reasonable time [AUCA s. 46(3)]. In the case where original records were seized under a Court order, the MSA will, on written request of the party from whom they were seized, return the originals (after copying) [AUCA s. 49(2)]. Where no request is made, the original records will be returned within 60 days after the conclusion of the investigation (including any related hearing or appeal) [AUCA s. 49(1)].

4.8 Internal MSA Records Not Disclosed

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 [MSR s. 6(12)].

4.9 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 records in its possession that are relevant to the matter [AUCA s. 45(1)].

After such notification, the MSA may continue or discontinue its investigation, or collaborate with the other body [AUCA s. 45(2)].

The MSA may, at its discretion, advise the party under investigation that the MSA has communicated with another body regarding the investigation. The specific communications between the MSA and the other body will not be disclosed to the party under investigation or made public unless required by legislation or Court order.

5 Outcomes of an Investigation

5.1 Discontinuance

If at any time during an investigation the MSA is satisfied that an issue, complaint or referral is frivolous, vexatious or trivial or otherwise does not warrant investigation, the MSA may discontinue the investigation [AUCA 43(1)].

5.2 Forbearance

The MSA may choose to discontinue an investigation or refrain from taking direct enforcement action notwithstanding a finding that there has been a contravention [AUCA s. 43].

5.3 Enforcement Action

Where, based on its investigation, the MSA has concluded that the conduct at issue amounts to a contravention of relevant enactments or rules, the MSA may take enforcement action [AUCA s. 51(1)]. Before taking enforcement action, the MSA will provide a summary of its findings to the party under investigation. A reasonable opportunity to provide written feedback regarding the findings will be provided to the party under investigation.

The specific form of enforcement action is at the discretion of the MSA. The MSA may negotiate a settlement agreement, seek a Commission hearing, or take other action as appropriate [AUCA s. 44, s. 51].

5.3.1 Communication Regarding Enforcement

The MSA will necessarily be in communication with the persons against whom the MSA will take enforcement action. In the case of a request for a hearing or other proceeding before the Commission, the MSA will serve notice to any persons named in the notice in accordance with Commission rules [AUCA s. 51(3)].

Once enforcement action has been made public through a Court or Commission process, the MSA may provide notice of the matter to the market and general public.