

March 4, 2004

NOTICE

GUIDELINE RE: CODE OF CONDUCT REGULATION - REPORTING

To: Market Participants

Take Notice that the Market Surveillance Administrator (“MSA”) is issuing the following Guideline pursuant to s. 49(4) of the *Electric Utilities Act*, SA 2003 cE – 5.1 (“Act”).

The Guideline specifically relates to matters arising under the *Code of Conduct Regulation* AR 160/2003 (“Code”), as set out below. This Notice will discuss the background, before setting out the specific Guideline.

Background

Section 49(4) of the Act allows the MSA, as part of its mandate, to establish guidelines to further the fair, efficient and openly competitive operation of the market. The MSA must make those guidelines public.

The Guideline set out in this Notice discusses the manner in which the MSA will treat reporting required of owners and their affiliated retailers pursuant to the Code. Readers are made aware that the MSA has been following the approach described in the Guideline and will continue to do so until further notice.

Owners and Affiliated Retailers

The terms “owner” and “affiliated retailer” are defined in the Code, sections 1 and 2, respectively. Other terms used in this Notice and Guideline are also found in the Code, or in the Act.

Compliance Plans

Pursuant to section 31 of the Code, before an affiliated retailer begins to provide retail electricity services to customers, the affiliated retailer and its owner must each file and obtain approval for a compliance plan. Responsibility for review and approval of compliance plans rests with the MSA.

Audits

Pursuant to sections 38 and 39 of the Code, respectively an owner and its affiliated retailer must each appoint an independent auditor to perform an audit, and the choice of auditor and the audit work plan must be approved by the MSA.

Exemptions

Pursuant to section 43 of the Code, the MSA is given the power to grant an exemption from all or any provision of the Code, and also to approve an alternative compliance plan that meets the objectives of the Code but in a way that is different from the requirements of the Code. The discretion of the MSA is not unfettered; certain criteria must be met.

Objectives of the Code

In the view of the MSA, the Code reflects the policy intent of the Alberta government insofar as its concern that retail competition and customer choice should be fostered by ensuring a level playing field for all retailers, while at the same time protecting customers and customer information.

Under the Code, an owner and its affiliated retailer are allowed to make arrangements to create cost efficiencies in their operations, so long as those arrangements do not create an unfair competitive advantage for the affiliated retailer. For example, the sharing of customer information between owner and affiliated retailer is allowed, provided that steps are taken to ensure that such information is not improperly used.

Regulatory flexibility is also contemplated, as evidenced by the possibility of exemptions or alternate compliance mechanisms which accord with the objectives of the Code.

Issue

The definition of affiliated retailer in the Code means that a retailer does not have to be affiliated with an owner through ownership in order to be considered 'affiliated'. Other types of business arrangements are also caught by that definition. This is understood to be the intention of the drafters of the Code.

The implications for an owner with an affiliated retailer are that compliance plans and audits are required. These are significant reporting obligations.

Compliance plans and audits are useful and important instruments toward ensuring that owners and affiliated retailers comply with the Code. That said, it is recognized that there are costs associated with compliance, just as there are costs associated with non-compliance. Costs here should be understood to mean both financial and other costs, to the individual participant as well as to the market.

The view of the MSA is that regulation of the market should be efficient and effective; the costs of regulation should not outweigh its benefits. The manner of regulation should create incentives for efficiency. Such an approach reflects the purposes of the Act, as well as the objectives of the Code. The public interest is also served.

In issuing this Guideline, the MSA is setting out an approach which essentially seeks to match the level of reporting with the level of functions being performed by the owner or affiliated retailer, while meeting the requirements and objectives of the Code.

Approach of the MSA

The starting point here is that an owner and its affiliated retailer are required to provide a compliance plan and audit, pursuant to the Code. In certain circumstances, however, it may be possible to obtain sufficient assurances as to compliance through other means, including other Code reporting, and therefore it may be appropriate to relax the compliance plan or audit reporting obligations of a given party.

The MSA will actively consider alternatives to compliance plan and audit reporting, where useful, in order to create effective and efficient regulation of owners and affiliated retailers.

Guideline

This Guideline sets out principles upon which the MSA may relax the requirements for compliance plan and audit reporting.

The application of these principles is at the discretion of the MSA, and depends upon the circumstances at hand. Further, the MSA may apply other factors in its assessment of the circumstances.

The numbering below is for reference purposes only.

- 1. Each owner and affiliated retailer must meet the express requirements of the Code in relation to compliance plans and audits, unless specifically otherwise advised in writing by the MSA.**
- 2. Any affected market participant may seek to avail itself of the Guideline, and can form its own assessment as to whether a compliance plan or audit should be required under its circumstances. However, the MSA will not be bound by the assessment of any other party without having been advised in writing of all relevant circumstances and having then confirmed its view in writing to the relevant market participant(s).**
- 3. The MSA will not necessarily require a formal application pursuant to section 43(1) of the Code in order to consider whether a compliance plan or audit should be required from a party under a given set of circumstances. The MSA may enter into informal discussions with a market participant on these matters, through request or otherwise. Upon request, and based upon information provided, the MSA will confirm its view as to the nature of reporting required under the circumstances at hand.**
- 4. The review of the circumstances will, as relevant, take into account the criteria set out in section 43(2) of the Code.**

5. Specific factors which may be given consideration include, but are not limited to:

- (i) The nature of affiliation between the owner and affiliated retailer. For example, where the parties are affiliated by ownership, greater assurance as to compliance may be required directly from each than if the parties are affiliated by contractual arrangement. The premise is that parties affiliated only by contractual arrangement may be seen at greater arm's length (considered more likely to act independently).**
- (ii) The manner in which the interface with the customer and other members of the public is handled. The primary customer interface role should generally be subject to compliance plan and audit scrutiny. Where a party has outsourced all or most of the customer interface functions, it may not need direct compliance plan or audit reporting itself.**
- (iii) The possibility and likelihood of inadvertent harm through failure to meet Code requirements. This relates to the customer interface as well as to the arrangements employed by the owner or affiliated retailer in meeting its obligations. For example, if an owner has contracted out its regulated rate tariff ("RRT") obligations and does not typically interact with customers or potential customers in relation to RRT, then the possibility and likelihood of harm is arguably lower than if that owner had the primary customer interface.**
- (iv) Whether it is possible to characterize a market participant in more than one fashion pursuant to the definitions set within the Code. For example, pursuant to section 1 of the Code, retailer (which includes affiliated retailer) is defined to include a person performing any or all of the functions of that retailer (affiliated retailer). However, it may also be possible to characterize that person as an 'agent' or 'contractor' of the retailer (affiliated retailer). By extension, the MSA could then look to the compliance plan and audit of the retailer (affiliated retailer) to capture the activities and compliance of its contractor or agent, as an alternative to requiring a compliance plan or audit from that person directly. This approach accords with the requirements around a compliance plan, as described in section 31 of the Code.**
- (v) Whether the operations of the owner or affiliated retailer can be adequately assessed through the compliance plan and audit of its counterpart (or another party). For example, if the affiliated retailer will be required to provide a compliance plan and audit, and it is that affiliated retailer which is performing the key functions from a Code perspective, it may be possible to scrutinize the operations of the related owner through those mechanisms. The owner could thus be relieved of the obligation to provide a compliance plan or audit directly itself.**

- (vi) **The manner and extent of other assurances which can help to determine whether an owner or affiliated retailer is compliant with the Code. For example, quarterly or annual compliance reporting required of an owner or affiliated retailer pursuant to section 34 of the Code can provide insight into the operations of the market participant. Further, the MSA may require other information from the market participant, pursuant to the Code and the Act.**
6. **The MSA will seek to apply these principles fairly and consistently, and will exercise its discretion taking into account all circumstances.**
 7. **The MSA reserves the right and discretion to review and amend its assessment as to whether a compliance plan and audit is required under the circumstances.**
 8. **The process for determining any application of these principles, whether requested by formal application pursuant to section 43 of the Code or through some informal means, will be determined by the MSA at its discretion.**
 9. **Further to the above, the MSA may choose to make some or all of the related matters public, at its discretion.**

MSA Contact

All communications to the MSA in respect of these matters should be directed to:

Douglas Wilson
Legal Counsel
Market Surveillance Administrator
#500, 400 – 5th Avenue S.W.
Calgary, Alberta
T2P 0L6

Telephone: 403-538-3445
Fax: 403-232-8343
Email: douglas.wilson@albertamsa.ca

**Notice issued by
MARKET SURVEILLANCE ADMINISTRATOR**

“Original signed by”

Per: _____
Martin J. Merritt,
Market Surveillance Administrator.