

January 18, 2019

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

Attention: Mr. Gordon Kaiser

Dear Mr. Kaiser,

Re: Merits of Introducing an Advisory Opinions Program

Capital Power provides this letter in response to the Market Surveillance Administrator's ("MSA") December 14, 2018 request for stakeholder feedback on the MSA-retained consultant report from Independent Economics Consultant Mr. Ian Nielsen-Jones (the "Consultant") regarding the merits of introducing an Advisory Opinions Program ("AOP").

The Consultant was requested by the MSA to answer three questions:

- 1) Could an AOP assist market participants?
- 2) If so, what form should that programme take?
- 3) What has been the experience of other regulators with these types of Programmes?

Capital Power's key points of feedback in respect of these questions are as follows:

- An AOP cannot effectively take the place of a set of broadly applicable principles to address uncertainty regarding the MSA's enforcement stance. If, however, such a program was to be considered, it should be supplemental to a foundational document that outlines the MSA's approach to assessing permissible conduct. For example, with respect to offer behavior, Capital Power remains of the view that the MSA should reinstate the *Offer Behaviour Enforcement Guidelines* ("OBEGs") that were previously in effect until the Capacity Market has been operationalized rather than provide guidance through an AOP.
- The MSA's existing tool kit already contemplates similar action to the AOP that, while not as formal, is similarly limited as it generally provides only case-specific guidance. Given this limited applicability, market participants would still face uncertainty in other similar (but not exact) circumstances. Such narrow guidance then, even if public and binding, would be of limited value.

A broad set of enforcement principles or guidelines must be in effect prior to considering an AOP-like process.

Capital Power appreciates that, in conjunction with a broader enforcement or compliance framework, an AOP-like process may be a useful tool. As noted in the MSA's Consultant report, other regulatory and enforcement agencies in Canada have introduced similar programs.¹ Competition Bureau Canada (the "Bureau"), for example, has a written opinion process. However, the Bureau does not rely solely on this instrument to inform businesses and industries of its general approach to administration and enforcement of the *Competition Act* and various other related regulations. In Capital Power's view, the MSA should, likewise, avoid relying on narrowly focused instruments when a broader more comprehensive framework should first be put in place. Given that the energy-only market remains in effect, Capital Power reiterates its recent comments that the previous OBEGs not only remain applicable but would be far a superior solution to an AOP-like process in providing market participants clarity regarding the MSA's approach to enforcement.²

Rather than a patchwork of discretionary written opinions, as could be the result of an AOP-like process if implemented for Alberta's wholesale electricity market, the Bureau has the *Competition and Compliance Framework*³ wherein it notes, among other things, that "formal guidance"⁴ is provided through the issuance of technical documents such as enforcement guidelines or information bulletins. These documents articulate the Bureau's enforcement policy and are based on past experience, jurisprudence and accepted economic theory. Written opinions in response to proposed practices or conduct, such as those issued via the Bureau's AOP process, however, only play a narrow and supplemental role to support broader guidelines.

The scope of the Bureau's written opinions is constrained to "the applicability of one or more provisions of the *Competition Act* or regulations to a proposed practice or conduct."⁵ [Emphasis added] The Bureau also specifies that "[a] written opinion will not provide a binding opinion on whether the Commissioner would exercise enforcement discretion to commence an inquiry or pursue other enforcement activity with respect to the proposed conduct or practice."⁶ [Emphasis added] This is similar to the possible AOP for the Alberta wholesale electricity market suggested in the Consultant report, though it was noted the MSA could go as far as opining on whether it might initiate an investigation if the practice or conduct was adopted.⁷ Regardless, given the narrow scope and limited applicability of case-specific guidance, an AOP cannot effectively take the place of a set of broadly applicable principles in addressing uncertainty regarding the MSA's enforcement stance. Consequently, Capital Power strongly opposes an AOP (or similar type approach) and believes that such a process would be of limited assistance to market participants.

Neither existing MSA instruments nor an AOP can effectively replace guidelines or broad principles in addressing uncertainty regarding the MSA's general approach to enforcement.

Without broad enforcement principles in place (e.g. previous OBEGs), case-specific guidance, for example via an AOP-like process provides market participants with little substance in understanding the

¹ Page 1, *Report to the Market Surveillance Administrator of Alberta Regarding the Merits of Introducing an Advisory Opinions Program*, Ian Nielsen-Jones (14 December 2018)

² *Capital Power comments to the MSA's consultant's report on Offer Behaviour Guidelines prior to the implementation of the capacity market* (11 January 2019), <<https://albertamsa.ca/uploads/pdf/Archive/2019/2019-01-14%20Capital%20Power%20Comments%20-%20CRA%20Report%20re%20MSA%20Offer%20Guidelines.pdf>>

³ Competition Bureau Canada's *Competition and Compliance Framework*, though non-binding, provides a general description of how the Commissioner and the Bureau will approach the administration and enforcement of the Acts noting within it that one of the guiding principles is predictability. <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html#section2_2>

⁴ As described by the Bureau at Section 2 of the *Competition and Compliance Framework*, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html#section2_2>

⁵ *Written Opinions*, Competition Bureau Canada, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03000.html>

⁶ *Frequently Asked Questions: Competition Bureau – All about written opinions* <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03179.html#sec02>>

⁷ Page 2, *Report to the Market Surveillance Administrator of Alberta Regarding the Merits of Introducing an Advisory Opinions Program*, Ian Nielsen-Jones (14 December 2018)

MSA process in distinguishing conduct as being prohibited or permissible. Further, since case-specific guidance may change in even a slightly different scenario, what may be published would only be applicable in the narrowest of instances.

As more written opinions are issued, market participants may be able to patch together a broad understanding of the MSA's policies and approach to enforcement. However, this is unlikely under a discretionary process with no broad framework. Instead, market participants may engage in conduct based on their own assessments in which case the MSA may, at some point, be forced into an opinion that would have been better rendered ex-ante or prevented altogether had guidelines been in effect.

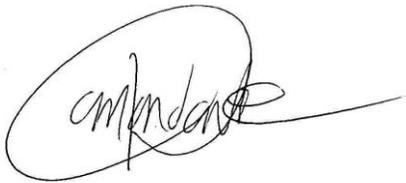
Closing Remarks

In closing, Capital Power believes that an AOP should not be pursued. As noted in its recent comments to the MSA's Offer Behaviour Guidelines consultation,⁸ Capital Power reiterates that an AOP would be an inferior alternative to a broader framework such as the previous OBEGs in providing existing and potentially new market participants with clarity and predictability regarding the MSA's enforcement stance.

While strongly opposed to an AOP process, Capital Power emphasizes that if the MSA were to implement an AOP, MSA-approval of business practices or conduct should not be required. Furthermore, absence of a request for an opinion should also not be held against a market participant. Failure to recognize these two points in an AOP would likely stifle market participants' ability to engage in what may otherwise be regular and permissible business conduct.

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,

A handwritten signature in black ink, appearing to read 'comandante', with a large, loopy flourish extending to the right.

Jason Comandante
Vice-president, Regulatory and Environmental Policy
Capital Power Corporation

⁸ Capital Power comments to the MSA's consultant's report on Offer Behaviour Guidelines prior to the implementation of the capacity market (11 January 2019), <<https://albertamsa.ca/uploads/pdf/Archive/2019/2019-01-14%20Capital%20Power%20Comments%20-%20CRA%20Report%20re%20MSA%20Offer%20Guidelines.pdf>>