

January 11, 2019

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

On September 27, 2018 the Market Surveillance Administrator (“MSA”) provided notice (“September Notice”) that it would consult to determine if guidelines to address offer behaviour during the period prior to the implementation of a capacity market are warranted.¹ The MSA retained Charles River Associates (“CRA”) to prepare a report (the “Report”) to consider the following three questions:

- Could there be a problem with offer behaviour that would need to be addressed during the transition period?
- If so, could the problem identified be addressed in whole, or in part, through MSA guidelines and what form could those guidelines take?
- 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?

On December 10, 2018 the MSA issued the Report² and requested written stakeholder comments on the Report by end of day on January 11, 2019. Suncor appreciates the opportunity to comment on this important matter.

Suncor agrees with the conclusion in the Report that new offer behaviour guidelines should not be introduced at this time.³ Suncor further agrees that offer behaviour guidelines that serve to reduce regulatory uncertainty are generally desirable.⁴ As described in more detail below, Suncor believes that the previous Offer Behaviour Enforcement Guidelines for Alberta’s Wholesale Electricity Market dated

¹ Available online: <https://albertamsa.ca/uploads/pdf/Archive/000000-2018/2018-09-27%20Notice%20re%20OBEG%20guidelines.pdf>

² Available online: <https://www.albertamsa.ca/assets/Documents/Report-to-MSA-re-Merits-of-Introducing-an-Advisory-Opinions-Program.pdf>

³ Report at page 20.

⁴ Report at page 18.

January 14, 2011⁵ (the “OBEG”) achieved these benefits. The legal basis and market framework supporting the guidance provided in the OBEG has not changed since the OBEG was initially issued or since it was revoked on May 26, 2017. Accordingly, there is no reason to initiate new consultation on a new set of guidelines around offer behaviour.

The OBEG provided much needed clarity on the MSA’s view of market participant conduct that could lead to investigation and enforcement action, consistent with promoting a fair, efficient and openly competitive energy market. This is important as public investigations, even those that do not result in enforcement actions, carry significant reputational risk for the parties involved. Absent this clarity, market participants may use overly conservative offer strategies and refrain from fair conduct out of fear of public investigation. Suncor suggests reinstating the OBEG, at least until the implementation of the new capacity market, to increase transparency and predictability in the market and improve regulatory certainty.

1. Background

The MSA is Alberta’s independent electrical market watchdog.⁶ The MSA operates under the statutory authority set out in the *Alberta Utilities Commission Act* (“AUC Act”).⁷ The MSA’s mandate includes surveillance, investigation, and enforcement over matters related to the electricity market.⁸

In carrying out its mandate in relation to the electricity market, the *AUC Act* requires the MSA to assess whether or not the conduct of an electricity market participant supports the fair, efficient and openly competitive operation of the electricity market and whether or not the electricity market participant has complied with or is complying with legislation, ISO rules, reliability standards, market rules, and certain agreements.⁹ In doing so, the MSA is also required to assess whether or not the ISO rules are sufficient to discourage anti-competitive practices in the electric industry and whether the ISO rules support the fair, efficient and openly competitive operation of the electricity market and the capacity market.¹⁰

The *AUC Act* further provides that the MSA may establish guidelines to support the fair, efficient and openly competitive operation of the electricity market.¹¹ Section 40 of the *AUC Act* also requires that the MSA “carry out its mandate in a fair and responsible manner.”

The MSA previously exercised its statutory authority to establish guidelines to support the fair, efficient and openly competitive operation of the electricity market when it issued the OBEG. The OBEG was issued following the introduction of the *Fair, Efficient and Open Competition Regulation* in September 2009 (the “*FEOC Regulation*”) and further to almost a year of stakeholder engagement. As noted in the OBEG:

⁵ Available online: <https://albertamsa.ca/uploads/pdf/Archive/00000-2017/2017-05-26%20Offer%20Behaviour%20Enforcement%20Guidelines%200011411%20Revoked.pdf>

⁶ *TransAlta Corp v Alberta (Market Surveillance Administrator)*, 2014 ABCA 196 at para 1.

⁷ SA 2007, C A-37.2, section 39.

⁸ *AUC Act*, section 39(1), 39(2).

⁹ *AUC Act*, section 39(3)(a).

¹⁰ *AUC Act*, section 39(3)(d).

¹¹ *AUC Act*, section 39(4). The language in this section of the version of the *AUC Act* in force at the time the OBEG was issued was the same.

...the [*FEOC Regulation*] introduced a number of specific prohibitions some of which have application to market participant offer behaviour in the Alberta electricity market. In the absence of jurisprudence, the Market Surveillance Administrator (MSA) believes it is helpful to stakeholders to explain our analytical framework and how we intend to enforce the provisions in the Regulation with potential application to offer behaviour. We have done so in this document, called the Offer Behaviour Enforcement Guidelines.¹²

According to the MSA, the OBEG also:

... strive to provide transparency and predictability regarding the MSA's assessment of market participant offer behaviour so that participants can govern themselves accordingly. The document goes beyond enforcement in the narrow sense of the term to explain our approach where there is not a breach but, in our view, the ISO rules or other elements of the market framework are not adequately supporting the fair, efficient and openly competitive operation of the market. We believe it is equally important to publicly identify, document and propose remedies for these kinds of shortcomings.¹³

The OBEG provided helpful guidance on the MSA's interpretation of the *FEOC Regulation* and conduct that was consistent with the statutory requirement that market participants "conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market."¹⁴ The OBEG also improved transparency and predictability, in turn providing better regulatory certainty, on the MSA's potential enforcement actions.

On March 17, 2017, the MSA issued a notice of consultation regarding revoking the OBEG. Further to the MSA's request for written comments, Suncor sent a letter to the MSA stating the importance of the OBEG in providing certainty on market rules in the energy-only market, the market framework that was in effect then and remains in effect now.¹⁵

On May 26, 2017, the MSA revoked the OBEG, citing concerns that market participant conduct would no longer serve to increase dynamic efficiency.¹⁶ The MSA did not reference any changes to the underlying legislation, regulations, ISO rules, or market framework to support its decision to revoke the OBEG.

¹² OBEG at Adobe page 2.

¹³ OBEG at Adobe page 2.

¹⁴ *Electric Utilities Act*, SA 2003, C E-5.1, section 6; OBEG at page 12.

¹⁵ Suncor letter to the MSA dated April 7, 2017 re: Market Surveillance Administrator ("MSA") Consultation re Revocation of the Offer Behaviour Enforcement Guidelines. Available online: <https://albertamsa.ca/uploads/pdf/Archive/00000-2017/2017-04-07%20OBEG%20notice%20comments%20from%20Suncor.pdf>

¹⁶ MSA Notice dated May 26, 2017 re: MSA Decision and Response to Stakeholder Comments re Revocation of Offer Behaviour Enforcement Guidelines at 2. Available online: <https://albertamsa.ca/uploads/pdf/Archive/00000-2017/2017-05-26%20MSA%20decision%20and%20response%20to%20stakeholder%20comments%20re%20OBEG%20consultation%20New.pdf>

2. Comments on the Report

Suncor agrees with the specific conclusions of the Report outlined above and discussed below. However, Suncor also wishes to comment on certain portions of the Report and highlight certain areas of disagreement, also discussed below. A lack of comment in relation to any portion of the Report should not be construed as agreement.

Suncor agrees with the conclusion in the Report that new offer behaviour guidelines should not be introduced at this time.¹⁷ However, Suncor's reason for reaching this conclusion is that the legislative basis for assessing market participant offer behaviour has not changed since the OBEG were issued in January 2011.¹⁸ Moreover, there are no changes to Commission-approved ISO rules that would underpin a change in the MSA's enforcement of market participant conduct. Notwithstanding the work that is currently being undertaken by the Alberta Electric System Operator and stakeholders to design the new capacity market, the underlying energy-only market framework also has not changed since that time. Accordingly, there is no reason to initiate new consultation on a new set of guidelines around offer behaviour.

Suncor further agrees with the Report that “[p]olicies and actions of the MSA which serve to reduce regulatory uncertainty are generally desirable” and “[o]ffer behaviour guidelines could achieve such an objective”.¹⁹ Accordingly, Suncor believes that reinstating the OBEG until the implementation of the new capacity market would contribute to increased transparency and predictability in the market and improve regulatory certainty. Reinstating the OBEG would achieve these benefits without the downsides of promulgating new guidelines, some of which are identified in the Report, including the increased burden and draw on attention and resources from the MSA and other Alberta market stakeholders during the capacity market design process.²⁰ Additionally, and as noted above, public investigations, even those that do not lead to enforcement action, carry reputational risk. The clarity, transparency, and certainty provided by the OBEG promoted the functioning of a fair, efficient and openly competitive energy market.

Notwithstanding Suncor's agreement with the above conclusions adopted in the Report, Suncor believes it is important to highlight the following issues with the Report. At the outset, Suncor notes the CRA's statement that:

The period between the legacy energy-only market and the implementation of the capacity market constitutes a transition period.

While we agree that the period between the energy-only market and the implementation of a parallel capacity market would constitute a transition period, the “legacy” energy-only market is not dissolved. There have been no material changes to legislation, regulations or rules that eliminated the market. The mere fact that one market will in the future, likely in 2021, be replaced by another does not place industry in a transition period.

¹⁷ Report at page 18.

¹⁸ Specifically, sections 2(h), (j), and (k) of the *FEOC Regulation* and section 6 of the *Electric Utilities Act* remain the same.

¹⁹ Report at page 18.

²⁰ Report at page 18.

Suncor notes that the Report cites difficulties in promulgating new rules²¹ and creating new regulations²² as issues with implementing offer behaviour guidelines prior to the implementation of the capacity market. Offer behaviour guidelines should provide context and certainty regarding analysis and enforcement of existing legislation and rules. There should be no further requirement to create new rules and regulations to implement offer behaviour guidelines.

In describing the OBEG, the Report also states:

The guidelines tolerated economic withholding, so long as spot prices, averaged over a period of months, were no higher than would be necessary to attract sufficient investment (i.e. long run marginal cost, or “LRMC”).²³

For clarity, any market participant conduct “tolerated” by the OBEG was permitted by the relevant legal framework. At the time the OBEG was operational, economic withholding²⁴ was not precluded by the *FEOC Regulation* or otherwise and was not limited based on average spot prices. This is equally true now.

The Report further states that:

In the past, MSA guidelines with respect to offer behaviour sought to ensure that spot prices, averaged over time, did not exceed levels necessary to attract investment.²⁵

Ensuring any sort of price outcomes for the market is not part of the MSA’s legislative mandate. Offer behaviour guidelines are intended to provide guidance as to whether conduct is supportive of a fair, efficient and openly competitive market – not to drive price outcomes.

The Report also attempts to assess whether offer behaviour guidelines are required up and until the time the capacity market is implemented in 2021 from a market fundamentals perspective. Specifically, the Report states:

Our goal is to assess whether there are indicators that market prices are, or are expected to reach, levels that are indicative of behaviour not consistent with competitive outcomes.²⁶

The Report then discusses Alberta’s historical and forecast supply cushion and reserve margins and market share offer control. With respect, these analyses are not relevant to establishing whether market participant offer strategy is permitted. While market fundamentals may impact the extent to which market participant offer behaviour may influence market price, they are not relevant to determining whether the offer behaviour is not supportive of a fair, efficient and openly competitive market.

3. Conclusion

²¹ Report at page v.

²² Report at page 18.

²³ Report at page iv.

²⁴ This refers to economic withholding on its own, *i.e.* not combined with uncompetitive conduct.

²⁵ Report at page 16.

²⁶ Report at page 4.

As discussed above, Suncor agrees with certain conclusions in the Report. Suncor believes there is no reason to initiate new consultation on a new set of guidelines around offer behaviour. Instead, the OBEG should be reinstated to increase transparency and predictability in the market and improve regulatory certainty.

If you have any questions concerning the above submissions, please contact the undersigned.

Sincerely,

- original signed by -

Horst Klinkenborg
Senior Regulatory Advisor
Suncor Energy Marketing Inc.
as duly authorized agent for
Suncor Energy Inc.