

## **NOTICE TO PARTICIPANTS AND STAKEHOLDERS**

July 15, 2016

**Re:** MSA Response to Stakeholder Comments on Investigation Procedures and Stakeholder Consultation Process

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On June 27, 2016 the MSA [requested](#) written comments from stakeholders regarding updated drafts of the MSA's Investigation Procedures and Stakeholder Consultation Process. Comments received regarding the refresh were [published](#) on the MSA's website on July 12, 2016. The purpose of this document is to provide the MSA's response to those comments.

### **Stakeholder Consultation Process**

ENMAX suggested the MSA not alter the fundamentals of the current stakeholder consultation process and submitted that the 2008 version of the consultation process provided a stronger commitment to two-way communication with stakeholders. The MSA remains committed to a transparent and rigorous consultation process including two-way communication and providing stakeholders with a reasonable opportunity to provide feedback to the MSA. The MSA believes the updated draft provides a simplified explanation of this process.

### **Investigation Procedures**

#### **Section 1.2 – Scope and Application of Investigation Procedures**

A number of market participants expressed concerns that the draft Investigation Procedures gave the MSA discretion whether to discuss deviations from the Investigation Procedures with the party under investigation. This was a change from previous versions of the procedures that required the MSA to discuss any such change with the party under investigation.

The MSA believes it is reasonable that market participants be informed of deviations from the published procedures if under investigation and has modified the draft accordingly.

#### **Section 1.3 - Confidentiality of Communications**

TransAlta requested that “the MSA clearly set out its position with regard to how it will treat confidential records provided to it in the course of an investigation or enforcement proceeding, having regard to the provisions of the MSR and FOIP.”

The MSA, as a public agency, is subject to the *Freedom of Information and Protection of Privacy Act* (“FOIP”). The *Market Surveillance Regulation* (“MSR”) does not prevail over FOIP in the event of a conflict [s. 5 of FOIP]. The MSA does not, however, envisage conflicts between the MSR and FOIP. It is unlikely the MSA would be required to produce personal or commercially sensitive records in its custody under FOIP because of the broad document production exceptions in FOIP. FOIP contains exemptions from disclosure for information

related to law enforcement activities [see s. 17(4) and 20] and exceptions related to information that would reveal commercially sensitive [s. 16] and privileged records [s. 27]. For information obtained pursuant to an investigation, the MSA will assert all appropriate exceptions to keep information confidential when it believes such information is exempt from disclosure under FOIP.

### **Section 3.2 Issue Assessment – Information Gathering**

ENMAX submitted that a person being requested to provide information to the MSA should be provided with “some level of detail about the line of questioning and context around the investigation or information gathering process.” The draft Investigation Procedures do not preclude the MSA from providing such information. The MSA agrees with ENMAX, and to the extent that high level information about the request is likely to facilitate a more productive response, the MSA will provide such information when appropriate.

### **Sections 4.1 and 5.3.1 – Notice Requirements**

TransAlta submitted that “[i]n cases where a market participant is under investigation, and individual employees of the market participant may also be under investigation, [...] notice must be provided to those individual employees.” The Investigation Procedures state that notice will be provided to parties under investigation. If an individual is a party under investigation, notice will be duly provided. The MSA has inserted the following into the draft “should the MSA expand the investigation to involve another party, the MSA will provide notice to the additional party.”

### **Section 4.4.2 Interviews**

A number of market participants submitted that, should an interview be recorded in the course of an investigation, the recording or transcript should be made available to the person interviewed and to the party under investigation (if different) in all cases. The MSA has modified the draft Investigation Procedures to clarify that if a transcript or recording of an interview is made by the MSA, the MSA will provide a copy 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.

TransCanada further submitted that, if the MSA intends to prohibit market participants from recording an interview, it should make such prohibition explicit. The MSA will not permit parties being interviewed during an investigation to record the interview. These measures are in place to protect the integrity of ongoing investigations.

### **Section 4.5 – Privilege or Privacy Claims**

TransAlta submitted that while “the MSA may ultimately choose to resolve privilege claims pursuant to a Court process, it submits that all parties would benefit from a well-defined process for resolving such disputes in advance of a Court application.” The Investigation Procedures allow the MSA to pursue an out of Court process for resolving privilege disputes, as suggested by TransAlta, as well as a Court process. The MSA believes that the process for resolving privilege disputes should be determined on a case-by-case basis.

**Statement of Facts Section (Suggested Addition)**

ENMAX suggested that the MSA add a section to its Investigation Procedures that “includes a process for agreeing on facts that are not in question.” The MSA believes that this can be determined on a case-by-case basis and should not be included in the Investigation Procedures.