Alberta Utilities Commission

IN THE MATTER OF A COMPLAINT
MADE PURSUANT TO s. 58 OF THE *ALBERTA UTILITIES COMMISSION ACT*
RE: MARKET SURVEILLANCE ADMINISTRATOR

COMPLAINT

RE: CONDUCT OF MARKET SURVEILLANCE ADMINISTRATOR

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Alberta Utilities Commission

COMPLAINT IN RESPECT OF CONDUCT BY THE MARKET SURVEILLANCE ADMINISTRATOR

I. INTRODUCTION

1. This is a complaint by TransAlta Corporation, TransAlta Energy Marketing Corp. and TransAlta Generation Partnership (collectively, "TransAlta") concerning the conduct of the Market Surveillance Administrator (the "MSA") in relation to its current investigation of TransAlta and more generally to its failure to properly consult with market participants prior to making fundamental decisions with far-reaching effects regarding permitted behaviour in the market. As detailed more fully in this Complaint, TransAlta submits that the MSA has engaged in conduct that is fundamentally unfair to TransAlta and is acting in a manner contrary to its statutory requirement to discharge its mandate in a fair and responsible manner.

2. The investigative process undertaken by the MSA has caused harm to TransAlta and will continue to do so if permitted to continue. Moreover, TransAlta states that the conduct exhibited by the MSA in this case has caused considerable uncertainty in the electricity market. Regulatory changes made absent consultation and in a haphazard manner may cause harm to markets by creating regulatory risk that may constrict future innovation and investment by market participants. TransAlta thus invokes the Commission's supervisory mandate under subsection 58(1) of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (the "AUCA") to remedy this state of affairs by directing the MSA to cease its investigation of TransAlta and by commencing its own consultation with market participants on an impartial basis regarding the conduct that owners of PPA units may lawfully engage in.

3. TransAlta raises this complaint in relation to the following MSA conduct:

   (a) the MSA's failure to take into account the Power Purchase Arrangement ("PPA") terms and entitlements when drafting the Offer Behaviour Enforcement Guidelines (the "OBEG");

   (b) the MSA's provision of inconsistent guidance in relation to outage timing at PPA units during the course of its preparation of the OBEG;

   (c) the MSA's failure to abide by its commitment to consider PPA terms and entitlements as they relate to the OBEG in a formal stakeholder process;

   (d) the MSA's decision to renege from pursuing a promised formal stakeholder process into offer behaviour principles for PPA units, as contemplated in the OBEG and other MSA documents;

   (e) the MSA's replacement of the promised industry consultation process with its pursuit of TransAlta in a formal investigation and the use of the yet-to-be-completed investigation as the basis to form unilateral conclusions for the

guidance of other market participants in relation to offer behaviour principles for PPA units;

(f) the MSA's conduct of the investigation of TransAlta in a manner that will retroactively apply these unilateral conclusions to time periods that:

(i) predated finalization of the original OBEG issuance (where industry consultation was promised as being the next step); and

(ii) predated the MSA's disclosure of its unilateral conclusions regarding OBEG principles for PPA units.

II. FACTS

TransAlta

4. TransAlta Corporation is a publicly traded, wholesale power generator and marketer, with operations in Canada, the United States and Australia. TransAlta is the owner of eight thermal coal units subject to PPAs. PPAs are statutory commercial arrangements created during the deregulation of the Alberta electricity market.

5. Wholesale marketing is conducted by TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing Corp. Market activity is composed of asset hedging and optimization of TransAlta's power generation portfolio and securing TransAlta's fuel requirements, electricity retailing to mid to large sized commercial and industrial customers, and proprietary trading of electricity and natural gas.

The OBEG

6. In February 2010, the MSA undertook roundtable consultations on market participant offer behaviour with a view to developing the OBEG.[1] This consultation arose from questions of uncertainty regarding whether types of offer behaviour were viewed to be consistent or inconsistent with section 6 of the *Electric Utilities Act*, SA 2003, c E-5.1 (the "EUA") and the *Fair, Efficient and Open Competition Regulation*, Alta. Reg. 159/2009 (the "FEOC Regulation"). The consultation did not arise from concerns about anti-competitive behaviour; rather, the market was fully functioning and competitive. The consultation process resulted in comments from TransAlta and other participants urging greater clarity from the MSA as to its proposed regulation of market offer behaviour.[2] Some participants expressed concern that the MSA would consider making pronouncements about offer behaviour at all.

7. In April 2010 the MSA published a discussion paper entitled "Foundational Elements Shaping the Market Surveillance Administrator's Approach to Bids and Offers"

[1] Notice to Market Participants & Stakeholders re Roundtable Discussion on Market Participant Offer Behaviour dated February 8, 2010; Notice to Market Participants & Stakeholders re Roundtable on Market Participant Offer Behaviour dated February 10, 2010.

[2] Notice to Market Participants & Stakeholders re Draft Roundtable Notes dated February 25, 2010.

("Foundational Elements"). The MSA set out its views that competition, and not regulation (and particularly not quasi-price regulation) should shape market outcomes. The MSA expressed the view that if competition is enabled and allowed to deliver an efficient outcome, regulatory intervention would not be warranted.[3]

8. In its Foundational Elements paper, the MSA placed greater emphasis upon dynamic efficiency rather than static efficiency, and in doing so distinguished Alberta from other electricity markets.[4] Such an approach would not involve policing against exercise of market power as would be appropriate in a static efficiency context; conduct inconsistent with static efficiency would be acceptable as long as there is a corresponding benefit to dynamic efficiency and no restricting or prevention of competition.[5] Thus, the MSA would permit economic withholding or offering below avoidable cost as acceptable practices if such practices resulted (or were likely to result) in overall gains in market efficiency.[6]

9. TransAlta was in agreement, and continues to be in agreement that there should be a focus on dynamic efficiency in the market, in order to ensure that sufficient investment takes place to replace large generating units that will be retired in the coming decade.

10. In June 2010, the MSA published another discussion paper entitled "Analytical Framework for the Monitoring of Bids, Offers and Market Health" ("Analytical Framework"). In this paper, the MSA further noted that economic withholding and below-cost pricing on select transactions in order to maximize profits for the portfolio constituted rational economic behaviour; that these strategies would be disciplined by the actions of competitors, and that the MSA would monitor such behaviour but would be concerned only if there was "evidence that the market participant undertook additional actions to prevent or impede [a] competitive response -- what is referred to as abusing market power".[7]

11. Importantly, this was a significant change in the way that market behaviour had previously functioned, and signalled a direction that was directly contrary to that taken in neighbouring jurisdictions, where regulatory oversight and prohibition of such conduct has increased. Conduct that is expressly permitted under the OBEG is explicitly prohibited in many other jurisdictions around the world.

12. Based on the MSA's issuance of these two substantive documents, the Foundational Elements (at 18 pages) and the Analytical Framework (at 16 pages), both of which expressly permitted economic withholding, TransAlta understands that some market participants other than TransAlta began engaging in economic withholding. At no time

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3 Foundational Elements, p. 1.

4 Foundational Elements, p. 8.

5 Foundational Elements, p. 8.

6 Foundational Elements, p. 8.

7 Analytical Framework, p. 3.

did the MSA caution market participants not to rely on or act in accordance with the Foundational Elements or Analytical Framework.

13. The Foundational Elements and Analytical Framework discussion papers were followed by further consultation with market participants.

14. In late June 2010, the MSA notified market participants that it was commencing a formal stakeholder consultation process for the purpose of assisting in the development of a formal OBEG.[8] The MSA sought written comments from market participants on the two discussion papers, and specifically example behaviours, that would help provide clarity to the guidelines and assist market participants in understanding the boundaries of accepted economic withholding behaviour. Following this notice, the MSA received comments from market participants on the two discussion papers.[9]

15. In September 2010, the MSA published a notice to market participants containing illustrative examples intended to provide more clarity on the two discussion papers.[10] On September 17, 2010, the MSA held a workshop with market participants to discuss these illustrative examples. TransAlta personnel attended and participated in the workshop.

16. On September 29, 2010, the MSA issued a notice regarding its response to the comments received from stakeholders.[11] The MSA further advised that it was working on a draft OBEG which was expected to be provided to stakeholders for comments in October to November 2010. The MSA expected to finalize the OBEG in November to December 2010.

17. A lack of clarity existed as to how the economic theory of permitting economic withholding behaviour, without automatic mitigation measures, would operate in the context of the Alberta energy-only market. This was a novel approach without clear precedent in energy markets throughout the world, including energy-only markets. In an attempt to address this issue, TransAlta sent a letter to the MSA dated September 30, 2010 enclosing TransAlta "Fact Patterns".[12]

18. On October 8, 2010, TransAlta met with senior representatives from the MSA to discuss the fact patterns that TransAlta had submitted to the MSA for discussion purposes in its September 30, 2010 letter. The Administrator of the MSA (the "MSA Administrator"), together with senior MSA staff and senior TransAlta personnel, attended the meeting.

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8 Notice to Market Participants and Stakeholders re Market Participant Offer Behaviour – Stakeholder Consultation dated June 29, 2010, MSA Summary of Facts and Findings File No. 0630 dated November 27, 2013 (the "Outages Findings"), Tab 33.

9 Notice to Market Participants re Stakeholder Comments on Market Participant Offer Behaviour dated August 4, 2010, Outages Findings, Tab 34.

10 Notice to Market Participants and Stakeholders re Market Participant Offer Behaviour: Illustrative Examples dated September 10, 2010, Outages Findings, Tab 35.

11 Notice to Market Participants and Stakeholders re Market Participant Offer Behaviour: MSA Response to Stakeholder Comments dated September 29, 2010, Outages Findings, Tab 36.

12 Letter from TransAlta to the MSA dated September 30, 2010 re "Fact Patterns".

The purpose of the meeting was to discuss the fact patterns and how conclusions reached regarding economic withholding applied to the concept of overall portfolio bidding. The fact patterns largely focused on generic outages at a generating facility, namely thermal coal units that had a boiler leak. In each case, the MSA representatives were invited to respond and provide their views and opinions as to whether they viewed instances of economic withholding involving TransAlta's coal-fired units to be consistent or inconsistent with the EUA and FEOC Regulations. At all times the MSA was aware that the majority of TransAlta's coal-fired units are subject to PPAs. These illustrative examples were provided in an attempt to clarify the types of conduct that would be considered permissible pursuant to the OBEG and under FEOC, which itself provided only a statement of concepts upon which the Alberta electricity market should be operated. At no time during this meeting did the MSA distinguish between merchant units and PPA units.

19. Following the October 8, 2010 meeting, on October 29, 2010, the MSA issued a notice to market participants which included illustrative fact patterns as examples of activity regarding market participant offer behaviour.[13] The scenarios and MSA responses indicated in the notice were nearly identical to those discussed during the October 8, 2010 meeting. The October 29 notice reiterated the advice provided by the MSA at the October 8 meeting.

20. In combination with the Foundational Elements paper, these consultation sessions made clear that the MSA supported a competitive market that would signal correct and required investment decisions. It was also clear that the MSA believed that the by-product of portfolio bidding and economic withholding would be sufficient investment in Alberta's electricity market by merchant generators who would earn sufficient revenue from energy market prices.

21. The October 29, 2010 illustrative examples clearly indicated that the timing of outages to benefit a portfolio position would be acceptable to the MSA, provided that steps were taken to ensure that there was no trading on non-public outage records, and that there was no collusion with other market participants. Further, the MSA clarified through these illustrative examples that a financial position held in the market for energy trading purposes by a market participant when timing outages would be irrelevant to the question of whether there was a breach of the FEOC Regulation.

22. In reliance on the consistent views expressed by the MSA during the October 8, 2010 meeting and the October 29, 2010 notice, TransAlta implemented its portfolio bidding strategy effective November 16, 2010, which included forced outage timing optimization. Such conduct was consistent with the conclusions reached in the Foundational Elements and Analytical Framework discussion papers, the statements made by the MSA officials in the October 8, 2010 meeting and the October 29, 2010 Notice to Market Participants.

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[13] Notice to Market Participants and Stakeholders re Offer Behaviour Examples # 2 dated October 29, 2010, Outages Findings, Tab 36.

23. On November 26, 2010, the MSA issued a draft OBEG (the "Draft OBEG") and solicited market participant comments before December 17, 2010.[14]

24. The Draft OBEG explicitly permitted the following types of behaviour by generators in the Alberta electricity market:

    (a) economic withholding (pricing generation out of merit with the intent of driving up prices in the market);

    (b) timing of outages to benefit overall portfolio (timing outages at units with the intent of driving up market prices and benefiting from the sale of MWs at other units); and

    (c) uneconomic flows on the intertie line (flowing electricity uneconomically on the intertie line – into another market where there is presently a lower price – in order to reduce supply in Alberta and drive prices up).

25. The Draft OBEG made no distinction between merchant units and PPA units in its discussion of economic withholding. The MSA indicated that "additional considerations under the fair, efficient and openly competitive standard may apply" in the case of discretionary outages where a unit is subject to a PPA. The MSA stated it was seeking market participants' input on this issue.[15]

26. In late November 2010, participants in the OBEG consultation, including TransAlta, started to engage in some or all of the behaviours expressly authorized by the MSA. Corresponding increases in the Alberta electricity pool price occurred over the next year.

27. In December 2010, in response to the MSA's request, certain market participants who were engaged in the OBEG consultation process then raised concerns with the MSA's conclusions respecting economic withholding and suggested that different principles should apply to economic withholding and the timing of forced outages that occur for merchant generation units and units that are the subject-matter of PPAs.

28. TransAlta replied to these views in correspondence dated December 17, 2010. TransAlta stated that there was no basis for such a distinction.[16] This continues to be the view held by TransAlta. To date, the MSA has not, in any public communication to market participants, stated any basis for such a distinction.

29. On January 14, 2011, the MSA issued its final OBEG that described the general approach of the MSA in applying the FEOC Regulation to market participant offer behaviour in

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[14] Notice to Market Participants and Stakeholder re Market Participant Offer Behaviour: Draft Guidelines dated November 26, 2010 and Draft OBEG.

[15] Draft OBEG.

[16] Letter from Sterling Koch, Vice President, Regulatory Affairs, TransAlta to the Market Surveillance Administrator dated December 17, 2010.

Alberta's wholesale electricity market.[17] In an accompanying notice, the MSA stated that in relation to discretionary outages at units covered by a PPA, the matter merited "further and detailed consideration outside the guideline making process" and that the MSA would work on a discussion paper, followed by a further opportunity for stakeholder consultation.[18] The MSA amended section 4.7.2 of the Draft OBEG to state in the final OBEG that the MSA provides "no guidance to market participants on the timing of discretionary outages at PPA units".[19] Accordingly, in the OBEG the MSA provided no view – either favourable or unfavourable – towards the timing of discretionary outages at PPA Units.

30. The accompanying notice also stated that "stakeholders should expect to see a paper outlining the MSA's views in the area of discretionary outages at PPA Units in the next few weeks" and that an "opportunity will be provided for further stakeholder comment at that time".[20]

31. The OBEG provided a number of fact patterns related to discretionary outages. It went on to state that the MSA was "still considering the application of these examples to units subject to a PPA and at this time offered no guidance on outage timing at PPA Units. Once the MSA is in a position to provide such guidance this section of the guideline will be revised."[21]

32. The OBEG made it clear that the MSA was continuing a course of consultation that would involve market participants. Importantly, the MSA did not conclude that the timing of forced outages at PPA Units constituted behaviour inconsistent with the FEOC Regulation. Furthermore, the MSA did not provide any rationale for why PPA Units should be distinguished from merchant units.

33. No consultation process on the issue of timing outages at PPA Units was ever commenced by the MSA. As will be further outlined below, the MSA did not expressly advise TransAlta that it viewed such conduct as contrary to the FEOC Regulation until a private meeting on December 20, 2011, and did not advise other market participants of its position until May 18, 2012. At no time has the MSA provided any justification for its position.

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[17] Offer Behaviour Enforcement Guidelines for Alberta's Wholesale Electricity Market dated January 14, 2011, Outages Findings, Tab 39.

[18] Notice to Market Participants and Stakeholders re Final Offer Behaviour Enforcement Guidelines and Stakeholder comments on the draft dated January 14, 2011, Outages Findings, Tab 39.

[19] Offer Behaviour Enforcement Guidelines for Alberta's Wholesale Electricity Market dated January 14, 2011, p. 28, Outages Findings, Tab 39.

[20] Notice to Market Participants and Stakeholders re Final Offer Behaviour Enforcement Guidelines and Stakeholder comments on the draft dated January 14, 2011, Outages Findings, Tab 39.

[21] Offer Behaviour Enforcement Guidelines for Alberta's Wholesale Electricity Market dated January 14, 2011, p. 28, Outages Findings, Tab 39.

Commencement of the Investigation

34. On March 8, 2011, less than two months after the MSA issued the OBEG and promised to continue consultation with market participants on the issue of timing outages at PPA Units, the MSA commenced its investigation against TransAlta relating "to outages at, and the timing thereof" certain of TransAlta's PPA units (the "Investigation").[22] The MSA notice stated that the Investigation would seek to establish whether TransAlta complied with the requirements of legislation and ISO rules, including section 6 of the EUA and the FEOC Regulations.

35. Two days later, on March 10, 2011, the MSA issued another notice to market participants, advising that it had suspended its plans for a stakeholder consultation relating to the timing of outages subject to PPAs.[23] The MSA's notice stated that it had received a complaint on a substantively similar matter and was conducting an investigation. The MSA stated that "...the investigation and the stakeholder consultation are best handled sequentially, in that order". The Notice further stated that the statement in section 4.7.2 of the final OBEG, that "[t]he MSA ...at this time offers no guidance on the outage timing at PPA units", remains the status quo until further notice. Finally, the Notice indicated that the MSA would reassess the need for stakeholder consultation following completion of the investigation.

36. On March 23, 2011, the MSA provided TransAlta with particulars of its Investigation.[24] The March 23 letter indicated that the period under Investigation was in respect of outages taken during the period from November 2010 to February 2011 inclusive.

37. In June 2011, TransAlta responded to Information Requests from the MSA, wherein TransAlta acknowledged that it had engaged in timing discretionary outages at PPA units.

38. The MSA did not communicate further with TransAlta regarding the scope of the Investigation until December 2011, when it requested a meeting. On the day prior to the meeting, the MSA provided TransAlta with notice that it was extending the timing of its Investigation from November 1, 2010 to December 19, 2011.[25]

39. On December 20, 2011, the MSA held its meeting with TransAlta. At that meeting, the MSA Administrator communicated for the first time that the MSA considered the timing of outages at PPA Units to be offside the FEOC Regulation. When asked why it had not provided such guidance previously, the MSA stated that it could not provide guidance without consultation, and while in the course of an investigation.[26] The MSA further

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22 MSA Notice of Investigation dated March 8, 2011, Outages Findings, Tab 1.

23 Notice to Market Participants and Stakeholders re Update – Notice January 14, 2011 re: Timing of discretionary outages at units that are subject to Power Purchase Arrangements dated March 10, 2011.

24 Letter from the MSA to TransAlta dated March 23, 2011.

25 Notice of Investigation dated December 19, 2011, Outages Findings, Tab 3.

26 There is absolutely no legal basis or "rule" that prevents an investigatory body from making its position on a critical compliance issue clear in the course of an investigation. To the contrary, it is expected that regulatory

advised that if there had been any ambiguity on the issue, there was no ambiguity any longer.

40. Notwithstanding TransAlta's continuing belief that there is no difference in market impact between the timing of an outage at a PPA Unit and a merchant facility, it ceased timing of outages at PPA units immediately after the December 20, 2011 meeting, following the MSA's communication of its position. [27]

The Outages Findings

41. On November 27, 2013 the MSA issued a Summary of Facts and Findings following the receipt and review of information pursuant to the Investigation regarding the timing of certain discretionary outages (the "Outages Findings"). In short, the MSA concludes in the Outages Findings that TransAlta engaged in conduct contrary to the EUA and the FEOC Regulation. On January 10, 2014, TransAlta provided a response to the MSA outlining TransAlta's disagreement with the Outages Findings and its position that TransAlta did not act in contravention of the EUA or the FEOC Regulation.

42. The Outages Findings is focused on TransAlta's timing of outages at certain of its coal-fired generating units that are the subject of PPAs. The MSA's view (for the first time expressed in the Outages Findings) is that a PPA Owner, such as TransAlta, is in contravention of section 6 of the EUA and the FEOC Regulation if it does not schedule required outages at PPA units so as to minimize the Availability Incentive Payments ("AIPs") payable to PPA Buyers. The MSA maintains this position despite the fact that:

    (a) its own OBEG do not require a PPA Owner to do so;

    (b) the PPAs themselves do not require a PPA Owner to do so and, to the contrary, do not prohibit in any way the specific behaviour TransAlta engaged in; and

    (c) there are no provisions in the EUA or FEOC Regulation requiring a PPA Owner to do so.

43. The Outages Findings demonstrate that the MSA has failed to take into account the basic underlying structure of the PPAs. The process which led to the Draft and final OBEG also indicates that the MSA: failed to properly consider or understand the PPAs; drafted the OBEG notwithstanding that lack of consideration or understanding; promised a consultation to deal with the issue of PPAs; reneged on that promise; and launched an extensive and expanded investigation of TransAlta in relation to the terms of the PPAs. At no time during this process did the MSA have a discussion with TransAlta regarding the application of the OBEG to PPAs. Discussions with the MSA have instead consisted of ever-expanding allegations against TransAlta.

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bodies make the rules regarding conduct that is on or offside very clear to stakeholders to assist stakeholders with compliance, but even more importantly to ensure that the underlying policy objectives that underpin the conduct rules are met. This is particularly the case when the facts suggest that the regulatory body knew that the party under investigation continued to engage in the impugned conduct while the investigation carried on.

[27] Letter from TransAlta to the MSA dated January 18, 2012.

44. In its response to the Outages Findings dated January 10, 2014, TransAlta maintained that at all times it acted in accordance with section 6 of the EUA, the FEOC Regulations and the PPAs. The EUA and the FEOC Regulation do not contain any provisions that support the MSA's view that discretionary outages at PPA Units must be managed differently by an Owner when compared to discretionary outages at merchant units. The PPAs themselves expressly confirm that a PPA Owner may interrupt generation services at any time.[28] However and in any event, the record clearly demonstrates that TransAlta at all times took into consideration the MSA's guidance. TransAlta remains of the view that the Outages Findings were improperly issued and the conclusions therein are not supported at law.

III. THE LAW AND LEGISLATIVE FRAMEWORK

The Relevant Regulatory Framework

45. There are two essential legislative enactments that govern the Alberta electricity market: the EUA and the AUCA. The former sets out the structural features of the market, including the principle of a fair, efficient and openly competitive market.[29] The FEOC Regulation provides detail regarding the implications of this principle. The latter statute, the AUCA, establishes the Commission and the MSA and sets out their mandate and powers.

46. Under section 58(1) of the AUCA, any person may make a written complaint to the Commission about the conduct of the MSA. In response, the Commission is empowered to dismiss all or part of the complaint, direct the MSA to change its conduct in relation to the matter that is the subject of the complaint, or direct the MSA to refrain from the conduct that is the subject of the complaint.[30]

47. The mandate and powers of the MSA are found in Part 5 of the AUCA. The MSA, established under the EUA, was continued as a corporation under the AUCA.[31] The MSA's mandate is focussed on two general modalities: to carry out market surveillance,[32] and to investigate.[33]

48. In carrying out its mandate, the MSA is required to assess whether or not the conduct of electricity market participants supports the fair, efficient and openly competitive operation of the electricity market.[34] As part of its mandate, the MSA may establish

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[28] See, for example, Article 5.2 of the Power Purchase Arrangement for Keephills, Outages Findings, Tab 29.

[29] EUA, ss. 5 and 6.

[30] AUCA, s.58(3).

[31] AUCA, s. 32(1).

[32] AUCA, s. 39(1)(a).

[33] AUCA, s. 39(1)(b); note that this mandate is repeated in subsection 39(2) wherein reference is made to "surveillance and, where applicable, investigation and enforcement".

[34] AUCA, s.39(3)(a).

guidelines to support the fair, efficient and openly competitive operation of the electricity market.[35]

49. The MSA's expressed view of its guidelines is that they do not constitute market rules "but should be interpreted as representing the MSA's views".[36] However, the MSA cautions market participants that failure to follow MSA guidelines may result in the market participant finding themselves under scrutiny for failing to support the fair, efficient and openly competitive operation of the market.[37]

50. No provisions of the relevant legislation provide for rule-making ability by the MSA in relation to the operation and regulation of Alberta's electricity markets.

51. With respect to its guidelines, the *Market Surveillance Regulation*, Alta. Reg. 266/2007 (the "MSR") provides that the MSA "must consult with market participants on any new guidelines it develops pursuant to section 39(4) of the AUCA or any existing guideline it decides to materially change."[38] The MSA is also required to consult with market participants on proposed changes to processes used to develop guidelines under section 39(4) and make public any revised process.

52. Moreover, the MSA is required by the AUCA to carry out its mandate in a fair and responsible manner.[39]

53. In its report entitled *Principles for Stakeholder Engagement, and a Common Framework, for MSA Public Projects* (15 January 2008) (the "MSA Principles Document"), the MSA set out its public framework for undertaking consultations relative to common project frameworks. Among other things, the MSA Principles Document states the following:

    (a) the principles in the document represent their "fundamental beliefs, consistent with the MSA's mandate about engagement with the MSA's stakeholders on public projects";

    (b) the key desired characteristics for engagement include purposeful, inclusive, transparent, meaningful, and <u>timely</u> attributes; [emphasis added]

    (c) particularly, the MSA states that its public consultation processes and the rationale for its decisions are <u>transparent</u> (subject to issues around commercially sensitive information); [emphasis added]

    (d) an <u>open, transparent process</u> and basis for decisions are required to <u>build trust and demonstrate fairness</u>, and that stakeholders are more likely to support a decision if

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35 AUCA, s.39(4).

36 See, for example, the MSA's Intertie Conduct Guidelines at s. 1.1.

37 *Ibid.*

38 MSR, s 8(1).

39 AUCA, s. 40.

they understand the rationale behind the decision and how their perspectives were considered in reaching the decision; [emphasis added]

(e) that the greater the expected significance and impact of an item, the more extensive the MSA's stakeholder consultation will be (subject to acting in a timely manner);

(f) that the MSA will communicate the rationale behind their decisions, with explicit focus on the use of the stakeholder input received (omitting any commercially sensitive information) [emphasis added]; and

(g) that the MSA must make information on its public projects and decisions available to stakeholders.

54. While the MSA may ultimately decide what processes it will use in its operation and whether and how it will respond to issues in the marketplace, it draws a distinction to situations (e.g., investigations) where no public consultation takes place as the MSA does not view this as adding value to that particular activity.

55. The MSA confirms that it developed this framework for stakeholder consultations to seek input into development of, among other matters, MSA guidelines and that the MSA will use the process framework described in the MSA Principles Document to develop such guidelines.

56. With respect to the Commission, its powers are broadly defined by the AUCA and include (i) the conduct of hearings and granting of remedies;[40] (ii) the ability to act on its own initiative and do "all things that are necessary for or incidental to" the exercise of its powers;[41] (iii) the power to order any person to do "any act, matter or thing" required under the Act;[42] and (iv) to make rules regarding the procedure and administration of its duties.[43] As noted above, the Commission is also responsible for hearing and rendering determinations regarding complaints made about the MSA's conduct.[44]

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[40] AUCA, ss. 8(5) and 11.

[41] AUCA s. 8(2).

[42] AUCA, s. 23.

[43] AUCA, s. 76(1).

[44] AUCA, s. 58.

Procedural Fairness, Retroactivity and Legitimate Expectations

57. A duty of procedural fairness applies at the investigative stage of an administrative process[45]. Further, where a party's rights, privileges or interests are at stake, there is also a duty to act in a procedurally fair manner. [46]

58. The nature of the duty of procedural fairness in the investigative context requires that "the matter must be dealt with objectively and with an open-mind; that there can be no predetermination of the issue; and that the parties are informed of the evidence put before the Commission so they can make meaningful representations. Put another way, ... [the investigating body] must satisfy at least two conditions: neutrality and thoroughness."[47]

59. There is also a presumption that discretionary powers should not be exercised unreasonably, discriminatorily,[48] retroactively[49] or in an uncertain manner. With respect to retroactivity, it is settled law that statutes, regulations and delegated discretionary authority (including policy-making powers) are presumed not to apply in a retroactive fashion. The rationale is that parties subject to these rules are entitled to know what the law is at the time they make decisions about conduct, and therefore this presumption against retroactivity is recognized to have constitutional force.[50]

60. These principles apply to the MSA and particularly to its retroactive application of conclusions reached as to timing of outages in relation to PPA units in its present investigation of TransAlta. Particularly, TransAlta says that it is entitled to know the policies in force at the time that it made decisions about its business conduct, and not to have those policies, as expressed in the MSA's conclusion as to the lawfulness of this conduct, retroactively applied to it.

61. In addition, the doctrine of procedural fairness includes the concept of legitimate expectations, which arise when a public body has adopted a course of conduct or otherwise leaves a person or group to believe that a decision affecting rights will not be taken without some form of hearing, procedure, or consultation.

62. The Supreme Court of Canada decision in *Old St. Boniface Residents Association Inc. v. City of Winnipeg (City)*[51] is frequently cited as the authority for this proposition. The

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45 *Nova Scotia (Attorney General) vs. Ultramar Canada Inc.* (1995), 127 DLR (iv) 517 (FCTD); see also *Re Pergamon Press*, [1971] ch. 388 (CA).

46 *Cardinal v. Kent Institution (Director)* [1985] 2 SCR 643.

47 *Canadian Broadcasting Corp. v. Paul*, [1999] 2 FC 3, (1998), 168 DLR (4th) 727 (FCTD).

48 *Lacewood Development Co. v. Halifax (City)* (1975), 58 DLR (3d) 383 at 395-396 (NSSC).

49 *Canuck Holdings Western Ltd. v. Fort Nelson (Improvement District)* (1963), 42 DLR (2d) 313 (BCSC).

50 For example, see *Western Decalta Petroleum Ltd. v. Alberta (Public Utilities Board)* (1978), 6 Alta LR (2d) 1, 86 DLR (3d) 600 (CA); *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 SCR 271; and *N.W.T.T.A. v. Northwest Territories (Commissioner)* (1997), 153 DLR (4th) 80.

51 [1990] 3 SCR 1170 ("*Old St. Boniface*").

Supreme Court confirmed that the principle of legitimate expectations "affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation."[52]

63. In the present case, TransAlta had a legitimate expectation that the MSA would follow a proper consultation process prior to rendering a determination on the applicability of the outage timing provisions of the OBEG to PPA units. The law is clear that where a legitimate expectation has been created as to a consultation process, procedural fairness will be denied where such consultation does not occur.

64. In *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)*, Fruman J., noted that:

> Even in circumstances where there is no duty of procedural fairness, such a duty can arise where there has been a holding out that a specified procedure would be followed by the decision maker and there was reliance upon that position by interested parties (*Furey v. Conception Bay Centre Roman Catholic School Board* (1991), 2 Admin. L.R. (2d) 263 (Nfld. T.D.); *Sunshine Coast Parents for French v. Sunshine Coast School District No. 46* (1990), 49 B.C.L.R. (2d) 252 (S.C.).).[53]

65. Similarly in the Alberta case of *Czerwinski v. Mulaner*,[54] the Court held that the doctrine of legitimate expectations applied in circumstances where a public body had engaged in an established practice of public consultation, notwithstanding the finding that the body (a school board) was making a policy decision through a delegated legislative function. D.G. Hart J. noted that,

> Notwithstanding the deference that must be extended to elected bodies making policy decisions through the pursuit of a delegated legislative function, I am of the view that the Board breached a duty of fairness owed to the Applicants. It was the Board's policy to consult with school councils prior to making a decision of this nature, and the applicants were entitled to expect that the Board would follow its policy.[55]

66. The Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)* recently confirmed that procedural guidelines create legitimate expectations.[56] The case involved an appeal of a decision made under the *Immigration and Refugee Protection Act*. With respect to legitimate expectations, the Court stated that:

> the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate

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52 *Old St. Boniface, supra* note 52, at para. 111.

53 [1993] A.J. No. 807 (Alta. Q.B.) ("*Lehndorff*"), at para. 47.

54 [2007] AJ No 1005 (Alta QB) ("*Czerwinski*").

55 *Czerwinski, ibid.*, at para. 38.

56 2013 SCC 36 ("*Agraira*").

> expectation that that framework would be followed. ... The Guidelines are and were publicly available, and ... they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, the appellant could reasonably expect that his application would be dealt with in accordance with the process set out in them.[57]

67. As noted above, the MSA "must consult with market participants on any new guidelines it develops pursuant to section 39(4) of the AUCA or any existing guideline it decides to materially change."[58]

IV. SUBMISSIONS IN SUPPORT OF THE COMPLAINT

The MSA Acted Unfairly and Irresponsibly in Commencing the Investigation

68. The MSA failed to conduct itself in accordance with its own policies and section 40 of the AUCA when it failed to carry out further consultation regarding the applicability of the OBEG to PPA units and instead initiated the Investigation. In so doing, the MSA also contravened section 8 of the MSR. This heavy handed approach is unwarranted and unfair to TransAlta. It is also unfair to other market participants who reasonably expected that the MSA would engage in consultation prior to making significant changes to the OBEG. TransAlta and the other market participants had a legitimate expectation and a statutory right to be consulted prior to the MSA rendering a determination on this issue.

69. In this way, the MSA has improperly used its investigation powers as a substitute for a consultation process and has violated statutory and common law requirements for consultation in relation to the making of guidelines, and changes to the manner in which such guidelines are developed. As indicated in its January 10, 2014 response to the MSA, TransAlta maintains that the strategy it pursued regarding the timing of discretionary outages was legal, compliant with the EUA, the FEOC Regulation and the PPAs. Moreover, the behaviour was expressly permitted by the MSA. The MSA therefore acted unfairly and irresponsibly, contrary to section 40 of the AUCA, by commencing the Investigation against TransAlta prior to completing the promised consultation process and by publicly stating a position regarding the permitted behaviours at PPA units.

70. TransAlta's decision to implement the portfolio bidding strategy was completely consistent with the MSA's guidance, both written and oral. In October 2010, TransAlta was provided with assurances that such conduct would be acceptable for PPA units. As referred to above, the OBEG provided a number of fact patterns related to discretionary outages and made it clear that its application to PPA units would be subject to further consultation with market participants. However, the MSA failed to provide any indication of its position in the interim and did not provide any rationale for the distinction drawn between PPA units and merchant units.

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[57] *Agraira, supra* note 57, at para. 98.

[58] MSR, s. 8(1).

71. The MSA had over six months from the commencement of the OBEG consultation process to consider these matters and the opportunity to reach and state a conclusion. In the context of the MSA's promised industry consultation process, it is entirely reasonable to regard the "no guidance" message as consistent with the promised consultation process. In reliance on the MSA's pronouncements, TransAlta continued timing outages at PPA units in accordance with its entitlements under the PPA. TransAlta believed that its conduct was proper and that the timing of outages at PPA units would continue to be the subject-matter of the promised consultation with the MSA, as indicated by the MSA itself and that TransAlta would be given an opportunity to provide input regarding its entitlements under the PPA.

72. In addition, TransAlta was cognizant of the fact that failure to implement a portfolio bidding strategy that was consistent with the MSA's guidance could be viewed by the MSA as behaviour that is in contravention of the EUA and the FEOC Regulation. Behaviour not consistent with portfolio bidding, based on the MSA's own guidance, could be viewed as a deliberate attempt to keep electricity prices lower with a view to minimizing the likelihood of new market entrants. This dilemma demonstrates the uncertainty created by the MSA's actions.

73. TransAlta reasonably expected that any prohibition on activity not prohibited and explicitly contemplated by the PPAs would be clearly set out by the MSA, whether the view was a temporary one pending further consultation, or a permanent prohibition. If the MSA viewed the discretionary timing of outages at PPA Units as contrary to the FEOC Regulation, TransAlta reasonably believed and expected that the MSA would have clearly communicated that position to market participants and would have done so in reference to the terms and rights awarded under the PPA; particularly after it had provided express guidance to TransAlta and the market in October 2010 that such conduct was acceptable.

74. As stated above, on December 20, 2011, at a meeting with TransAlta, the MSA Administrator communicated for the first time that the MSA considered the timing of outages at PPA units to be offside the FEOC Regulation. Therefore, prior to engaging in any further consultation with market participants, and prior to concluding the Investigation, the MSA unilaterally determined that conduct authorized in the Foundational Elements and Analytical Framework papers, the Draft OBEG, and the PPA, was now contrary to the EUA and the FEOC Regulation, and retroactively applied this new-found conclusion to the activities of TransAlta. This conclusion was inconsistent with information previously communicated by the MSA to TransAlta and was unfairly applied to TransAlta in a retroactive fashion.

The MSA's Conduct has Created Significant Market Uncertainty

75. On May 18, 2012, some five months after the MSA had privately communicated to TransAlta its conclusion that timing outages at PPA units were offside the OBEG, the MSA finally issued its guidance by notice to the market.[59] This guidance was issued after more than 14 months of MSA silence on the issue (since its March 10, 2011 Notice), and

[59] Feedback – Timing of Discretionary Outages – PPA Units dated May 18, 2012.

in light of observations from some market participants that this silence was contributing to uncertainty in the marketplace. The MSA did not engage in any consultation with market participants prior to issuing this guidance.

76. The May 18, 2012 notice was the first occasion on which the MSA advised the market publicly that the timing of discretionary outages at generating units subject to PPAs to the benefit of a PPA-Owner's generation portfolio is "inconsistent with the obligation to support the *fair, efficient and openly competitive* operation of the market" [emphasis in original] and that until the Commission adjudicated on the matter, parties should proceed on this basis.[60]

77. The MSA further advised that, should information come to their attention that a PPA Owner is engaging in such conduct, "...the MSA would consider launching an investigation and taking additional action as appropriate".[61] The notice also states 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".[62]

78. TransAlta submits that the MSA's position on timing outages in relation to PPA Units evolved as follows:

(a) throughout the more than 6-month stakeholder consultation process leading up to the OBEG and up to January 14, 2011, such conduct was considered to be in accordance with the *FEOC Regulation*;

(b) at some point between November 2010 and March 10, 2011, the MSA became less certain on the issue and promised to undertake further public consultation on the propriety of such conduct;

(c) as of March 10, 2011, the MSA determined to conduct an investigation in relation to such conduct, thereby trumping the promised public consultation, which would be deferred or potentially cancelled;

(d) on December 20, 2011, the MSA's conclusion (expressed privately only to TransAlta) was that such conduct was not in accordance with the FEOC Regulation (and, in combination with the MSA's investigative notices, this conclusion would be retroactively applied, and for a period extending back to November 2010); and

(e) on May 18, 2012 the MSA expressed its public conclusion that the conduct was not in accordance with FEOC Regulation.

79. This about-face by the MSA and the threat of regulatory sanction against TransAlta is wholly unjust and certainly not consistent with principles of fair regulatory oversight.

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60 Feedback – Timing of Discretionary Outages – PPA Units dated May 18, 2012.

61 *Ibid.*

62 Feedback – Timing of Discretionary Outages – PPA Units dated May 18, 2012 per "Note to reader".

80. More particularly, the manner in which the MSA handled the OBEG process, in particular as it pertains to its applicability to PPA units, is in contravention of the *MSR* and the MSA's own Draft OBEG. The Draft OBEG states: "If a material change is warranted, the MSA will address this through its public Stakeholder Consultation Process."[63] This process was not followed in this case.

81. A consultative requirement is also stipulated in the MSR, which states:

> 8(1) The MSA must consult with market participants on any new guidelines it develops pursuant to section 39(4) of the Act or any existing guideline it decides to materially change.[64]

82. In this case, the MSA contravened section 8 of the MSR when it unilaterally concluded that PPA units would be, as it pertains to the scheduling of outages, distinguished from all other generating units without engaging in any public consultation on the issue. The MSA's failure to comply with the Draft OBEG and section 8 of the MSR resulted in significant market uncertainty. The Draft OBEG and the MSR contemplate that guidelines which may be used for enforcement purposes will be subject to public consultation so that market participants have input into and an understanding of the rules of the market. In this case, the MSA has chosen to set aside public consultation and to instead pursue market redesign through the pursuit of enforcement action against a single market participant.

83. The MSA's chosen course of action, to pursue an investigation as opposed to a consultative process, contravenes the statutory requirements referred to above. In addition, the MSA misunderstood its role in Alberta's electricity market and exceeded its jurisdiction when it treated its guidance as established market rules. Pursuant to the EUA, it is the AUC and the AESO, not the MSA, that establish the rules that market participants must abide by.[65] The MSA may only issue guidance but the AUCA does not empower the MSA to assess whether a market participant has complied with such guidance. Instead, the MSA is only to assess whether a market participant has complied with "the *Electric Utilities Act*, the regulations under that Act, the ISO rules, reliability standards, market rules and any arrangements entered into under the *Electric Utilities Act* or the regulations under that Act, in the case of an electricity market participant".[66]

84. The MSA's issuance of the OBEG significantly altered the behaviour within, and therefore the effective design of, Alberta's electricity energy market.[67] The MSA failed to

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63 Draft OBEG, p. 5.

64 MSR, s. 8.1.

65 EUA, Part 2, Division 2

66 AUCA, s. 39(3)(b)(i)

67 Changing effective market design with the goal of incenting generation investment, as is referenced in the Foundational Elements at page 8, is not within the core statutory mandate of the MSA, which is focussed on surveillance, investigation, enforcement, and assessing conduct and compliance: See sections 39(1), (2) and (3) of the AUCA. Subsection 39(4) of the AUCA, which allows the MSA to establish guidelines to support the fair, efficient and openly competitive operation of the electricity market, as part of its mandate, in TransAlta's submission, cannot expand the power and scope of the MSA to issue guidelines beyond its stated mandates.

carry out its proper mandate in a fair and responsible manner when it developed the OBEG and, in particular, as it concerns the applicability of the OBEG to PPA units. Any uncertainty regarding the scheduling of outages at PPA units arises directly due to the approach undertaken by the MSA.

The Investigation is Interfering with Dispute Resolution Under the PPAs

85. The MSA is allowing its investigation process to be used collaterally and improperly by a market participant to assist in the prosecution of a subsequent claim for damages pursuant to the dispute resolution provisions contained in the PPAs. This is a commercial dispute between a PPA Buyer and TransAlta which has been elevated by the MSA into an investigation despite the absence of evidence of any type of market harm.

86. On October 25, 2012, the MSA invited TransAlta to attend an "on the record" meeting regarding the status of its investigation. The meeting was attended by the MSA Administrator, the MSA's Chief Economist and others from the organization. The main purpose of this meeting was stated by the MSA officials to provide information regarding their status and findings that they have reached regarding TransAlta's strategy to time outages at PPA Units in the time period both before issuance of the OBEG dated January 2011, and before definitive views were expressed by the MSA on December 20, 2011, and, indeed before public views were provided by the MSA on May 18, 2012.

87. During the course of the October 25, 2012 meeting, representatives of the MSA stated the following:

(a) that they believed that there had been direct harm to PPA buyers, that direct harm had occurred to the pool price, that there had been indirect harm to the forward market and liquidity, and that actions on the part of TransAlta were intentional;

(b) that they believed such conduct was part of a "broader scheme" involving TransAlta management, with a pattern of persistent conduct; and

(c) that they would seek information relating to TransAlta's compliance through a further request or requests for information in relation to the Commission's Rule 013 "Criteria Relating to the Imposition of Administrative Penalties".

88. The MSA representatives also stated that they were nowhere near the end of their investigation and were not presenting facts and conclusions in relation to TransAlta at this time.

89. At this meeting, TransAlta representatives first learned that the initial complaint sparking the MSA's investigation in this case was made by a PPA counterparty to TransAlta and was filed in March 2011. This is confirmed in the Outages Findings. The counterparty has reserved its rights to commence arbitration under the PPA or a court action against TransAlta and a related entity for damages as a result of the same outages that are the subject of the Investigation.

90. The counterparty to TransAlta in the pertinent PPAs seeks to pursue as damages compensation in excess of what TransAlta has already paid pursuant to the PPAs' AIP

regime. In TransAlta's view, the counterparty's case in this regard depends on the MSA's Investigation to allege that TransAlta's conduct, while compliant with the PPA, was not in compliance with the EUA or the FEOC Regulation. Therefore, the MSA's Investigation has become a key issue in the commercial dispute between the PPA counterparty and TransAlta. The MSA should not have engaged in a manner of consultation or initiated an Investigation that led to this result.

91. The Investigation was commenced as a result of a complaint from a commercial counterparty with whom TransAlta may be in dispute resolution, which will determine what, if any, remedy that counterparty is entitled to pursuant to the PPA. The Investigation was not initiated on the MSA's own motion because the MSA identified market harm as a result of TransAlta's behaviour. The complaint was filed by a commercial counterparty to TransAlta which had identified a strategy which it believed may lead to compensation that is greater than the compensation contemplated under the PPAs through the AIP.

The MSA Has Acted Pursuant to a Flawed View of the Regime Governing PPAs

92. To date, the MSA has not publicly communicated a rationale for distinguishing PPA units from merchant units, as it pertains to discretionary outage timing, because no such rationale exists. The MSA acknowledges that the purpose of the PPAs was to create competition in the generation market. As soon as the PPA auction was complete and the right to dispatch capacity was sold to third-party Buyers, the competitive restructuring goals of the Province of Alberta had been met. Subsequently and on multiple distinct occasions, policymakers and the MSA have noted that the Alberta market is competitive. There is no rationale that justifies the MSA's position, developed through the Investigation, that only owners of merchant units are entitled to compete when it pertains to the timing of discretionary outages, whereas PPA units, which are simply subject to commercial off-take arrangements which stipulate that all operational control rests with the PPA Owner, are not. The PPAs recognize that the PPA Owner as the Operator is the only entity responsible for scheduling forced and planned outages.[68] The PPAs created the AIP to provide compensation in recognition that there would never be perfect alignment between PPA Owner and PPA Buyer. The MSA is wrong to conclude that the timing of required discretionary outages at PPA units must be based only on the impact of the AIP without taking account of a broader portfolio while all other generators can take all factors into account when timing such outages. Such a position is discriminatory as against a PPA Owner and precludes a PPA Owner from initiating a competitive response in reaction to market developments, contrary to the competitive nature of the market as contemplated in the EUA and the FEOC Regulation.

93. The MSA asserts the view that a PPA Owner has an obligation to take steps to minimize the AIPs payable to a PPA Buyer when scheduling a discretionary outage. However, there is no provision in the PPAs that requires a PPA Owner to do so, despite the fact that such a provision could easily have been included, had the framers of the PPAs so chosen.

94. Section 5.2 of the PPA allows for an "Interruption in Supply" where it is:

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[68] Power Purchase Arrangement Thermal for Keephills, Article 5, Outages Finding, Tab 29.

> [. . .] necessary to safeguard life, property or the environment, or to the extent reasonably necessary to conduct preventative maintenance to safeguard life, property or the environment, whether such interruption is caused by an even of Force Majeure or otherwise.

95. Also, section 5.2 of the PPA imposes the following obligations on the PPA Owner:

> To the extent practicable and as soon as may be practicable, the Owner shall: (i) limit the duration of such interruptions, and (ii) other than upon the occurrence of an event of Force Majeure, give notice to the Buyer of its intention to interrupt the provision of Generation Services.

96. The MSA does not allege that TransAlta contravened section 5.2 of the PPA. It is not alleged that TransAlta took outages that were not necessary for the purposes of safeguarding life, property or the environment. It is not alleged that TransAlta failed to the extent practicable to limit the duration of such interruptions. It is not alleged that TransAlta failed to notify the PPA Buyer as soon as may be practicable of the outage. In all respects, TransAlta complied with the PPAs.

97. Section 5.2 could have included an obligation on PPA Owners to take forced outages as soon as possible, but it does not. The Independent Assessment Team Report to the EUB August 99 Revision explicitly confirms that section 5.2 only contains two obligations, namely: to limit the duration of outages; and to notify the buyer of its intention to interrupt generation services.[69]

98. Furthermore, section 5.2 of the PPA recognizes that the PPA Owner as Operator "shall have the right to interrupt the provision of Generation Services from any Unit at any time to the extent necessary ..." [emphasis added].[70]

99. The MSA acknowledges that the Owner will be required to pay higher AIPs in the event that the outage is taken during a peak period. The MSA appears to conclude that the existence of this financial incentive creates a requirement to schedule outages during non-peak periods, despite the fact that there is no such requirement anywhere in the PPAs. In fact, while section 5.1(c) of the PPA, as it pertains to planned outages, requires an Owner to "make reasonable efforts and act in good faith to accommodate" the Buyer, there is no such requirement with respect to forced outages, although such a requirement would have been easy to include, if desired. Outages remain the sole responsibility, and at the discretion, of the PPA Owners.

100. It must also be noted that the position of the MSA on PPA units is particularly problematic when one considers the fact that the MSA has permitted PPA buyers to create outages at PPA units at any time for purely economic reasons. This outage is caused by the buyer when it prices minimum-stable generation out-of-merit. Such outages have had significant impact on market prices.

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69 Independent Assessment Team Report to the EUB August 99 Revision, p. 52.

70 Power Purchase Arrangement Thermal for Keephills, Outages Findings, Tab 29.

V. CONCLUSION

101. The MSA has failed to act responsibly or fairly in commencing and conducting the Investigation, in issuing the Outages Findings and in its communication with market participants regarding, and the arrival at its position on, the timing of outages at PPA units. This conduct is in contravention of section 40 of the AUCA in the following ways:

(a) by promising, and then reneging upon the process of industry consultation on the issue of timed outages at PPA units, thereby violating its statutory requirements of consultation with market participants as to the content of guidelines and the manner in which such guidelines are developed;

(b) by applying conclusions as to conduct relating to the timing of outages in PPA units in a targeted investigation of TransAlta, without having issued guidance to market participants on the conduct in question; and

(c) by conducting its Investigation so as to apply conclusions reached regarding the unlawfulness of conduct relating to timing of outages in PPA units in a retroactive fashion to prior time periods in which TransAlta was induced to conduct its operations in accordance with previous MSA pronouncements on the subject.

102. The OBEG and the MSA's investigation process was haphazard and contradictory. The MSA's positions originally portrayed conduct as being "onside"; then expressed "no view" some months later; and portrayed the very same conduct as "completely offside" only months later. This regulatory about-face has created an untenable position for TransAlta and other stakeholders and has created a circumstance best described as a regulatory minefield that TransAlta has been led into. The MSA failed to realize that as a market watchdog, it has a duty to be fair and forthright in its work with market participants.

103. Quite simply the MSA did not offer guidance until December 2011 because the MSA did not know what its guidance should be and it was developing its position on this issue even during this Investigation. TransAlta notes that even now the MSA has still failed to offer a rationale for its contradictory positions on discretionary scheduling of outages at PPA Units and merchant units.

104. Alternatively, if the MSA was aware of its view prior to commencement of or throughout the Investigation, and made a deliberate decision not to advise TransAlta or other market participants until December 2011, then the MSA clearly breached its legislated obligation to "carry out its mandate in a fair and responsible manner" as stipulated in section 40 of the AUCA.

105. TransAlta therefore submits that the MSA has breached its overriding duty of fairness to TransAlta and has failed to conduct itself in a fair and responsible manner with respect to the discharge of its mandate under the AUCA.

VI. RELIEF SOUGHT

106. TransAlta therefore claims the following relief pursuant to subsection 58(3) of the AUCA:

(a) that the Commission direct the MSA to change its conduct in relation to its practice of issuing guidelines that result in fundamental changes to the Alberta electricity market; and

(b) that the Commission direct the MSA to cease its present investigation of TransAlta.

107. In addition, TransAlta requests that the Commission (rather than the MSA), pursuant to section 8(2) of the AUCA, commence a new round of stakeholder consultations and make a determination on permitted behaviour for PPA unit owners in analyzing and scheduling outages for the benefit of the unit owners' portfolios. Pursuant to the legislative scheme, it is the AUC and not the MSA that is the proper body to make a binding decision on this issue. In any event, MSA has already indicated its view without providing reasons regarding this matter and is therefore not an impartial body capable of fairly conducting such consultation and drawing conclusions following stakeholder input.

108. TransAlta also hereby provides notice that it will be filing a request pursuant to subsection 6(12) of the *Market Surveillance Regulation* for disclosure of MSA documentation regarding the development of the MSA's position on the timing of discretionary outages at PPA units.

ALL of which is respectfully submitted.