ALBERTA UTILITIES COMMISSION

APPLICATION 1607868
PROCEEDING ID 1553

Market Surveillance Administrator Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator and TransAlta Energy Marketing Corp.

Opening Statement of the Market Surveillance Administrator

Hearing
March 14 - 16, 2012

Introduction

1. This proceeding is ultimately about the fair, efficient and openly competitive operation of the market, often referred to as 'FEOC'.

2. Market participants are required to conduct themselves in a manner that supports FEOC. If they do not, the Commission will in a proceeding such as this think about how to help ensure that FEOC is supported in the future. The approach taken to the sanction will vary with the circumstances. Here, the proposed approach is set out in the settlement agreement filed for approval.

3. The question for the Commission to determine is whether, on a balance of probabilities, the proposed outcome would reasonably help to ensure that FEOC is supported in the future. The MSA submits that it will, and should therefore be approved. Our reasoning is summarized below.

Vigorous competition is in the public interest

4. As with other deregulated markets, Alberta relies upon competition to deliver electricity at an appropriate price. Moreover, vigorous competition is genuinely encouraged because that will more likely deliver a good result than muted or weak competition. The rules of engagement are not always clear and even where they are it is easily foreseeable, perhaps inevitable, that market participants will on occasion make mistakes or errors in judgement.

5. Deterrence of unwanted conduct should not go so far as to create a chilling effect deterring other conduct that would in fact enhance FEOC. There is a balancing act for the Commission as well as for the MSA in this regard. The crafting of deterrence is perhaps as much art as science.

6. The Commission naturally put its mind to this balancing when it imposed administrative penalties in the past. There is also evidence of the Commission's views in its rules setting out specified penalties, including AUC Rule 019. For example, contravention of ISO rule 6.3.3 (which is referenced in the proposed settlement agreement) could at the relevant time have been addressed by issuance of a specified penalty in the amount of $500, $1,500, $3,000 or $5,000 depending on the number of contraventions in the applicable period.[1]

7. In principle, contravention of ISO rule 6.3.3 is especially relevant to the issues before the Commission in this proceeding. The conduct at issue here is alleged to have caused a reduction in imports and thereby increased pool price. By analogy, an importer that failed to meet its obligations under ISO rule 6.3.3 would also cause a reduction in imports and may thereby increase pool price.

8. The Alberta wholesale market involves a power pool through which all electric energy is exchanged. Accordingly, a change to the pool price can have broad ripple effects. Such changes can happen from a myriad of causes.

[1] http://www.auc.ab.ca/acts-regulations-and-auc-rules/rules/Documents/Rule%20019/Rule%20019%20March%202010.pdf

9. The design of sanctions, including the specified penalties approved by the Commission, would naturally consider the possibility that a related impact to pool price may potentially have further impacts. However, the crafting of appropriate deterrence does not necessarily involve large penalties.

Fostering compliance promotes FEOC and the public interest

10. Since FEOC is seen as furthering the public interest overall, it stands to reason that efforts to foster compliance by market participants will then be in furtherance of the public interest. Good faith compliance efforts are by their nature consistent with the obligation to support the fair, efficient and openly competitive operation of the market.

Market participants generally aim to be compliant

11. It is reasonable to rely on the premise that market participants generally wish to comply with market rules and other such obligations. It follows that it is reasonable to rely upon compliance undertakings and other good faith efforts.

12. Such reliance on compliance undertakings is part of the approach taken by the Commission in its rules and decisions, as is consistent with the legislative scheme overall. Compliance programs are considered under AUC Rule 013. Mitigation plans are taken into account under AUC Rule 027. Information sharing approvals given by the Commission pursuant to the *Fair, Efficient and Open Competition Regulation* rest, in part, upon compliance undertakings.

Settlements are in the public interest

13. The *Alberta Utilities Commission Act* reflects the view that the public interest is furthered by resolving matters through negotiation rather than litigation. A settlement must be reasonable to be in the public interest.

14. Furthermore, it is creditworthy that a market participant would voluntarily acknowledge wrongdoing in a settlement agreement as part of its efforts to address misconduct.

Penalties are part of the answer

15. There is some disagreement in this proceeding regarding whether the proposed administrative penalty is sufficient under the circumstances. There is little doubt that penalties can cause market participants to focus necessary resources toward compliance, thereby fostering FEOC and furthering the public interest. The MSA submits that the proposed penalty will achieve that aim.

Reputation matters

16. It is reasonable to take into account that TransAlta, like other market participants, is based in Alberta. It lives here and is therefore naturally concerned about its reputation in this province. It follows that it is reasonable to take into account the harm to TransAlta's reputation in relation to this settlement.

Enforcement response is a factor

17. It is reasonable to take into account the signal sent to market participants by swift and effective enforcement action against non-compliance. This settlement is evidence of credible enforcement capabilities.

Materiality in this case

18. It cannot be consistent with the obligation to support FEOC to engage in conduct that by its nature would undermine or reduce potential competition. Here the allegation is that the timing chosen for export e-tags would reduce the likelihood of imports. This might be seen as the pre-emption of a scarce resource, time and ultimately access to the intertie by importers.

19. The materiality of such conduct can be gauged in part by the direct impact on competition or competitive response. That is, in this case, by the extent to which import transactions were impacted. The conduct at issue in this proceeding is considered significant by the MSA by virtue of that impact.

The proposed settlement is within a range of suitable outcomes

20. Under the settlement agreement as proposed, TransAlta will give up its estimated economic benefit. It will also be made worse off economically by the administrative penalty of $125,000.00. It has incurred further monetary and other costs by virtue of the investigation, settlement negotiations and this proceeding. The alleged misconduct has been the subject of considerable media attention, with attendant impacts on its reputation.

21. The proposed settlement agreement acknowledges wrongdoing. The conduct was stopped relatively quickly and by TransAlta of its own accord. Significant compliance undertakings have been made to address the conduct at issue and to prevent it in future. There is no allegation of lack of cooperation. There is no allegation of disregard for FEOC obligations.

22. As stated at the outset, the Commission is assessing whether the proposed settlement would, on a balance of probabilities, reasonably help to ensure that FEOC will be supported in future. The MSA submits that the answer is yes. The settlement agreement is in the public interest and should be approved accordingly.

All of which is respectfully submitted.