



December 20, 2011

Submitted via DDS

Alberta Utilities Commission
Fifth Avenue Place,
Fourth Floor
425 – 1st Street S.W.
Calgary, Alberta
T2P 3L8

Attention: Darin Lowther – Director, Markets

Dear Mr. Lowther:

**Re: Application No. 1607868 – Proceeding ID 1553
Submission on Standing**

1. Pursuant to the Notice issued by the Alberta Utilities Commission (Commission) on December 15, 2011, the Market Surveillance Administrator (MSA) is providing its views on the requests for standing submitted by the Alberta Direct Connect Consumer Association (ADC), ATCO Power Ltd. (ATCO), the Industrial Power Consumers Association of Alberta (IPCAA) and the Office of the Utilities Consumer Advocate (UCA). We would note that we were today advised that ATCO has withdrawn its request for standing, and so have amended our submission accordingly.

General Comments on Standing

2. The Commission has an established practice which appropriately limits the parties in such a proceeding to the MSA and the market participant who is the respondent (alleged contravener). This general approach was tested and affirmed by the Commission in a recent consultation, as reflected by the following excerpt from AUC Bulletin 2010-17¹.

¹ <http://www.auc.ab.ca/news-room/bulletins/Bulletins/2010/Bulletin%202010-17.pdf>

Opening up standing to include interveners who are not named parties

72. When determining the matter of standing in any proceeding before the Commission, the Commission is generally guided by the principle that standing should be granted to parties who may be directly and adversely affected by a decision of the Commission. With respect to an administrative penalty, the nature of this type of a proceeding is such that the only parties directly impacted by the outcome of the Commission's finding are the MSA who had brought the alleged contravention before the Commission and the alleged contravener.

73. While other parties may be interested in presenting their views, particularly on the matter of the determination of the administrative penalty to be imposed, the Commission will be guided by the particular facts before it and by Rule 013.

74. The Commission will continue the practice of limiting standing in administrative penalty proceedings to the MSA and the alleged contravener. Nonetheless, parties not named may request standing by showing that they may be directly and adversely affected by the decision in the matter.

3. The general approach taken by the Commission does not preclude the possibility that a party may be granted standing, but does set limits on standing. The Commission has asked in this proceeding that any request for standing show how the party may be “directly and adversely” affected by the decision in this matter, and how the MSA does not adequately represent the party’s interest. It does not appear that any of the parties seeking standing have met the burden placed upon them. Accordingly, the MSA submits that the Commission should follow its established practice by limiting the parties in the proceeding to the MSA and TransAlta Energy Marketing Corp. (TransAlta).

4. Like the Commission, the MSA has a mandate which is intended to help ensure that the public interest is safeguarded. A key test for the MSA in relation to its mandate is whether conduct supports the fair, efficient and openly competitive operation of the market. The MSA has over many years stated publicly that the fidelity of the price signal is of utmost importance; that is, that the market price reflects fundamentals.

5. Conduct such as alleged in the proposed settlement can affect the market price, and thus the price signal. The MSA is therefore, like consumers and other stakeholders, strongly focused on any price impact as part of its considerations. That is of course not to say that parties with similar interests will necessarily agree on a reasonable outcome. The MSA will be submitting at the hearing of this matter that the proposed settlement is consistent with the range of administrative penalties and other sanctions open to the Commission.

6. This is an administrative penalty proceeding and not a proceeding that invites broad public participation. Consistent with its view as expressed in Bulletin 2010-17², and in past settlement proceedings, the MSA expects that the Commission will be guided by the facts before it and by AUC Rule 013³ when determining whether the settlement, including the proposed administrative penalty, is in the public interest. By the nature of the proceeding, the facts will implicitly be restricted to those put forward by the MSA and TransAlta in support of the settlement, including any facts provided in response to Commission inquiries.

7. It is also important to note that while Commission powers are significant in an enforcement proceeding such as this, as shown in Part 6 of the *Alberta Utilities Commission Act* (AUCA)⁴ they do not include making penalties payable to third parties.

8. While the approaches taken by the consumer interveners IPCAA, ADC and the UCA are similar in certain respects, the MSA will address each (and ATCO) on its own.

IPCAA

9. IPCAA seeks standing on the basis that its members, as consumers, have been affected by the price impacts of TransAlta's actions. IPCAA has expressed a concern that the proposed administrative penalty is too low. In the MSA's submission this is not enough to justify granting standing. There is no allegation of a direct or adverse impact on IPCAA or its members.

10. The key concerns raised by IPCAA on page 2 of its December 12, 2011 letter are not matters unique to IPCAA but are matters of general application.

² ibid

³ <http://www.auc.ab.ca/acts-regulations-and-auc-rules/rules/Documents/Rule013.pdf>

⁴ SA 2007 Chapter A-37.2, as amended

11. Clearly, the only party subject to paying the administrative penalty as proposed will be TransAlta. The only recipient of the administrative penalty, if approved, will be the General Revenue Fund. The only parties directly affected by approval or rejection of the proposed settlement will be the MSA and TransAlta.

12. The only effects on IPCAA and its members of the Commission decision in this matter will be the benefits achieved by any sanctions. These are the same benefits that any member of the public receives as a result of a more fair, efficient and openly competitive market. Those would be indirect effects of the decision.

ADC

13. Like IPCAA, the ADC represents a group of large industrial customers and argues that the amount of the negotiated settlement is too low. For the same reasons the MSA raised in the general comments, and with respect to IPCAA previously, the MSA disagrees with ADC being given standing.

14. ADC is unique among those seeking standing in that it seeks an order against TransAlta requiring it to “repay to the ADC members the sum of \$215,911.34, being the economic impact suffered by the ADC members” allegedly as a result of TransAlta’s conduct. ADC’s calculations are illustrative impacts of TransAlta’s actions in the market, based on challengeable assumptions made by ADC. The calculations do not relate to any direct and adverse impact of a Commission decision on ADC and are not relevant to the question of standing.

15. The MSA submits the Commission does not have the authority to make ADC’s proposed order and it will not be part of the Commission’s decision. The AUCA does not authorize the Commission to direct that damages be paid to a particular market participant or any other person. Administrative penalties are payable only to the General Revenue Fund.

UCA

16. The UCA itself will not be directly and adversely affected by any AUC decision in this matter. Section 2 of the *Government Organization Act*, cited by the UCA, makes it clear the UCA’s interest in standing arises from the interests of those it represents; Alberta residential, small business and farm consumers of electricity. The MSA submits that the same arguments for not granting standing to IPCAA and ADC, both of whom represent significant groups of consumers, apply to the UCA.

17. The UCA also suggests in its request for standing that in order to fulfill its mandate it needs to be aware of and understand the issues in this proceeding. It further argues that it cannot adequately inform, educate and disseminate correct information as part of its mandate without participation in the proceeding. The MSA submits that standing is not necessary to carry out these functions.

18. The Commission has made clear that, subject only to possible confidentiality around commercially sensitive information, the proceeding will be made transparent to the public. This appears to undermine the assertions made by the UCA in support of its request for standing. The materials already on the record provide a clear sense of the nature of the conduct and proposed settlement. Any party granted standing as an intervener would, to the extent given access to confidential information, presumably be required to use the information only for the purposes of the proceeding and not for any other purpose. The decision of the Commission will also no doubt be explanatory. It is therefore not clear how the position of the UCA is improved by participation in the proceeding.

ATCO

19. We understand that the ATCO request for standing has been withdrawn.

Summary

20. The parties representing consumer interests have generally based their arguments of harm on their estimates of the market impacts of TransAlta's behavior, not on the direct impacts of the Commission's decision as requested by the Commission. In applying their test, the MSA submits that those parties have gone beyond what the Commission's decision can entail in this case. The Commission can approve the settlement as proposed, including the administrative penalty to TransAlta. The Commission can also reject it. The legislative scheme makes clear that even though they may naturally be interested in the workings of the market, parties such as IPCAA, ADC and the residential, business and farm customers represented by the UCA will not be "directly and adversely affected by the Commission's decision in this matter".

21. Similarly, the quantum of the administrative penalty will ultimately not directly and adversely affect ADC or IPCAA, or their members, or the consumers represented by the UCA (except perhaps by the amount of any benefit they might receive as Alberta taxpayers). Indirect effects from a penalty, such as deterrence of inappropriate conduct, may arrive to the market overall but only TransAlta will be affected directly by an administrative penalty included in the decision in this matter.

22. Finally, it also bears noting in relation to the requests for standing brought by the parties representing consumers, IPCAA, ADC and the UCA, that there is no real distinction between their members and other electricity consumers exposed to the market price insofar as the test for standing. The MSA submits that applying a view which would effectively sees all such consumers as being “directly and adversely” affected by the Commission’s decision is not an effective test of standing as contemplated in AUC Bulletin 2010-17 or in AUC Rules, and should not be adopted by the Commission.

23. As argued above, none of the requests made by these parties have met the burden of showing why they should be granted standing. Accordingly, the Commission should reject those requests.

24. We trust that this will be of assistance and thank you for the opportunity to provide these views.

All of which is respectfully submitted.

Yours truly,

“Original Signed”

Market Surveillance Administrator
Per: Douglas Wilson
Senior Legal Counsel.