

# REPORT TO THE MARKET SURVEILLANCE ADMINISTRATOR OF ALBERTA REGARDING THE MERITS OF INTRODUCING AN ADVISORY OPINIONS PROGRAM

## 1. INTRODUCTION

The Market Surveillance Administrator (MSA) of Alberta is an independent enforcement agency that promotes and protects the fair, efficient and openly competitive operation (FEOC) of Alberta's wholesale electricity markets and its retail electricity and natural gas markets. The MSA ensures that these markets are not subject to behaviour by market participants that wittingly or unwittingly distorts the efficient, reliable and economic supply of electricity and natural gas to consumers and businesses. The MSA's duties include surveillance, investigation and enforcement.

The MSA is currently considering the launch of an advisory opinions program that would encourage market participants to seek an opinion of the MSA with respect to whether **proposed** business conduct and practices comply with the market rules, FEOC and any other obligation placed on market participants by the *Electric Utilities Act* and its regulations.

Advisory opinion programs have been introduced by regulatory and enforcement agencies in Canada and elsewhere in order to foster an understanding of how laws and regulations are administered and to encourage compliance with legislation, regulations and rules. The MSA itself has had its Feedback Notes program in place but it now wishes to consider the launch of a more formal and detailed program in which the outcome is strictly an advisory opinion regarding **proposed** business conduct.

This program will not grant opinions on matters the Alberta Electric System Operator (AESO) provides guidance on as outlined in its Information Document 2017-001.<sup>1</sup>

It is fair to assume that most market participants and their personnel prefer to comply with the law rather than become the subject of an investigation by a regulatory agency. When industry participants do not breach rules and regulations both they and the regulatory or enforcement agency save money and time and there exists an environment of cooperation and respect. The establishment of an advisory opinions program by the MSA would assist persons and corporations who wish to avoid conflict with Alberta's energy rules and regulations. In addition, such a program would reduce the need for investigations and enforcement action and enable the MSA to strike the appropriate balance between compliance and enforcement.

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<sup>1</sup> See AESO Information Document 2017-001 Requests for Information regarding Authoritative Document Requirements <https://www.aeso.ca/rules-standards-and-tariff/requests-for-information-waivers-or-variances-regarding-authoritative-documents/>

## 2. OVERVIEW OF A POSSIBLE ADVISORY OPINION PROGRAM

It is recommended that the MSA implement a program in which it has the discretion, on a request from any “**person**”, to provide a **written** opinion stating whether the **proposed** practice or conduct brought forward by the person would raise an issue. Written opinions are advice and guidance, which would be provided only for **proposed** business conduct.

It is recommended that, if market participants in Alberta wish to avail themselves of the MSA’s advisory opinion program, they should be required to make their request in writing and provide all of the details of their proposed practice in written form. Meetings could then be held to enable the MSA to seek additional information or clarification, if necessary. In such circumstances, the MSA should require the party seeking an opinion to also provide the additional information in writing.

Written advisory opinions provided by the MSA would be **binding** on the MSA if all of the material facts had been submitted, were accurate and remained substantially unchanged. A written opinion would be based on the information provided, taking into account any applicable previous opinions, the current rules and legislation, any relevant jurisprudence and the stated policies of the MSA at the time the opinion is issued. It would be predicated on the basis that: (1) no material facts had been omitted or misrepresented in the applicant’s written request or its subsequent provision of supplemental information; and (2) the conduct/practice was carried out or instituted as proposed.

All advisory opinions would be signed by the Chief Executive Officer (CEO) of the MSA. The CEO would retain the discretion to decline to issue an opinion for one or more of the reasons outlined in **section 3**.

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*<sup>2</sup> 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.

It is recommended that, in any public material regarding its advisory opinions program, the MSA should highlight that the quality of an opinion is directly related to the amount and quality of the information provided to the MSA by an applicant.

As the MSA’s opinions/guidance might change if the province’s energy rules or regulations are subsequently amended, it is suggested that applicants receiving a written advisory opinion be reminded to seek legal advice or re-contact the MSA to

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<sup>2</sup> Including Regulations made pursuant to that Act.

ascertain whether any future amendments to Alberta's energy laws and regulations would have an impact on the opinions they have received in the past. Further, the MSA's enforcement stance on specific matters may change as a result of decisions from the Alberta Utilities Commission and the courts. As well, the MSA could consider that its advisory opinions are valid for a defined period of time, say five (5) years. The MSA could also pro-actively advise applicants and market participants, when appropriate, that an opinion or opinions issued in the past is/are no longer partially or entirely applicable because of rule changes or decisions of the Alberta Utilities Commission.

### **3. DECLINING TO PROVIDE AN OPINION**

It is suggested that under its advisory opinion program, the MSA should retain the discretion to decline to issue a written advisory opinion in certain circumstances. For example, if the party seeking an advisory opinion did not provide sufficient and/or suitable information, the MSA might not feel comfortable or even be able to provide a binding opinion. As well, the MSA might not wish to provide an opinion when the facts are uncertain or hypothetical. It is also likely that the MSA would not want to provide an opinion if doing so could interfere with an existing investigation.

Depending upon the MSA's views regarding third-party information (see **section 5** below), the MSA might not want to issue opinions if providing a fulsome and credible opinion would require the MSA to seek information from third parties (raising confidentiality concerns as well).

The MSA may periodically decide, for other reasons, that it is reasonable or advisable to decline to provide an advisory opinion.

If any of the above circumstances should happen or be present, the MSA would so advise the applicant and should consider any submissions made by the applicant concerning the decision to decline to provide an opinion.

### **4. SEEKING ADDITIONAL INFORMATION/CLARIFICATION FROM APPLICANT**

Under its advisory opinion program, it is likely that the MSA will often feel it necessary to seek additional information from a party requesting an advisory opinion and/or to seek clarification of information already provided by an applicant. These occurrences should form part of the opinion program and be specially noted in the public description of the MSA's program. Any clarifications provided by applicants should be in writing.

Occasionally, the MSA may come to the conclusion that the proposed practice or conduct put forward by an applicant does or might raise an issue. In such cases, the MSA could advise the applicant of this finding and enable the party to revise its proposed conduct to mitigate the MSA's concerns such that the MSA's ultimate opinion is positive. If the MSA were to issue an opinion that expressed the view that the proposed conduct would raise competition concerns, it should permit the applicant to submit a revised request for consideration.

## 5. THIRD-PARTY INFORMATION

In some instances, the MSA may feel it necessary to have information that is in the possession of an independent third-party in order to issue an opinion. In such circumstances, the MSA should request that the applicant obtain the information in order to preserve confidentiality. The applicant should be made aware that, if it is unwilling or unable to obtain the required information, the MSA will likely not be able to provide an opinion.

It should be noted that, under its advisory opinion program, the Competition Bureau, the federal agency responsible for the enforcement of the *Competition Act* and for the promotion of competition in Canadian marketplaces, does **not** provide an opinion, if it requires information from third parties in order to make its determination.

## 6. FEES FOR OPINIONS

The Competition Bureau (the Bureau) has had various iterations of an advisory opinion program in place for approximately 40 years. Initially, the Bureau did not charge for any of its written opinions. However, in 1997, the Bureau began to charge for its opinions and increased the fees in 2003. The fees have remained the same since that year. The stated rationale for this policy is that those who benefit most from a government service should pay for it, rather than having all Canadians pay through general taxation.

The Bureau's fees are based on what provision(s) of the *Competition Act* are the subject of the written opinion request and how complex the request is. The degree of complexity is at the sole discretion of the Bureau.

It is recommended that, if the MSA launches an advisory opinion program, it should not charge for its opinions for a reasonable period of time so that market participants are not discouraged from taking advantage of this worthwhile initiative. Should the MSA decide at a later date to charge fees for its advisory opinions, it is recommended that

the MSA charge more for opinions that entail a high level of complexity and are more time consuming to prepare.

## **7. SERVICE STANDARDS FOR THE PREPARATION OF ADVISORY OPINIONS**

Since 1997 the Bureau has published service standards for the preparation of its opinions. The standards, like its fees for service, are based on what provision(s) of the *Competition Act* are the subject of the written opinion request and how complex the request is. If the Bureau finds it necessary to seek additional information from a party seeking an opinion, it may pause the service standard until all of the information is received. If the Bureau does pause the applicable service standard, it so advises the party and later communicates when the pause is ended.

In March of 2018, the Market Assessment and Compliance Division (MACD) of Ontario's energy regulator, the Independent Electricity System Operator, launched its Compliance and Enforcement Guidance program, which involves the provision of opinions in different formats/situations. MACD decided that, as its guidance service was new, there would be no service timelines put in place initially but it has stated that it may consider implementing service standards in the future.

It is recommended that, if the MSA launches an advisory opinion program, it should delay establishing strict service standards until it has sufficient experience with the process and timelines associated with preparing different types of opinions to enable it to set meaningful service standards. The MSA could, however, adopt an initial policy of providing market participants applying for opinions with a general and informal sense of when an opinion would likely be finalized.

## **8. PUBLICATION OF ADVISORY OPINIONS**

To promote a culture of compliance and transparency and good will, the MSA may wish to publish the advisory opinions it issues to market participants or summaries of the opinions on its web site while maintaining the confidentiality of the applicant in question and any commercially sensitive information. The publication of an advisory opinion would be most important when it deals with a new or unusual issue. Should the MSA wish to publish an opinion in its entirety, it is suggested that the MSA contact the market participant involved to seek consent. If consent is not granted, the MSA would edit the applicable opinion to produce a summary that protects both corporate identities and commercially sensitive information.

## **9. FEEDBACK FROM APPLICANTS**

The MSA may wish to encourage parties, which have submitted requests for written advisory opinions, to provide feedback regarding their experience with the process, the value of the opinion they received and any other matters related to the service provided by the MSA. If the MSA decides to seek such commentary, it could develop a simple questionnaire to be completed by interested parties or it could use the services of a survey/research firm to obtain the feedback. The MSA would ensure the confidentiality of the respondents' identities and their particular feedback.

The MSA would regularly review the feedback it has received and decide whether it wishes to revise its program to take account of some of the comments/suggestions put forward by applicants.

## **10. THE COMPETITION BUREAU'S EXPERIENCE WITH ADVISORY OPINION PROGRAMS**

In Canada, the MSA can look to the long history of the federal government's Competition Bureau for some guidance and experience. The author of this report was actively involved in the Bureau's program with respect to the design and implementation of the program during a lengthy career with the organization.

The Bureau's program has been in place since the mid-1970s providing written opinions to companies in the private sector. The program deals exclusively with proposed conduct and does not involve the provision of interpretations of laws, regulations or rules without a fact situation. If the Bureau decides to provide interpretations of the provisions of the *Competition Act*, it does so through an interpretation bulletin.

The Bureau's advisory opinions are binding provided that all of the material facts have been submitted, they were entirely accurate, and they remain substantially unchanged. The Bureau has issued as many as 275 opinions in a given year as its mandates covers almost all industries in Canada. Summaries of opinions that the Bureau views as noteworthy or timely are published in the Bureau's Annual Report with the identity of the applicant kept confidential.

As noted above, the Bureau instituted a fee program for its advisory opinions in 1997. This had the effect of reducing requests for advisory opinions by almost 70%. The Bureau publishes its fee schedule, with the fees running from \$1,000 to \$15,000. The Bureau also publishes a table outlining the standards of service for the preparation of its advisory opinions. The standards are based on which section(s) of the *Competition Act* are relevant and how complex the proposed conduct is deemed to be. The standards range from two (2) to ten (10) weeks.

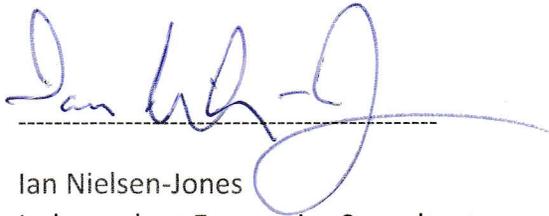
## 11. SUMMARY AND RECOMMENDATIONS

It is recommended that the MSA introduce an advisory opinions program. This type of pro-active initiative will foster compliance and should be well-received by market participants as it will increase their understanding of how the MSA interprets the rules and provisions it enforces. An advisory opinions program will also send a message to industry participants that the MSA is a cooperating partner when it comes to ensuring that Albertans have a reliable and economic supply of energy. Putting an advisory opinions program in place will likely reduce the number of MSA investigations and enforcement actions, which should lower the MSA's costs of doing business.

It is recommended that the MSA's advisory opinion program should have the following features:

- 1) requests for advisory opinions and the supporting information should be in writing;
- 2) advisory opinions will only be issued for proposed conduct or business practices;
- 3) the opinion issued by the MSA should be in writing;
- 4) at least initially, all MSA advisory opinions should issued by the CEO;
- 5) the MSA's opinion should be binding on the MSA, if all of the material facts have been submitted, were accurate, and remain substantially unchanged;
- 6) the MSA's opinions should be valid for a defined period of time such as five (5) years;
- 7) the MSA should allow an applicant to adjust or revise its proposed conduct or business practice in order to ultimately receive a positive opinion from the MSA;
- 8) opinions would be provided in cases where the MSA needed information from one or more third parties provided that the party applying for an opinion agrees to obtain the required information from the third-party contact(s);

- 9) the MSA should retain the right to decline to issue an advisory opinion in certain circumstances<sup>3</sup>;
- 10) the MSA should publish its advisory opinions in order to increase the reach and value to market participants of this type of guidance;
- 11) the MSA should seek formal feedback on the program, process and service from parties that have taken advantage of the program, and perhaps more widely;
- 12) initially the MSA should not charge any fees for its advisory opinions; and,
- 13) the MSA should establish service standards for the preparation of its advisory opinions but only after it has had suitable experience with the process and timelines required to issue the opinions.



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<sup>3</sup> The circumstances would include instances in which the MSA felt it had insufficient information or it was unable to verify certain information or it was uncomfortable with some of the information.