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Capital Power Corporation  
1200 – 10423 101 Street NW  
Edmonton, AB T5H 0E9  
www.capitalpower.com

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January 11, 2019

Market Surveillance Administrator  
Suite 500, 400 5<sup>th</sup> Avenue SW  
Calgary, AB T2P 0L6

**Attention:** Mr. Gordon Kaiser

Dear Mr. Kaiser,

**Re: Offer Behaviour Guidelines prior to the implementation of a capacity market**

Capital Power provides this letter in response to the MSA's request of stakeholders to provide comments on MSA retained consultant, Charles River Associates' ("CRA") report (the "Report") regarding Offer Behaviour Guidelines prior to the implementation of a capacity market.

Capital Power's key points of feedback, which will be elaborated upon throughout the remainder of this letter are as follows:

- A new set of guidelines do not need to be developed nor does an Advisory Opinion Program ("AOP") need to be implemented. The MSA's previous *Offer Behaviour Enforcement Guidelines* ("OBEGs") are technically robust and remain consistent with legislation. Those OBEGs can simply be reissued to be in effect until the implementation of a capacity market, specifically the first capacity delivery period.
- Long run marginal cost ("LRMC"), while potentially a useful benchmark for assessing dynamic efficiency over an extended period, is not a practical measure for establishing offer behaviour guidelines particularly during the remaining period of less than three years for the current market design.
- The Balancing Pool must not be viewed as an entity that will have "a moderating impact on prices"<sup>1</sup> or in any way presumed or expected to utilize its PPA portfolio to achieve any policy outcome other than supporting a fair, efficient and openly competitive market. The Balancing Pool is a market participant with an obligation to act in a commercial manner and must be expected to act in the same fashion as other market participants.
- Use of the MSA's tool kit should be focused on addressing anticompetitive behaviour or in maintaining a framework that allows for the fair and openly competitive operation of the energy market rather than driving the market to specific price outcomes.

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<sup>1</sup> Page v, *Offer Behaviour Guidelines Prior to the Implementation of a Capacity Market*, Charles River Associates (10 December 2018).

Before elaborating on these key points, Capital Power reiterates its long-standing opinion that the OBEGs (specifically the guidelines that were in effect from 2011 until 2017) support the fair, efficient and openly competitive functioning of Alberta's energy-only market. This view, likewise, applies to the remaining period during which the energy-only market will remain in place.

## A. Initial Remarks

The OBEGs provided clear and concise principles for distinguishing between permissible and prohibited conduct, which in turn provided greater certainty and confidence for market participants and stakeholders. A key distinction was whether the conduct would inhibit a competitive response. Absent this, the MSA articulated that unilateral and independent conduct, such as economic withholding, that attempted to capture surplus (i.e. profits) is not only permissible but competitive behaviour.<sup>2</sup>

Capital Power believes that this remains applicable for the duration of the energy-only market; nothing has changed to render the OBEGs inconsistent with the legislative framework or proper functioning of a competitive market. Nor will any of the attributes of the capacity market that are intended to contribute to greater revenue certainty to be in effect. Simply put, until the capacity market goes into effect, the energy-only market is in full effect, and must be allowed to function. In this regard, Capital Power disagrees with any characterization of the remaining term as a "transition period" and any related interpretations that key aspects of the existing framework can be withdrawn and/or diminished during the remaining timeframe.

Capital Power remains of the view that, respectfully, the MSA's decision to revoke its previous guidance was unwarranted, and failed to fully consider impacts on market participants, especially those who have invested and / or may be planning investments in generation. The fact that Alberta is implementing a capacity market in 2021 does not address the "missing money" issue for generation facilities expecting to operate during the full remaining term of the energy-only market.<sup>3</sup> The revocation of the OBEGs has resulted in uncertainty regarding the rubric by which offer enforcement by the MSA would be carried out.<sup>4</sup>

Reinstating the OBEGs now would restore and strengthen the confidence of incumbent market participants and prospective entrants that investments would be provided an opportunity to earn a return on and of capital. Further, all stakeholders (both consumers and producers) would benefit as this action would decrease the unnecessary risk related to "regulatory hold up" that was previously identified.<sup>5</sup> Reducing risks reduces the cost of investment and, ultimately, the costs borne by consumers.

For these reasons, and as outlined in its previous comments to the MSA,<sup>6</sup> Capital Power submits that the MSA should reinstate the OBEGs.

- 1) A new set of guidelines do not need to be developed; the OBEGs can simply be reissued.

During the MSA's 2017 consultation that ultimately led to the OBEG's revocation, Capital Power and other stakeholders (including load representatives) largely agreed that the OBEGs should be maintained. Capital Power remains of this view and recommends the OBEGs be reissued. Reissuance would avoid having to undergo development and implementation of new guidelines

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<sup>2</sup> This conduct is also known as extraction. In the MSA's now revoked OBEGs, it referred to the following paper in outlining what offer behaviour could be considered permissible (extraction) and what would be prohibited (extraction): *Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct*, Carlton, Dennis W., and Ken Heyer (2008), <<http://economics.mit.edu/files/4058>>.

<sup>3</sup> See para 20 at page 10 and footnote 22 of the paper attached to the May 8, 2017 submission of the Independent Power Producers Society of Alberta for further discussion on this issue, <<https://albertamsa.ca/uploads/pdf/Archive/00000-2017/2017-05-09%20IPPSA%20Comments%20and%20Paper.pdf>>.

<sup>4</sup> The fact that the MSA has received requests from market participants to establish a voluntary Advisory Opinion Programme to provide guidance on specific planned conduct highlights the existence of and the desire of stakeholders to diminish uncertainty regarding the MSA's stance on conduct enforcement.

<sup>5</sup> *Ibid*, p.16-18.

<sup>6</sup> Capital Power comments to the MSA during consultation to revoke the OBEGs dated April 7: <<https://albertamsa.ca/uploads/pdf/Archive/00000-2017/2017-04-07%20OBEG%20notice%20comments%20from%20Capital%20Power.pdf>> and May 8, 2017: <<https://albertamsa.ca/uploads/pdf/Archive/00000-2017/2017-05-09%20Comments%20of%20Capital%20Power%20MSA%20Draft%20Position%20OBEG%20Revocation.pdf>>.

which CRA notes as one of their reasons against issuing guidance. Perhaps most importantly, and as discussed above, nothing in legislation has changed to indicate that the OBEGs are no longer applicable and all of the reasons for their reinstatement remains intact.

Capital Power will respond in more detail to CRA's report on an AOP in a separate submission and in accordance with the process the MSA has set forth for that initiative. However, at this time, Capital Power would note it is of the view that an MSA opinion provided through the potential AOP would be an inferior and likely less effective framework than reinstating the OBEGs in terms of providing clarity and certainty for all market participants regarding appropriate offer behaviour guidelines while the energy-only market remains in effect.

- 2) LRMC, while potentially a useful benchmark for assessing dynamic efficiency over an extended period, is not a practical measure for establishing offer behaviour guidelines. Instead of outcomes, the MSA should be focused on the process by which they occur.

A textbook example of a market with an efficient price signal is one where the price paid for a good or service is equal to the all-in cost of producing that good or service in the long run. Alberta's energy-only market has exhibited this efficient price signal driven, in part, by permitting competition including conduct such as economic withholding. However, the issue with using a long-run measure such as "LRMC" is that it requires, among other things, a sufficient and defined time horizon to establish whether a structural issue with the market is present. Price outcomes over defined durations may not be an appropriate comparison to the LRMC of entry particularly in the Alberta power market given less than three years remain in the transition period. Rather than relying on price outcomes, Capital Power submits that it would be more effective for the MSA to focus on the process by which prices result and whether such results were the product of a market exhibiting fair, efficient and open competition rather than on the price levels themselves.

- 3) The Balancing Pool should be expected to conduct itself in a commercial manner consistent with legislation and be treated as any other market participant.

CRA makes reference to the Balancing Pool potentially moderating price outcomes and could be interpreted by some as the Balancing Pool being a unique market participant that, instead of acting in a commercial manner, would be expected to discipline and offset the effects of economic withholding by other market participants. Capital Power is concerned with and is strongly opposed to any such suggestion.

The Balancing Pool is required to act in a commercial manner and compete on a level playing field. This includes its offer strategy. To act contrary to this and, instead, operate with the objective of "moderating impact on prices"<sup>7</sup> would be inconsistent with its legislative mandate and other provisions in regulation. The Balancing Pool is a market participant and should be viewed, monitored and addressed in the same fashion as any other.

- 4) Use of the MSA's tool kit should be focused on anticompetitive behaviour regardless of the level or direction of any price outcome

CRA makes reference to the MSA's tool kit that can be used to address uncompetitively high prices. While Capital Power agrees that the MSA does have a tool kit to examine and address anticompetitive behaviour that may lead to inefficiently high prices, the opposite, inefficiently low prices, also needs to come under the same scrutiny. If anticompetitive conduct results in average prices below reference levels for a sustained period of time, the MSA has and should use their tool kit to examine and address behaviour leading to such inefficiency.

## **B. Responses to MSA Questions**

Capital Power's views on the MSA's three questions posed to CRA are as follows:

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<sup>7</sup> Page v, *Offer Behaviour Guidelines Prior to the Implementation of a Capacity Market*, Charles River Associates (10 December 2018).

- 1) “Could there be a problem with offer behaviour that would need to be addressed during the transition period?”

There has not been and is not a problem with offer behaviour other than those specifically addressed by the MSA. There is, however, a problem with clarity regarding how the MSA now determines anticompetitive behaviour and would engage in enforcement activities. While nothing in the legislative framework has changed to prohibit previously permitted offer behaviour, Capital Power, and likely other market participants, are uncertain of how the MSA will distinguish between what is permissible and what is not. This enforcement uncertainty will hinder and distort decisions that will need to be made in respect of hourly dispatch, forward transactions, commercial contracting, as well as maintenance, refurbishment, optimization investments – or potentially retirements - at existing facilities, among other things. These inefficiencies will preclude the market from achieving fair, efficient and openly competitive outcomes.

- 2) “If so, could the problem identified be addressed in whole, or in part, through MSA guidelines and what form could those guidelines take?”

The problem identified, can be addressed through MSA guidelines, specifically reissuance of the original OBEGs.

- 3) “If guidelines were made and market participants did not follow those guidelines what remedies should the MSA seek from the Alberta Utilities Commission (“Commission”) in an enforcement proceeding?”

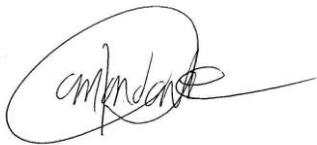
To the extent the OBEGs were reissued, the MSA could seek the same remedies it previously pursued from the Commission when breaches of the guidelines and the principles contained therein occurred including administrative penalties (such as disgorgement of economic benefits and monetary penalties) as well as requiring the market participant to institute safeguards (strengthened compliance programs, agreement of regular monitoring and self-reporting) to ensure no future breaches result. A further benefit of the clarity the OBEGs provide is an enhanced ability to demonstrate contravention of permitted activity.

### **C. Closing Comments**

In closing, there is not a problem with offer behaviour aside from what the MSA has identified and has or is in the process of addressing. There is, however, a problem with the lack of clarity regarding the principles guiding the MSA's approach to monitoring and assessing anticompetitive behaviour as a result of its decision to revoke the OBEGs. This unnecessary problem can be resolved without extraordinary effort through the reinstatement of those guidelines.

Capital Power appreciates the opportunity to provide these comments in this important initiative. Please feel free to contact me at (403)717-8162 if there are any questions or to discuss these comments.

Regards,



Jason Comandante  
Vice President, Regulatory and Environmental Policy  
Capital Power Corporation