

## NEWS RELEASE

March 4, 2004

*For Immediate Release*

### **MSA WARNS ENMAX OF UNACCEPTABLE MARKETING PRACTICES**

The Alberta Market Surveillance Administrator (MSA) today issued a letter to ENMAX Energy Corporation (ENMAX) in relation to various practices considered unacceptable under the *Code of Conduct Regulation* and otherwise not in accordance with a fair, efficient and openly competitive market.

The *Code of Conduct Regulation* applies to the retail electricity market in Alberta. The objects of this regulation include creating a level playing field for retailers, while at the same time ensuring that customers and customer information are adequately protected.

The MSA recently became aware that ENMAX had used restricted customer information to conduct sales and marketing efforts, and to sign customers to contracts, in breach of the *Code of Conduct Regulation*. In order to address harm done to the market, ENMAX has agreed to offer affected customers the right to cancel their contracts. This should allow other retailers some opportunity to compete for this business. The MSA is continuing its discussions with ENMAX as to the full extent of remedial action required.

On a separate matter, the MSA became aware that ENMAX was indicating to its customers that their information would be shared and used on the basis of deemed consent. The MSA immediately advised ENMAX that this approach is considered unacceptable in relation to the *Code of Conduct Regulation*, in part because of the effects on fair competition. ENMAX agreed not to use this approach for its sales or marketing efforts. Further, ENMAX will modify its privacy practices and customer communications accordingly.

Alberta's Market Surveillance Administrator is in place to monitor Alberta's electricity market for fairness and balance in the public interest, and keeps a close watch on the overall performance of Alberta's electricity market - checking that it operates fairly, efficiently and in an openly competitive manner. The MSA is specifically responsible for administering the *Code of Conduct Regulation*.

- 30 -

A copy of this News Release and the letter issued to ENMAX are available on the MSA website at:  
[www.albertamsa.ca](http://www.albertamsa.ca).

**For further information, please contact:**

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March 4, 2004

*Delivered via courier*

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**ATTENTION: SEAN DURFY, President and C.O.O.**

Dear Sean:

**RE: CODE OF CONDUCT REGULATION**

I am following up various matters relating to the *Code of Conduct Regulation* (Code). As you are aware, the Market Surveillance Administrator (MSA) has raised concerns about the legitimacy of some approaches taken by ENMAX Energy Corporation (ENMAX) and the effect of those approaches on retail competition. Discussions on some matters have been ongoing since September, 2003.

**Negative Option Consent**

In 2003 ENMAX began indicating to its customers that, subject to the customer specifically refusing or withdrawing consent, their customer information would be shared and used on the basis of deemed consent (also known as “negative option” consent). The communication of this policy to customers has been made through billing inserts and website communications, with reference to a “Personal Information Commitment”.

The MSA took immediate steps to inform ENMAX of our view that such an approach was not acceptable from the perspective of the Code (see our letter dated September 15, 2003). In part, the MSA view is based upon the interpretation that a party disclosing and using customer information on the basis of consent must be able to prove such consent, in order to provide the necessary assurance as to compliance with the Code. Thus, provable, active consent is the standard required by the MSA (typically in written or electronic form).

Other retailers were also advised of the view of the MSA, although we were not aware of similar practices by any retailer other than ENMAX.

ENMAX took the view that the cost of obtaining active customer consent was prohibitive from its perspective, and thus sought to use the deemed consent approach (which would be relatively cost free to ENMAX).

However, ENMAX failed to address the concern of the MSA that other retailers would be unfairly disadvantaged by the deemed consent approach, as those retailers would still need to obtain active consent and would therefore incur the cost of doing so.

Although ENMAX disagreed with the view expressed by the MSA, you nevertheless gave a voluntary undertaking that ENMAX would not use customer information on the basis of the negative option approach until such time as a final resolution to the issue was determined.

As you are aware, the MSA continues to hold the view we previously expressed on this issue. Further, based upon our discussions with representatives of your organization, the government and other parties in this regard, it does not appear that there will be any change in the regulation to allow the approach proposed by ENMAX. In other words, the approach remains unacceptable.

In January, 2004 we formally requested that ENMAX put the matters to rest through some type of public confirmation that customer information will not in fact be shared or used on the basis of deemed consent, as was proposed. Your initial response indicated your belief that no public statement or confirmation is necessary in this regard. Thus, ENMAX declined to meet the request of the MSA. However, your organization did provide written confirmation that it has abided by the undertaking given to the MSA in October, 2003, and that ENMAX has not relied on the deemed consent or used it in any way.

After further reflection, and prompted by another request from the MSA, ENMAX has now agreed to speak to the matter in its written communications to customers. The change of approach will also be documented on your website. The MSA appreciates your efforts to those ends, and will monitor the clarity and effectiveness of your communications. As set out, we expect that your revised communications will be helpful.

The MSA remains concerned that the matters should be put to rest publicly. Just as customers should receive clear assurances as to the handling and use of their information, the MSA also believes it important to send a signal to other participants that there is a commitment to a level playing field in the retail market. The MSA is therefore taking steps to these ends, as discussed further below.

#### Default Customer Information

ENMAX disclosed in its annual compliance report for 2003 that it had used default supply customer information for its sales and marketing efforts, in breach of the Code. This report has not yet been made public by the MSA, but in our view the matters should be spoken to publicly.

Among other issues, our concern is that ENMAX has by its approach unfairly disadvantaged other retailers who would actively compete with ENMAX for the business of those customers. ENMAX has misused information made available to it by its affiliate company ENMAX Power Corporation, and thereby tilted the playing field in its favour.

The apparent result has been that ENMAX has signed contracts with customers based upon information it should not have used.

As you are aware, the MSA has followed up to obtain information as to the extent of the breach and to assess the appropriate remedial action to be taken. Our discussions in this regard are ongoing, but it does appear that ENMAX will be offering to affected customers an opportunity to cancel their contract and to take their business elsewhere. This should allow other retailers a renewed opportunity to compete fairly for the business of those customers.

Again, the MSA believes that this is a step in the right direction.

In order to make stakeholders duly aware of these matters, the MSA has chosen to make this letter public, to provide background information for a related news release. A copy of the news release is attached with this letter, for your reference.

I trust that this accurately captures our communications and initiatives on these matters to date, and look forward to our further discussions toward resolving outstanding issues.

Yours truly,

*“Original signed by”*

Martin J. Merritt  
Market Surveillance Administrator.

Encl.

cc. Wayne Silk, MSA  
Douglas Wilson, MSA  
Kristine Robidoux, ENMAX Corporation