



19 March 2008

Market Surveillance Administrator
#500, 400 – 5th Avenue S.W.
Calgary, AB T2P 0L6

Re: IPPSA's Response to MSA Investigation Procedures, March 5, 2008 Revised Draft

Dear Sir/Madam:

The Independent Power Producers Society of Alberta ("IPPSA") appreciates the opportunity to comment on the Further Draft Revised Investigation Procedures.

Of the eight comments and requested changes set out in our February 20, 2008 letter, the Further Draft Revised Investigation Procedures incorporated one requested change. That change being: a party under investigation and a person being interviewed will now be provided a copy of the transcript of an interview conducted by the MSA, instead of this occurring only potentially by agreement. IPPSA appreciates this change.

However, we are disappointed with the nature and extent of the reasons given by the MSA in adhering so closely to the form of the investigation procedures that it published initially on a "strawdog" basis.

IPPSA incorporates into this letter the comments that we provided through our February 20, 2008 letter. In addition to those comments and requested changes, IPPSA provides the following further input:

1. In our February 20, 2008 letter, we identified that the strawdog Draft Revised Investigation Procedures were comprised to a great extent by provisions that merely paraphrase or summarize existing statutory or regulatory provisions. We also identified that there was not any level of detail as to the nature of the internal processes to be followed by, and the kinds of internal records to be prepared by, the MSA in the course of its activities. Combined, this does not provide participants with much insight into the MSA procedure that they may face.

Of note, the October 5, 2006 MSA Investigation Procedures (the "Existing Procedures") contains a great deal of information and transparency of process, that was deleted from the strawdog Draft Revised Investigation Procedures. We request that the provisions from the Existing Procedures be included back into the Further Draft Revised Investigation Procedures, given that (quoting from the MSA's Existing Procedures) "consistent and transparent issue assessment and investigation procedures are essential to ensure due process."

We urge the MSA to reconsider its decision to delete these elements of its process. While the MSA has identified Section 7 of the *Market Surveillance Regulation* in its defence of this decision, that provision does not require or suggest that the MSA should delete the guidance, clarification and information contained in the Existing Procedures that is critical to assist market

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participants in guiding and determining the nature of the conduct that they should undertake. That is especially the case with respect to the deletion of all of the MSA's investigation considerations and the related discussion and guidance that was included in the Existing Procedures. Although the MSA Response states that the MSA will continue to assess and consider factors relevant to the matters at issue, it is perplexing that the MSA proposes at the same time to delete these factors from the Existing Procedures.

As a result, there is a significant concern that the sole external focus of the Further Draft Revised Investigation Procedures will be problematic from a number of perspectives. As explained in our February 20, 2008 letter, the lack of clarity and guidance surrounding Section 6 of the *Electric Utilities Act* will be aggravated, for instance, because market participants will no longer be able to have a degree of comfort that they know the investigation considerations that the MSA considers to be key, to allow them to better assess whether certain conduct is likely to be considered onside or offside.

Further, the deletion of the substantive aspects of the Existing Procedures may well affect the ability of the Commission to consider the conduct of the MSA with reference to its own processes and records, as expressly contemplated in Section 6(12) of the *Market Surveillance Regulation*, and under Sections 40 and 58 of the *Alberta Utilities Commission Act* with respect to the obligation of the MSA to carry out its mandate in a fair and responsible manner.

Quite apart from the potential disclosure of internal MSA records expressly contemplated by Section 6(12) of the *Market Surveillance Regulation*, from the perspective of IPPSA, it is important that the MSA develop and identify processes and investigation considerations that the MSA believes to be appropriate, advise market participants of these processes, and then adhere to them. With the greatly increased penalties now in place under the *Alberta Utilities Commission Act*, principles of administrative law require an increased degree of due process and procedural safeguards and protection. The MSA's proposed deletion of the substance of the Existing Procedures appears to run counter to this well-established principle.

It is for reasons including those set out above that IPPSA urges the MSA to reconsider the comments and suggested changes in paragraph nos. 1, 3, and 4 of our February 20, 2008 letter.

2. Regarding the timelines for investigations, IPPSA understands the points set out in the MSA Response. However, we reiterate our request that the MSA include an express commitment to expedite investigations. In addition, if the 75-business-day target that was included in the Existing Procedures is now not realistic from the perspective of the MSA, it should be modified so that the MSA and market participants have some target to work toward, to be modified as may be warranted by the circumstances.
3. Paragraph no. 8 of our February 20, 2008 letter requested that the investigation procedures be revised to require the MSA to share, with the party under investigation, the MSA's specific investigation findings, reasons, and conclusions upon the discontinuance of its investigations. To summarize, this request was made in light of the lack of clarity surrounding Section 6 of the *Electric Utilities Act*, and the important role that would be fulfilled by the MSA in providing guidance and clarity, were this practice to be followed.

The MSA Response stated that one reason not to follow this practice is that, from a process perspective, the right to know the case against a market participant no longer arises upon the discontinuance of an investigation. That does not address the concerted desire by market

participants to obtain guidance and clarity from the MSA, in a proactive manner, about their ongoing and future conduct, elucidated through specific applicable examples and issues.

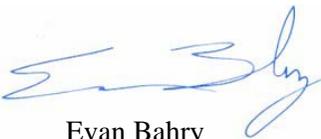
Another reason given by the MSA is that, in some cases, it might close its investigation file without making material findings. If that is the circumstance, then the MSA could simply let the market participant know that such is the case. IPPSA is not suggesting that the MSA should be required to provide material findings if the MSA has not made material findings.

Another reason given by the MSA is that an investigation may be discontinued for a variety of reasons, not all of which will directly relate to the market participant under investigation, for instance, the matter may be better addressed via guideline than through prosecution. Again, if that is the reason for discontinuing the investigation, it would be useful for market participants to know this.

Finally, the MSA noted that, by stating in the Further Draft Revised Investigation Procedures that the MSA will generally not share specific investigation findings with the party under investigation unless the MSA is considering taking enforcement action, the MSA was not precluding itself from the possibility of discussions with a market participant. IPPSA suggests that it is appropriate for the MSA to commit to providing some form of feedback to a market participant that has been subjected to the investigation process. As the MSA appreciates, given that our members invest a great deal of time and effort in responding to MSA inquiries, we would think that courtesy would warrant some understanding of what comes of that effort. We hope the MSA would agree.

In conclusion, Section 7(2) of the *Market Surveillance Regulation* mandates the MSA to consult with market participants on the material changes that it is proposing to the Existing Procedures. To satisfy the substance of that obligation, IPPSA requests that the MSA review and reconsider our February 20, 2008 letter and this letter, and either incorporate the requested changes, or provide sufficient reasons for deciding not to do so.

Sincerely,



Evan Bahry
Executive Director