

January 21, 2019

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Via Email: stakeholderconsultation@albertamsa.ca

RE: ATCO RESPONSE TO ADVISORY OPINION PROGRAMME CONSULTANT REPORT

On December 14, 2018 the MSA published a report by Ian Nielsen-Jones (the “Report”) regarding the potential for an Advisory Opinion Programme (the “Programme”) and requested comments by January 21, 2019. ATCO Power Canada Ltd. (“ATCO”) appreciates the opportunity to provide comments on this worthwhile initiative. ATCO supports the provision of additional transparency and insight into the MSA’s enforcement stance and interpretation of market rules and regulations. ATCO does, however, have several comments and concerns regarding the Report, primarily related to the MSA’s ability to issue binding opinions, the scope of the proposed opinions and ensuring that guidance applicable to the industry at large is publicly available.

ATCO agrees that the Programme will be more effective if the opinions are binding on the MSA, as suggested by the Report. The Report has not, however, identified the Alberta statute or regulation that would allow the MSA to issue binding opinions and hold the MSA to the opinion. ATCO is concerned that changes to the CEO of the MSA could affect whether the opinion is honoured, given the lack of a governing board. Section 10 of the Report discusses the Canada Competition Bureau’s (“Bureau”) experience with advisory opinions. While ATCO believes there are lessons to be learned from the Bureau’s experience, the Report appears to duplicate many aspects of the Bureau program without considering the industry-specific characteristics and legislation in Alberta.

Relevant legislation and regulations

Section 124.1 of the *Competition Act* outlines the Bureau’s authority to provide written opinions and ensures written opinions are binding on the Commissioner of Competition. There is no similar section in the *Electric Utilities Act* (“EUA”), *Alberta Utilities Commission Act* (“AUCA”) or the *Market Surveillance Regulation* (“MSR”). MSA opinions are not discussed in the applicable Alberta legislation and regulations. This means that there would be little recourse, other than a conduct complaint, for market participants if the MSA unduly changes or does not follow its opinion, unlike under the *Competition Act*. Further, it is unclear whether a complaint about the conduct of the MSA to the Alberta Utilities Commission (AUC) would be successful in this case, because there is no legislative underpinning for the proposed opinions.

There are two sections of Alberta legislation that may be applicable to advisory opinions: Section 39(4) and Section 57(1) of the ACUA. Section 39(4) of the AUCA enables the MSA to establish public guidelines. The process for establishing these guidelines is outlined in section 8(1) of the MSR. The MSA must consult with stakeholders before establishing or materially changing a guideline. The requirement to consult before changing a guideline provides some opportunity for stakeholders to comment publicly on the guideline before it is changed or withdrawn.

Under section 57(1) of the AUCA the MSA may forbear from exercising its powers or carrying out its mandate:

The Market Surveillance Administrator may decide to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the carrying out of any part of its mandate if the Market Surveillance Administrator finds as a question of fact that a person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

Neither of these sections contemplate the issuance of opinions that are binding on the MSA. Section 57(1) of the AUCA allows the MSA to refrain from enforcement action if certain criteria with respect to sufficient competition are met. The MSA should outline which aspect of the applicable legislation that underpins its proposal to provide binding opinions to the market. It is not immediately clear that the legislation as currently drafted will allow these opinions and ensure that the MSA follows its opinion for the duration of its applicability.

Feedback notes

In the past, the MSA has issued “feedback notes”. For example, on March 2, 2016 the MSA issued “Feedback Note – Forward Market Purchases Prior to PPA Termination Due to Change in Law.”¹ This note was provided in response to an inquiry with a hypothetical fact pattern. The MSA provided general guidance that the situation described appeared unlikely to result in concerns under the FEOC Regulation or the EUA. The note further contained the disclaimer that:

This feedback does not constitute a formal guideline or opinion of the MSA. However, within the parameters of the applicable facts and absent any superseding view, we consider ourselves bound by feedback given. Views expressed by the MSA do not supplant the role and authority of the courts, the Alberta Utilities Commission or another adjudicative body with jurisdiction over a given matter.

ATCO is unclear how the proposed Programme would differ materially from the MSA’s previously used “feedback notes”. The Report suggests requiring a requestor to provide significantly more information than appears to have been provided for the feedback note above, but it is not clear the resulting opinion would be materially different.

Scope of Opinions

ATCO is also concerned that the Report may define the scope of an advisory opinion too narrowly to be useful for market participants. The Report states:

A written opinion would set out the MSA's binding opinion on whether any provisions of the market rules, the FEOC Regulation or the Electric Utilities Act would be applicable to the proposed conduct or course of action described in a written request. An opinion could go so far as to indicate whether the MSA might initiate an investigation, if the conduct or practice at issue was adopted by the applicant.

This wording is similar to the wording of section 124.1(1) of the *Competition Act*, which provides for opinions on the applicability of the *Competition Act* to the proposed conduct. While opinions on the applicability of legislation may have some value in a general competition policy context, ATCO submits that they would have

¹ <https://albertamsa.ca/uploads/pdf/Archive/0000-2016/2016-03-02%20Feedback%20-%20Forward%20Purchases%20and%20PPA%20Termination.pdf>

little value in the Alberta electricity market. Rules and regulations are broadly applicable to market participants, so MSA opinions discussing only whether the rules are applicable would offer little value.

Opinions that comment on whether the MSA is likely to initiate an investigation into the proposed conduct would be of significantly greater value. While the Report proposes such opinions as an option, ATCO encourages the MSA to commit to commenting on whether the proposed conduct is likely to trigger an investigation. If the MSA does not feel it has sufficient information or is not able to provide an opinion on the subject, it can decline to provide an opinion, as suggested in the Report. Focusing the Programme on the likelihood of investigation will ensure the opinions have the potential to provide valuable guidance to market participants.

Role of guidelines

As articulated in its January 11, 2019 comments on the Offer Enforcement Behaviour Guidelines (OBEG), ATCO does not believe the Programme is a viable substitute for public guidelines for issues of broad industry interest and applicability. It would be burdensome for industry and the MSA to require participants to submit duplicative questions with private responses from the MSA. Further, if competitively valuable guidance is provided individually to market participants, the program may not support fair, efficient and open competition. ATCO submits that the MSA should articulate a clear line between questions that are eligible for the Programme and questions that should be addressed through the guideline making process. If at any point during an opinion process it is determined that the issue is of broad applicability, the issue should be moved to a guideline process.

Concluding remarks

ATCO is supportive of the MSA's initiative to establish the Programme to provide opinions to market participants on proposed conduct. ATCO believes the Programme needs to be a "made in Alberta" solution that considers the legislative framework and the specifics of the electricity industry. Enabling binding opinions may require changes to legislation or regulations to ensure market participants can rely on the opinions to provide conclusive guidance. If, however, legislative or regulatory change is not possible, ATCO is supportive of the formalization of the feedback note program into the Programme and believes it will provide market participants with an additional avenue for clarification from the MSA for issues that are not of broad industry applicability or interest.

Sincerely,

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