AUC
Alberta Utilities Commission

Market Surveillance Administrator

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

July 3, 2012

The Alberta Utilities Commission
Decision 2012-182: Market Surveillance Administrator
Application for Approval of a Settlement Agreement between the
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Application No. 1607868
Proceeding ID No. 1553

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1 Introduction and background

1. The central issue in this proceeding is whether approval of a proposed settlement is in the public interest.

2. On November 4, 2011, the Market Surveillance Administrator (MSA) filed an application (MSA application) with the Alberta Utilities Commission (AUC or the Commission), pursuant to sections 44 and 51 of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2 requesting that the Commission consider and approve the terms of a settlement agreement dated November 4, 2011 (settlement agreement), between the MSA and TransAlta Energy Marketing Corp. (TransAlta). The MSA application was assigned Application No. 1607868 and Proceeding ID No. 1553 (Proceeding 1553).

3. The MSA application and the settlement agreement relate to intertie scheduling activities of TransAlta during 31 separate hours over eight days in November, 2010 that had the effect of impeding import transactions which would otherwise have reasonably been expected to occur. This conduct was seen by the MSA to contravene Section 6 of the *Electric Utilities Act* through contravention of Section 2(h) of the *Fair, Efficient and Open Competition Regulation*.[1]

4. The MSA application requested that a written proceeding involving the MSA and TransAlta be initiated by the Commission, with no interveners, that the Commission approve a request for confidentiality of certain non-public, commercially sensitive information and that the Commission issue a decision and order:

(a) approving the settlement agreement;

(b) finding that TransAlta contravened Section 6 of the *Electric Utilities Act* in relation to separate contraventions in each of 31 hours during eight days in November, 2010;

(c) imposing an administrative penalty on TransAlta in the amount of $370,073.34 being:

i. $245,073.34 as a one-time amount to address the economic benefit received by TransAlta as a result of the contraventions; and

ii. $125,000 as a penalty for the contraventions.

5. The Commission issued a notice of application regarding the MSA application on November 22, 2011. In the notice of application, the Commission granted standing to the MSA

[1] Section 6 of the *Electric Utilities Act* deals with expectations of market participants, and Section 2(h) of the *Fair, Efficient and Open Competition Regulation* deals with conduct by a market participant that does not support the fair, efficient and openly competitive operation of the market.

and TransAlta, determined that it would hear the application by way of an oral hearing and invited written submissions from any other party wishing to request standing to participate in the proceeding.

6. On December 12, 2011, the Commission received written submissions requesting standing from the Alberta Direct Connect Consumer Association (ADC), ATCO Power Ltd. (ATCO Power), the Industrial Power Consumers Association of Alberta (IPCAA) and the Office of the Utilities Consumer Advocate (UCA). On December 20, 2011, ATCO Power withdrew its request for standing.

7. On January 19 and 20, 2012, the Commission conducted an oral hearing during which it heard submissions from the MSA, TransAlta, ADC, ATCO Power, IPCAA and the UCA as well as Capital Power Corporation (Capital Power), the Independent Power Producers Society of Alberta (IPPSA) and TransCanada Energy Ltd. (TransCanada) regarding the issues of participation in this proceeding and the request for confidentiality.

8. In its ruling issued on February 7, 2012, the Commission determined the following with respect to standing in this proceeding:

> 10. While TransAlta's alleged misconduct may have directly and adversely affected each of the parties seeking to intervene, the affect of this conduct is a different matter than the potential affect of the Commission's decision on them. The Commission is not satisfied that the rights and interests known to law of any of the parties seeking to intervene to participate in the settlement approval application will be directly affected by its decision. Consequently none of them are entitled as of right to participate in the settlement approval hearing; however, that does not end consideration of their grounds to participate.[2]

9. In the same ruling, the Commission went on to find that each of ADC, IPCAA and the UCA had a special concern or insight different than that being provided by the MSA, together with knowledge of relevant evidence which may be of assistance to the Commission. Accordingly, the Commission allowed ADC, IPCAA and the UCA to make submissions in this proceeding, but at the same time, restricted those submissions to the respects in which each contends that the proposed settlement agreement does not adequately address the harm and loss to its members or the consumers it represents and may not provide an adequate deterrence to prevent similar future market misconduct. In addition, the Commission stated that this ruling was not meant to serve as precedent to determine third party participation in future settlement proceedings or enforcement proceedings conducted under Section 51(1) of the *Alberta Utilities Commission Act.*

10. In its February 7, 2012 ruling, the Commission also granted the request for confidentiality made in the settlement approval application.

11. The Commission conducted an oral hearing on March 14, 2012 at its hearing room in Calgary. Written argument was filed by the MSA, TransAlta, ADC, IPCAA and the UCA on March 28, 2012, and written reply argument was filed by these same parties on April 4, 2012.

12. The Commission considers the record for Proceeding 1553 closed on April 4, 2012.

[2] Ex. 0028.00, Commission Ruling on Standing and Confidentiality, February 7, 2012, page 2, paragraph 10.

13. In reaching the determinations contained within this decision, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

2 Relevant statutory and regulatory provisions

14. The relevant statutory provisions respecting fair, efficient and open competition in the electricity market in Alberta are found in the *Alberta Utilities Commission Act,* the *Electric Utilities Act,* and the *Fair, Efficient and Open Competition Regulation* enacted pursuant to those Acts.

15. Section 5 of the *Electric Utilities Act* lists some of its purposes as follows:

> (b) to provide for a competitive power pool so that an efficient market for electricity based on fair and open competition can develop, where all persons wishing to exchange electric energy through the power pool may do so on non-discriminatory terms and may make financial arrangements to manage financial risk associated with the pool price;
>
> (c) to provide for rules so that an efficient market for electricity based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government-owned participants or any other participant;
>
> …
>
> (e) to enable customers to choose from a range of services in the Alberta electric industry, including a flow-through of pool price and other options developed by a competitive market, and to receive satisfactory service;
>
> …
>
> (h) to provide for a framework so that the Alberta electric industry can, where necessary, be effectively regulated in a manner that minimizes the cost of regulation and provides incentives for efficiency.

16. Section 6 of the *Electric Utilities Act* states the following:

> **Expectations of market participants**
>
> **6** Market participants are to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market.

17. Section 2(h) of the *Fair, Efficient and Open Competition Regulation* states the following:

Conduct not supporting fair, efficient and open competition

2 Conduct by a market participant that does not support the fair, efficient and openly competitive operation of the market includes the following:

…

(h) restricting or preventing competition, a competitive response or market entry by another person,

…

18. From the foregoing it is clear that competition and a market based on fair and open competition for all those wishing to exchange electric energy on non-discriminatory terms is the fundamental thrust of legislation governing the electricity market in Alberta. Further, any conduct that serves to restrict or prevent competition, a competitive response or entry into the market is at odds with the legislated structure of the market.

19. Under Part 5 of the *Alberta Utilities Commission Act* the MSA has the mandate to investigate matters and undertake activities including enforcement to address contraventions of the *Electric Utilities Act* and the regulations under that Act and conduct that does not support the fair, efficient and openly competitive operation of the electricity market.

20. Section 44(1) of the *Alberta Utilities Commission Act* authorizes the MSA to negotiate a settlement with a person to resolve any matter that relates to the mandate of the MSA and the MSA may enter into a settlement agreement with that person. Section 44(2) states that the MSA shall file a settlement agreement with the Commission for approval in accordance with the provisions found in Section 51(1)(b). The MSA may initiate enforcement proceedings alleging contraventions of the *Electric Utilities Act* and regulations under that Act and conduct that does not support the fair, efficient and openly competitive operation of the electricity market under Section 51(1)(a) of the *Alberta Utilities Commission Act* for subsequent adjudication by the Commission.

21. It is important to distinguish that in this proceeding the Commission is serving in its supervisory capacity considering approval of a settlement rather than itself deciding in the first instance what sanctions should be imposed following a decision that alleged contraventions have occurred.

22. Section 56(4)(b) of the *Alberta Utilities Commission Act* states that the Commission may provide direction or make any order it considers appropriate in respect of a matter that the MSA has brought before the Commission under Section 51(1)(b) while Section 63 states that the Commission may, by order, impose an administrative penalty on a person found to have contravened, among other things, any enactment under the jurisdiction of the Commission.

23. The Commission considers that the reference to “or other proceeding” in sections 56 and 63 of the *Alberta Utilities Commission Act* includes a settlement process pursuant to Section 44.

24. It is within this statutory context that the Commission will consider the MSA application. TransAlta is alleged to have intentionally restricted competition and a competitive response through the timing with respect to the creation and submission of export e-tags. The timing of these export e-tags, while not in contravention of ISO rules, is alleged to have restricted the

ability of or prevented other market participants from utilizing incremental import capacity. This restriction of imports into the Alberta electricity is alleged to have benefited TransAlta through higher pool prices than would have otherwise existed had the imports not been impeded from entering the Alberta market, and at the same time, impacted the fidelity of the price signal to the extent that the pool prices were higher than otherwise would have been the case.[3]

3 Agreed statement of facts

25. Appendix A to the MSA application is a copy of the settlement agreement. It includes an agreed statement of facts[4] as follows:

> 1. At all relevant times, TransAlta Energy Marketing Corp. ("TransAlta") was a pool participant as defined by the ISO rules and was a market participant as defined by the Alberta *Electric Utilities Act* S.A. 2003 c. E-5.1, as amended (the "EUA").
>
> …
>
> 4. As a market participant, TransAlta was required to comply with the ISO rules established by the Alberta Electric System Operator ("AESO") pursuant to the EUA.
>
> 5. At all relevant times, "TEEl" was the AESO sink asset identifier for a TransAlta energy export from Alberta to British Columbia ("BC") using the transmission connection (intertie) between the two provinces. The use of the TEEI asset was under the control of TransAlta subject to applicable ISO rules.
>
> 6. ISO rule 6.3.3 states, in part:
>
> > *Interconnection scheduling is subject to the operating procedures of other control areas. Energy market dispatch will be in the same form for all pool participants. NERC e-tags are required for interchange transactions and wheel-through interchange transactions.*
> >
> > An **energy market dispatch** on the **interconnections** must take these procedural conditions into account:
> >
> > …
> >
> > (c) **Importers** and **exporters** must make reasonable efforts to procure transmission service for the **offered available capability**.
> >
> > ….
> >
> > (e) The **pool participant** must submit **electronic tags (e-tags)** for each **interchange transaction**.
> >
> > …

[3] Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, Appendix 1 – Agreed Statement of Facts, pages 7-8, paragraphs 27-28.

[4] Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, Appendix 1 – Agreed Statement of Facts, pages 1-7, paragraphs 1-26.

(Bold highlighted terms as per ISO rules)

7. In order to comply with ISO rule 6.3.3 a pool participant must make reasonable efforts to procure transmission service in order that the energy schedule in the e-tags matches the offers made to the AESO. Import and export offers must be submitted to the AESO by two hours ahead of the intended period for the energy flow (T-2 hours).

8. In Alberta, import or export transmission is an opportunity service. According to OPP 301, which was part of the ISO rules at all relevant times,

   - an e-tag submitted for an interchange transaction will be subject to the following AESO validation:
     – Does not cause ramp capability of the Alberta Interconnected Electric System (AIES) to be exceeded.
     – Purchasing Selling Entity (PSE) is an AESO pool participant.
     – Connectivity of the interchange transaction is with an adjacent balancing authority to the AIES.
     – AESO is identified as a Transmission Provider (TP) in the physical path.

9. In addition, OPP 301 states:

   - All imports and exports with e-tags that are submitted by hh:40, have been approved by all approval entities, are within the ATC, will be included in the interchange schedule for the next hour.

10. The term "hh: 40" referred to above has the same meaning as "(T - 20 minutes)", insofar as the terms are used in the Alberta electric industry. Both mean 20 minutes before the start of the next hour.

11. The term "ATC" is defined in the ISO rules to mean the available transfer capability, being a measure of the transfer capability remaining in the physical transmission network for further commercial activity over and above already committed uses.

12. Import ATC on the BC intertie is affected by a number of factors, including the level of exports. In particular, where import ATC is fully taken up by scheduled imports an export subsequently scheduled will have the effect of adding incremental ATC in an amount corresponding to the amount of electric energy being exported. Conversely, export ATC on the BC intertie is affected by a number of factors, including the level of imports. In particular, where export ATC is fully taken up by scheduled exports an import subsequently scheduled will have the effect of adding incremental ATC in an amount corresponding to the amount of electric energy being imported.

13. BC Hydro operates an Open Access Transmission Tariff where participants may purchase transmission capacity in BC, including for the purpose of exporting electric energy from Alberta or importing electric energy into Alberta.

14. Information about reservations pertaining to transmission capacity booked by market participants for import and export transactions are made publicly available via an Open Access Same-Time Information System ("OASIS"), thereby providing information about the potential for such imports or exports in a given period. Transmission capacity is necessary for a market participant to meet its offers. ATC

information relating to the BC intertie is also made publicly available and facilitates the use of available ATC for the purposes of importing or exporting electric energy.

15. ISO rule 3.5.1, existing at the relevant times, requires that imports into Alberta are offered in blocks with a $0 price and exports in blocks with a $999.99 bid price. In general terms, imports will add to the supply of electric energy and have a downward impact on the Alberta pool price. Exports effectively add to the demand in the province and have an upward impact on the Alberta pool price.

16. The import of electric energy from other parts of the Western Electricity Coordinating Council ("WECC") to Alberta customarily involves the use of transmission in BC and the BC inter tie to Alberta. The closest electricity trading hub to Alberta within WECC is at Mid-Columbia ("Mid-C").

17. Generally speaking, in November, 2010 on-peak electricity prices in the Mid-C market in the north-western U.S. were much lower than Alberta pool prices during on-peak hours, even taking into account relevant transmission costs. Accordingly, consistent with this arbitrage opportunity, some market participants were attempting to schedule significant volumes of imports from the Mid-C market into Alberta.

18. Starting in mid-November 2010, the MSA observed an unusually high level of scheduled exports on the BC intertie. In the view of the MSA, the level of exports was unusual in the sense that it was not consistent with the price differential(s), or arbitrage opportunity, between Alberta and the Mid-C market. The MSA also observed that in some of the hours, although the Alberta pool price was high relative to Mid-C, the BC intertie was not full in the import direction. Furthermore, some of the import offers made at (T – 2 hours) were not scheduled, in other words there was no corresponding e-tag submitted to the AESO.

19. At about the same time, a market participant raised a concern with the MSA that it was being blocked by TransAlta in terms of accessing import capacity to Alberta on the BC intertie. The participant expressed the view that the blocking was a result of the time at which TransAlta created the e-tags for its export transactions.

20. Given the circumstances, pursuant to its mandate the MSA commenced an assessment involving screening of transactions in November, 2010 for hours where imports and exports may have been impeded by virtue of the timing of e-tags. For that month, 42 hours were identified where imports were potentially impeded and 6 where exports were potentially impeded. Through further investigation the number of hours in which imports were potentially impeded was dropped to 31, all of which involved the exports of one market participant (TransAlta), as set out below. The number of hours where exports were potentially impeded was considered small and did not appear systematic.

21. The MSA recognized that the lack of a scheduling e-tag for an import did not, of itself, mean that the import had been impeded. The screening looked for transactions where an export e-tag was created sufficiently close to gate closure at (T-20 minutes) that there would not reasonably be time for an import e-tag to be created before the gate closure. The assessment also looked for factors which might reasonably explain the timing of the export e-tag creation.

22. To carry out the screening the MSA requested information from TransAlta, including transaction related information which might be relevant.

23. Through the screening, the MSA ultimately identified 31 hours in November, 2010 (the Events, …) where there was evidence of:

    (a) Imports offered at (T - 2 hours) that were not scheduled;
    (b) Import ATC that was not fully used;
    (c) Creation of export e-tags by TransAlta sufficiently close to gate closure (T – 20 minutes) as to effectively preclude unscheduled importers the opportunity to schedule; and
    (d) Access to transmission on the BC intertie was not a constraint for TransAlta.

24. The MSA did not find evidence that imports or exports were similarly impeded in December, 2010. Insofar as the 6 hours in November, 2010 when exports were seemingly impeded, the events involved a number of market participants and no material market impact was apparent. Accordingly the MSA did not pursue that conduct further.

25. As a result of its assessment the MSA was satisfied that there were grounds to commence a formal investigation regarding the Events. The information obtained by the MSA to that point did not support a finding that scheduling complications or other factors adequately explained the observed conduct.

26. The MSA served notice of the investigation on TransAlta and made further inquiries. The Parties subsequently entered into this Settlement Agreement.

26. With respect to the allegations made by the MSA, the parties to the settlement agreed to the following:[5]

27. The Parties agree that:

    (a) the timing of the export e-tags created by TransAlta was such that it was not reasonably possible for another market participant to then schedule an import to utilize the incremental ATC;
    (b) the export e-tags could have been created by TransAlta earlier, if it chose to do so;
    (c) TransAlta was aware that the timing of the export e-tags would likely restrict or prevent the ability of another market participant to utilize the incremental import ATC resulting from the TransAlta export; and
    (d) TransAlta was aware that other market participants were or would likely be seeking to schedule the import of electric energy into Alberta, given the arbitrage opportunity.

28. The MSA alleges, and TransAlta does not contest, that in each of the 31 hours involved in the Events:

    (a) the inability of such imports to reach the market restricted competition and competitive response;
    (b) TransAlta expected to derive an economic benefit from the timing of the export e-tags, in that the absence of a subsequent import could result in a higher pool

[5] Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, Appendix 1 – Agreement Statement of Facts, pages 7-9, paragraphs 27-32.

price in Alberta than would have existed if a market participant had successfully imported and thereby counter-flowed the TransAlta export; and

(c) the fidelity of the Alberta market was affected by the conduct involved in the Events, specifically that to the extent the pool price was higher than it would otherwise have been, it affected both sellers and buyers in the market.

29. The MSA alleges, and TransAlta does not contest, that by the conduct involved in the Events TransAlta did not support the fair, efficient and openly competitive operation of the market. In particular, the conduct was inconsistent with subsection 2(h) of the [*Fair, Efficient and Open Competition Regulation* (FEOC Regulation)] and contravened section 6 of the EUA.

30. The MSA alleges, and TransAlta does not contest, that the conduct involved in the Events was an intentional scheduling practice of TransAlta. However, TransAlta indicates that it did not intend by its conduct to contravene any enactment.

31. The Events occurred in the context of an MSA consultation on market participant offer behavior which commenced in February, 2010 and culminated in January, 2011 with issuance by the MSA of its Offer Behaviour Enforcement Guidelines ("OBEGs"). The goal of the consultation was to provide clarity on the duty of participants to support the fair, efficient and openly competitive operation of the electricity market. During September and October, 2010 various hypothetical fact patterns were put forward for discussion as part of the consultation.

32. TransAlta acknowledges that beginning November 19, 2010 it undertook a practice of scheduling near to gate closure (T-20 minutes), believing that other market participants were engaging in the same tactic for imports and exports. However, as a result of views expressed by the MSA during the OBEGs consultation, including discussion regarding the timing of intertie scheduling, a member of TransAlta's management team directed on November 27, 2010 that scheduling near to gate closure should be avoided where it was reasonably possible to schedule earlier. The practice ceased on the same day. The MSA accepts the information given by TransAlta that intentional scheduling near to gate closure has not occurred after that time and the MSA has not found any other such issues regarding the timing of e-tags by TransAlta.

27. Finally, with respect to the issue of compliance and the economic benefit derived from the events that took place during November 2010, the parties to the settlement agreed to the following:[6]

33. TransAlta has accepted the guidance given in the final OBEGs, including as to the scheduling of transactions on the intertie, and has included this in their compliance program.

34. TransAlta has confirmed to the MSA that it takes compliance seriously. It has a corporate Code of Conduct that has been endorsed by senior management and is applicable to all directors, officers and employees; establishes a compliance training program; safeguards against unauthorized access to confidential information; requires internal corporate, regulatory and legal compliance, and has established oversight by internal audit and risk groups.

[6] Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, Appendix 1 – Agreement Statement of Facts, pages 9-10, paragraphs 33-38.

35. TransAlta has advised the MSA that all TransAlta personnel are made to understand that they have a responsibility to comply with all laws, rules, and regulations in jurisdictions in which they do business. Leaders of employees have the additional obligations to lead by example, using their own behavior as a model for all employees, and to enforce the policies that constitute the Code of Conduct by providing education, legal counseling and a business environment that promotes policy compliance. Leaders are responsible for identifying which policies have application to their staff and recognizing issues related to ethical conduct. Leaders are responsible for gathering feedback and continuously improving policy implementation and compliance. TransAlta's compliance program includes training, analysis, interpretation and guidance related to market policy, rules, tariffs and regulations. Additional training and guidance on new developments is also provided as needed.

36. TransAlta has confirmed that it reviews its compliance program to identify where improvements should be made and takes appropriate implementation measures. As a result of discussions regarding the Events, TransAlta has implemented a more formal process for approval of any new scheduling practice. The intent of this change is to avoid any reoccurrence of the same contravention.

37. TransAlta has also confirmed that it is supportive of the fair, efficient and openly competitive operation of the market and the need for compliance with all market rules. TransAlta also supports the timely clarification and amendment of ISO rules to make them consistent with the requirements of section 6 of the EUA and the FEOC Regulation.

38. Based upon a methodology proposed by the MSA, the Parties estimate that TransAlta derived an economic benefit from the Events in the amount of $245,073.34. The detailed methodology and calculation supporting this estimate is set out in Appendix 2, including Table 1 thereto. The MSA believes that the methodology proposed is fair and reasonable.

4 Discussion and analysis

4.1 Statutory jurisdiction to impose an administrative penalty

28. The settlement agreement contemplates the imposition by the Commission of an administrative penalty. The Commission's authority to do so is found in Section 63 of the *Alberta Utilities Commission Act* which requires the Commission to determine that a person has contravened or failed to comply with an enactment under its jurisdiction. Accordingly, the first step of the Commission's consideration of the MSA application is to determine whether a contravention has occurred.

29. The settlement agreement states that the specific nature of the contraventions is as set out in Section 2(h) of the *Fair, Efficient and Open Competition Regulation*, which describes conduct that does not support the fair, efficient and openly competitive operation of the market and which

is contrary to Section 6 of the *Electric Utilities Act*.[7] This conduct is identified as restricting or preventing competition, a competitive response or market entry by another person.

30. The MSA explained the nature of the contraventions as:

> Here we're looking at a market participant that could have scheduled their intertie transactions, obtained these electronic tags at an earlier time if they'd wished to. We find nothing that impeded them from doing that, and they chose not to. The effect of that was to prevent someone else from scheduling their e-tags within the time window.[8]

31. The agreed statement of facts reproduced above in section 3 indicates that during the 31 hours in question, in November 2010, TransAlta exported electricity from Alberta, and in doing so, intentionally delayed the filing its e-tags until just before the gate closed. This action did not contravene ISO rules. However, TransAlta acknowledged that it could have filed its e-tags earlier, but that it chose the timing in order to forestall the entry of competing imports of electricity. Given the structure of the e-tag system, TransAlta recognized that its late filings would allow importers no time to respond. This was purposeful conduct to reduce electricity supply in Alberta and raise the pool price.[9]

32. In the agreed statement of facts contained within the settlement agreement, TransAlta admitted that it knew that the timing of its submission of export e-tags would likely restrict or prevent the ability of other market participants from utilizing the incremental import capacity resulting from the TransAlta export.[10]

33. Further, TransAlta did not dispute that the inability of imports to reach the market restricted competition and a competitive response, and that it expected to derive an economic benefit from the timing of its export e-tags.[11]

34. Based on the admitted facts, the Commission finds that these intentional scheduling practices of TransAlta during the time period in question in November 2010 constitute contraventions of Section 2(h) of the *Fair, Efficient and Open Competition Regulation* and Section 6 of the *Electric Utilities Act*. Consequently the Commission considers that it has statutory jurisdiction to impose the administrative penalty proposed should it approve the settlement agreement.

4.2 The public interest and reasonableness of the proposed settlement

35. The fact that the Commission is determining in this proceeding whether to approve a settlement rather than itself deciding in the first instance what sanction to impose means that the Commission must decide whether or not the proposed settlement is reasonable in the sense that it falls within a range of acceptable outcomes appropriate to the facts and applicable sanctioning

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7 Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, page 1, paragraph 2.

8 Tr. Vol. 3, page 504, lines 7 to 13.

9 Section 78(1) of the federal *Competition Act* defines "anti-competitive act" as including the pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market.

10 Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, page 7, paragraph 27(c).

11 Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, page 8, paragraph 28.

principles rather than whether it is the sanction that the Commission might have chosen to impose.

36. AUC Rule 013 addresses the criteria requiring consideration when the Commission imposes an administrative penalty. The administrative penalty proposed in the MSA settlement is only one aspect of the full sanction proposed under the MSA settlement. The Commission considers that its Rule 013 criteria are equally relevant to its consideration of the adequacy of the full sanction under the MSA settlement in protecting the public interest. Section 3 of Rule 013 states that the relevant factors include, but are not limited to, the seriousness of the contravention, the compliance system and the cooperation of the person named in the contravention. To determine the seriousness of the contravention, numerous factors listed in Section 4 of AUC Rule 013 may also be considered.

37. The MSA submitted that the proposed settlement agreement is reasonable.[12]

4.2.1 AUC Rule 013

Harm

38. The TransAlta misconduct under consideration occurred in and had impacts upon the Alberta electricity market. The MSA application as originally filed failed to adequately address the market and customer impact of this misconduct, whether it involved significant sums of money, and how other parties were impacted by the wrongdoing. The Commission finds that these factors require consideration and are of significance to it in assessing whether the MSA settlement is in the public interest. This was an important reason for allowing interventions in this proceeding. The Commission thanks the interveners for their efforts in doing so.

39. ADC submitted that its nine members, which are large industrial power consumers, were impacted as a result of higher pool prices during the 31 hours when the misconduct took place. ADC submitted that the harm done to its members was $215,911.34 plus an amount for lost production from demand response in two specific hours. While ADC identified the two hours of concern, it did not substantiate the dollar value of this lost production.[13]

40. IPCAA submitted that the administrative penalty of $125,000 and a repayment of $245,073.34 in ill-gained economic benefit proposed under the MSA settlement are an insufficient sanction for TransAlta's activities. IPCAA submitted that the proposed settlement does not address the harm to the market – direct or indirect, as well as the loss to Alberta power consumers. IPCAA submitted evidence that the total settlement difference between the actual AESO pool price and the adjusted AESO pool price (which is the pool price upon which settlement would have taken place without TransAlta's contraventions) was $5,555,856. IPCAA estimated that its members represented approximately 35 per cent of this number, or approximately $2 million. IPCAA noted that the $2 million is an indicative value and that this was used to illustrate the order of magnitude of the impact on settlements. IPCAA stated that

[12] Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, page 20, paragraph 71; and Ex. 0047.02, Final Argument of the MSA, March 28, 2012, pages 28-34, paragraphs 69-91, and page 36, paragraph 102.

[13] Ex. 0033.02, ADC Direct Evidence, February 27, 2012, pages 1-2 and pages 4-5.

calculating the actual impact on IPCAA members would be onerous and would require load and contracting data for all members.[14]

41. In addition, IPCAA submitted that "TransAlta's actions cannot but have reduced confidence in the integrity of the Alberta electricity market and its resulting price signal."[15] With respect to the forward market, IPCAA submitted that hedge sellers[16] took a lower value than they would have if TransAlta had not impeded imports, and that this added risk for financial players. IPCAA further suggested that this may result in future premiums for forward contracts and the reduction of forward liquidity, but did not provide concrete evidence to support this assertion.[17]

42. The UCA submitted that there was harm to residential, small commercial and farm customers, however it was unable to make a definitive financial calculation and file evidence substantiating the harm suffered by the consumers it represents.[18]

43. The MSA challenged the ADC and IPCAA estimates of actual harm to their members and indicated that it is unlikely that all members would have been fully exposed to pool price on a flow-through basis.[19]

44. The MSA went further and emphasized that IPCAA, in asserting harm to market confidence, failed to consider that TransAlta's conduct was relatively limited, that the conduct was identified and stopped relatively promptly, including by the internal compliance efforts of TransAlta itself; that significant enforcement action ensued; that the conduct was readily identifiable; and that there was no evidence of such conduct continuing.[20]

45. TransAlta responded that its actions had only a minor impact on the overall wholesale market, including physical market prices and the forward market.[21] While this may be an aggravating rather than mitigating circumstance, TransAlta noted that it was not the sole beneficiary of a wealth transfer from consumers to suppliers selling energy in Alberta. Thus, in order to compensate the victims of the total economic loss, economic profits would have to be disgorged not only from TransAlta, but for all other beneficiaries in the market. TransAlta further noted that only a limited number of customers would be subject to hourly pool price movements, and thereby be subject to the impact of any change to these prices.

46. TransAlta referred to the heavy criticism resulting from its conduct, and that this criticism has been publicized through all forms of media to the point that it has damaged TransAlta's corporate reputation.[22]

47. It is clear to the Commission that consumers were harmed as a result of the contraventions. As noted by TransAlta, pool prices were impacted in 28 of the 31 hours in question. In each of the 28 hours, the pool price increased relative to what it might have been had the contraventions not taken place.

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14 Ex. 0035.01, IPCAA Evidence, February 27, 2012, pages 3-4.
15 Ex. 0035.01, IPCAA Evidence, February 27, 2012, page 4.
16 IPCAA describes hedge sellers as those who were not generators and had no physical supply.
17 Ex. 0035.01, IPCAA Evidence, February 27, 2012, page 5.
18 Ex. 0034.01, UCA Submission Letter, February 27, 2012, page 2, paragraphs 3 and 6.
19 Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, pages 6-9 and pages 12-13.
20 Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, page 13.
21 Ex. 0036.02, Report prepared by London Economics International LLC, March 5, 2012, page 11.
22 Ex. 0036.03, Evidence of Robert Schaefer, March 5, 2012, page 3.

48. There is little evidence on the record in this proceeding as to whether the MSA determined the harm that was caused by the contraventions made by TransAlta and how the MSA took this harm into account. Further, the MSA provided relatively few details regarding how it arrived at the proposed administrative penalty amount of $125,000 other than stating the following:

> 51. The MSA negotiated the settlement agreement taking account of a variety of factors, including: the significance of the precedent, including the administrative penalty; the steps taken by TransAlta of its own accord to stop the conduct at issue; the compliance commitments given by TransAlta; the speed and efficiency of reaching an outcome; the relative costs associated to a contested proceeding versus a settlement proceeding.
>
> 52. A proposed settlement agreement such as the one before the Commission in this proceeding is by nature intended to conclude outstanding matters and thereby give certainty. An unresolved and uncertain exposure to costs claims would tend to make settlement agreements less likely in general. The MSA seeks to foster the possibility of negotiated outcomes, consistent with the legislative scheme and the public interest.[23]

49. The Commission accepts that the harm caused by the contraventions was financial in nature, and that the amount of the harm was substantial.

Economic benefit to TransAlta

50. Appendix 2 of the settlement agreement provides the MSA calculation of the estimated economic benefit derived by TransAlta as a result of its strategy of submitting its e-tags close to gate closure.[24] The methodology used to derive this benefit was proposed by the MSA as being fair and reasonable, agreed to by TransAlta and no party to this proceeding challenged the methodology or the estimated amount of $245,073.34.

51. During the course of the oral hearing, the Commission sought clarification from the MSA that the methodology used to determine the adjusted net position of TransAlta had taken into account any exposure by TransAlta to forward contracts, the operating reserves market and its power purchase arrangements obligations. The MSA confirmed this to be the case.[25]

52. In addition, the Commission sought clarification with respect to the disgorgement calculations and any losses that TransAlta might have had as part of the export transactions that took place. The MSA confirmed that where TransAlta made a loss on a particular transaction, this loss did not lower the economic benefit that is proposed to be disgorged from TransAlta.[26]

53. These clarifications provided by the MSA were helpful, and the Commission encourages the MSA to include this level of detail in future settlement approval applications filed with the Commission. With these clarifications, the Commission accepts that the amount of the economic benefit to TransAlta as a result of the contraventions is $245,073.34.

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[23] Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, pages 15-16.
[24] Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, Appendix 2, pages 11-13.
[25] Tr. Vol. 3, pages 488-489.
[26] Tr. Vol. 3, pages 489-491.

Deterrence and public interest

54. The adequacy of the full sanctioning elements proposed in the MSA settlement as a general deterrent against similar market misconduct in the future was the Commission's greatest concern and source of greatest reservation in approving the MSA settlement.[27]

55. In considering the proposed settlement agreement, the UCA submitted that the Commission needs to balance the need for deterrence while at the same time ensuring the proposed penalty is commensurate given the relevant facts and circumstances.[28]

56. The UCA also submitted that the Commission should take public interest into account in the following context when considering the proposed penalty and settlement agreement:

> [T]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets.[29]

57. Considering the proposed settlement agreement, the UCA submitted that the Commission needs to balance the need for deterrence while at the same time ensuring the proposed penalty is commensurate given the relevant facts and circumstances.[30]

58. Ultimately after considering the filed evidence, sworn testimony and circumstances of this matter, the UCA indicated that it supported approval of the proposed settlement.[31]

59. IPCAA expressed concern that the negotiated settlement in this proceeding may set a precedent for other settlements, and that the present penalty is not high enough to deter market participants from engaging in behavior that is inconsistent with the fair, efficient and openly competitive operation of the market, in which case the integrity of the market will be further reduced and consumers will be faced with uncompetitive outcomes.[32] ADC made similar submissions.[33]

60. TransAlta urged that the administrative penalty should be significant enough to deter the unwanted behavior, yet not so excessive as to unbalance the market and create other unintended consequences. The Commission does not conceive how this would result from a sanction determined to be warranted to serve as an adequate general deterrent required to preserve confidence in consumers and protect the integrity of the market. Examples of unintended consequences given by TransAlta were that the company goes bankrupt and causes a major disruption in the market or that regulatory risk is increased to the point that it discourages investment in the market.[34] Neither of these consequences appears remotely applicable here.

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27 See *Cartaway*, 2004 SCC 26.
28 Ex. 0034.01, UCA Submission Letter, February 27, 2012, page 2, paragraph 8.
29 *Re Rowan* (2009), 33 OSCB 9, paragraph 101.
30 Ex. 0034.01, UCA Submission Letter, February 27, 2012, page 2, paragraph 8.
31 Ex. 0046.02, UCA Argument, March 28, 2012, page 1, paragraph 7.
32 Ex. 0035.01, IPCAA Evidence, February 27, 2012, page 4.
33 Ex. 0045.02, ADC Argument, March 28, 2012, page 4, paragraphs 13-16.
34 Ex. 0036.02, Report prepared by London Economics International LLC, March 5, 2012, page 8.

61. The MSA submitted that depending on the circumstances, an administrative penalty will help cause market participants to focus the necessary efforts and resources towards ensuring that it will be compliant in the future.[35]

62. The MSA and TransAlta identified a number of factors that the Commission should find favours approval of the proposed settlement agreement. Ultimately the Commission found these factors which follow sufficient in their totality to persuade it to approve the MSA settlement:

(a) During the oral hearing, the MSA witnesses clarified the nature of the contraventions as follows:

> So the settlement agreement doesn't allege a market manipulation. It alleges an impediment to competition.
>
> …
>
> What we do not believe is okay is a market participant extending their market power. That is going way beyond the extraction and impeding someone else from competing. And I believe that is captured in our settlement agreement. That is the case we're looking at here. One market participant wanted to do something. In fact, a number of market participants wanted to do something, and they were prevented by another from doing that. The outcome, therefore, we don't see as a competitive outcome.[36]

(b) This was TransAlta's first violation of FEOC.

(c) The duration of the contraventions were relatively short, with pool price impacts taking place in 28 out of 31 hours, and price impacts of greater than 10 per cent taking place in only 11 out of 31 hours.[37]

(d) TransAlta did not intentionally contravene the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation.*

(e) The misconduct occurred before the Offer Behaviour Enforcement Guidelines, and the Offer Behaviour Enforcement Guidelines were finalized.

(f) TransAlta's management took immediate steps to stop the export scheduling practice in question in this proceeding after issuance of the Offer Behavior Enforcement Guidelines.

(g) TransAlta cooperated fully with the MSA's investigation.

(h) No effort was made to cover up the conduct which was recorded and readily verifiable.[38]

(i) TransAlta's unequivocal public acceptance of responsibility and apology for its misconduct by its senior management in both public media and during this hearing is particularly creditworthy.[39]

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35 Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, page 3.
36 Tr. Vol. 3, pages 499-500, lines 13 to 25 and lines 1-8.
37 Ex. 0036.02, Report prepared by London Economics International LLC, March 5, 2012, Appendix A, page 29.
38 Ex. 0047.02, Final Argument of the MSA, March 28, 2012, page 32, paragraph 86.
39 Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, page 4.

(j) The significant media and stakeholder interest shown to this incident provides further assurance to the Commission that sufficient attention and effort has and will continue to be given by TransAlta to prevent recurrence of such misconduct with the result that the Commission is satisfied that there is no need for greater specific deterrence in this case.[40]

(k) The adverse reputational consequences for TransAlta resulting from publication of its misconduct, while deserved, are significant and afford a measure of effective deterrence.

(l) There is no evidence that the alleged misconduct has continued or will be repeated.[41]

(m) TransAlta's executive management has been and remains proactively engaged in improving its compliance programs with a view to preventing recurrence of such misconduct.[42]

63. The fact that this is an early settlement as opposed to a protracted litigated case means that the misconduct has been promptly and clearly denounced in public and timely guidance provided to other market participants at less cost and effort to regulatory authorities.

64. In approving the MSA settlement the Commission should not be taken as in any way establishing a precedent fettering its future discretion nor establishing a metric as between the amount of an administrative penalty to be imposed in relation to the amount of economic profits that should be disgorged.

Other factors considered

65. ADC, IPCAA and the UCA identified a number of concerns with the proposed settlement agreement, and in particular the amount of the administrative penalty:

(a) There is no evidence that the MSA undertook any consultation with Alberta consumers to ascertain the extent and degree of harm that was done as a result of TransAlta's behaviour.[43]

(b) The settlement does not provide the opportunity for retribution or redress on behalf of ADC customers.[44]

(c) The financial penalty is limited and insufficient given the extent of TransAlta's operations and its behaviour.[45]

(d) The ADC remains concerned that similar behavior may have been ongoing for some time, only not proven and not penalized.[46]

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40 Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, page 4.
41 Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, page 4.
42 Ex. 0036.03, Evidence of Robert Schaefer, March 5, 2012, pages 2-4.
43 Ex. 0045.02, ADC Argument, March 28, 2012, page 3, paragraph 11 and Ex. 0046.02, UCA Argument, March 28, 2012, pages 2-3, paragraphs 12-16.
44 Ex. 0045.02, ADC Argument, March 28, 2012, page 3, paragraph 12.
45 Ex. 0045.02, ADC Argument, March 28, 2012, page 4, paragraph 14 and Ex. 0048.01, IPCAA Argument, March 28, 2012, page 1.
46 Ex. 0033.02, ADC Direct Evidence, February 27, 2012, page 4, lines 22-23.

(e) The economic benefit potentially realized by other market participants is significantly greater than the amount realized by TransAlta and they simply get to keep the benefit of the misconduct while Alberta consumers have to pay for it.[47]

(f) The administrative costs associated with investigating and prosecuting a market participant guilty of market misconduct should be borne by the guilty party.[48]

(g) Social costs should play a part in determining the level of the administrative penalty.[49]

(h) While IPPCA acknowledged that it is difficult to calculate forward market impact, it submitted that there was some impact on forward trading and confidence in this market.[50]

(i) TransAlta cannot use its resulting reputational damage as an offset to the reputational damage to the market.[51]

(j) Even though the settlement was negotiated, IPCAA submitted that there was insufficient rationale as to why the administrative penalty was set at $125,000.[52]

66. As discussed above, the Commission finds that harm as a result of the contraventions is an important consideration in this case. In making this determination, the Commission will not be determinative as to how the MSA should go about estimating or calculating the amount of harm that took place or how such harm is best calculated. Consistent with this approach, the Commission will also not place any obligation on the MSA to consult with consumers regarding a negotiated settlement, as the governing legislation provides sufficient mandate to the MSA to make such determinations without the assistance of the Commission.

67. Retribution and other aspects of imposing punishment is not a proper regulatory sanctioning consideration in the Commission setting an administrative penalty. Administrative penalties may be directed towards achieving general or specific deterrence, to encourage compliance and to protect the public, but should not be designed to be punitive in nature. The legislative structure requires that payment of administrative penalties be made to the General Revenue Fund. The Commission views this as consistent with the general approach that administrative penalties be neither punitive nor remedial.

68. As part of the settlement agreement, the parties agreed that the MSA will not seek an award of costs in respect of the MSA application and the related proceeding.[53] In its evidence, IPCAA noted that the proceeds of the administrative penalty do not go back to consumers, while at the same time, ratepayers are charged with the MSA's costs regarding the investigation and the negotiated settlement. IPCAA submitted that TransAlta should be held responsible for the costs of the investigation and the hearing.[54]

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47 Ex. 0033.02, ADC Direct Evidence, February 27, 2012, page 5, lines 1-4.
48 Ex. 0048.01, IPCAA Argument, March 28, 2012, page 1.
49 Ex. 0048, 01, IPCAA Argument, March 28, 2012, page 7.
50 Ex. 0048.01, IPCAA Argument, March 28, 2012, page 5.
51 Ex. 0048.01, IPCAA Argument, March 28, 2012, page 6.
52 Ex. 0048, 01, IPCAA Argument, March 28, 2012, pages 8-9.
53 Ex. 0004.00, Application and Redacted Settlement Agreement – MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, page 4, paragraph 13.
54 Ex. 0035.01, IPCAA Evidence, February 27, 2012, page 5.

69. The MSA responded to IPCAA's concerns by indicating that application for costs in relation to an enforcement proceeding is at the discretion of the MSA and subject to adjudication by the Commission. The MSA indicated that the proposed settlement reflects a negotiation in which there is give and take on both sides.

70. TransAlta indicated in its evidence that it has sustained significantly greater costs than implied by the $125,000 administrative penalty. TransAlta indicated that it incurred considerable expense to participate in the MSA's investigation, negotiate a settlement and cooperate in the AUC proceeding.[55]

71. The Commission considers that an application for costs in an enforcement process is at the discretion of the MSA and the Commission accepts that the MSA acted within its discretion in determining that, as part of the negotiated settlement, it will not make an application for costs. The lack of MSA costs recovery in the MSA settlement agreement was not found sufficient to tip the scales against approving it.

72. The MSA was questioned as to whether the practice of scheduling near to gate-closure may have been ongoing for some time, without being detected or penalized. The MSA concluded that any suspicion about past misconduct is not well founded.[56] The Commission is not persuaded that sufficient bases for this concern were established.

4.3 Commission findings

73. After consideration of all of the evidence presented in the MSA application including at the hearing, all submissions made and after assessing the factors discussed above, the Commission will approve the settlement agreement, notwithstanding some reservations.

74. The Commission considers that the resulting harm is a significant factor in this case. The contraventions were the result of direct and deliberate actions on the part of TransAlta, with knowledge that these actions would in all likelihood impact the pool price for electricity and impact both TransAlta and many other parties across the province. Upon discovery of its actions, TransAlta did not self-report these actions to the MSA.

75. The $125,000 administrative penalty, in addition to the disgorgement of $245,073.34, appears to be at the low end of reasonableness.

76. In making its submissions, the MSA made reference to AUC rules regarding specified penalties, namely AUC Rule 019, which deals with specified penalties for contravention of ISO rules and AUC Rule 027, which deals with specified penalties for contravention of Alberta reliability standards. The MSA submitted that these rules are relevant and instructive.[57]

77. The Commission differentiates between specified penalties and administrative penalties and does not consider the penalties amounts outlined in AUC Rule 019 and AUC Rule 027 reflect the administrative penalty warranted in this case. There are a number of reasons for the

[55] Ex. 0036.02, Report prepared by London Economics International LLC, March 5, 2012, page 13.

[56] Ex. 0004.00, Application and Redacted Settlement Agreement, - MSA TransAlta, November 4, 2011, Appendix A – Settlement Agreement, Appendix 1 – Agreed Statement of Facts, page 6, paragraph 24; Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, pages 8-9, paragraphs 26- 28.

[57] Ex. 0037.01, Rebuttal Evidence and Submissions of the MSA, March 5, 2012, pages 18-20 and Ex 0040.28, Opening Statement of the MSA, March 14, 2012, paragraph 6, page 3.

differentiation. First, the governing legislation contemplates that the Commission can identify those rules and standards for which a specified penalty might apply. This is outlined in Section 52(7) of the *Alberta Utilities Commission Act* and the Commission has not determined that all ISO rules and reliability standards are eligible for specified penalties. Second, the specified penalty tables do not take into account specific market impact and impact to others discussed in more detail above This aligns with the fact that the maximum prescribed specified penalty amount is $100,000 per day, while the maximum amount of an administrative penalty is $1,000,000 per day in addition to a one time amount to address economic benefit derived directly or indirectly as a result of a contravention. Finally, there is no legislation making specified penalties applicable for contravention of legislation or a regulation.

78. The Commission considers that specified penalties are intended to be imposed for routine and typical contraventions. The Commission does not consider the circumstances of this case to be typical or routine. Further, for those ISO rules or reliability standards for which a specified penalty has been established, the Commission has established categories of contravention. These categories differentiate between specified penalties based on the seriousness or severity of the contravention or how the ISO rule reliability standards might have been contravened as further discussed in the consultation discussed in Bulletin 2011-28. As a result, the dollar amounts reflected in the matrices established by the Commission for specified penalties should not be taken as an indication by the Commission as the dollar amounts that the Commission considers applicable for administrative penalties.

5 Order

79. It is hereby ordered that:

(a) The MSA application for approval of the settlement agreement is granted; and

(b) TransAlta Energy Marketing Corp. shall pay an administrative penalty in the amount of $370,073.34 within 30 days of the issuance of this Decision, with payment made by cheque or certified funds made out to the "General Revenue Fund c/o Minister of Finance" and delivered to the Alberta Utilities Commission.

Dated on July 3, 2012.

The Alberta Utilities Commission

(original signed by)

Tudor Beattie, QC
Panel Chair

(original signed by)

Bill Lyttle
Commission Member

6 Concurring reasons of Commission Member Yahya

80. I join the Commission's decision approving the settlement, but I offer the following additional comments. TransAlta's conduct has attracted both public commentary in the media as well as much negative commentary by the interveners. It would be a simple task to accept the terms of the settlement, and it may even be simple to reject the settlement on the grounds that the penalties proposed by the MSA were not sufficiently high enough, but it would be a very difficult task to reject the settlement outright on the grounds that the terms of the settlement do not disclose misconduct by TransAlta. Difficult that task may be, but not impossible. Indeed, when there is a clamouring for justice to be done, it is at those very moments that the duty of any decision-maker to ensure that justice is served in the highest. The Commission has an obligation to ensure that the public interest is properly served, and this includes those who are accused of contravening the *Electric Utilities Act* and the associated regulations.

81. I offer three reasons for why the Commission should not only scrutinize MSA settlement agreements for appropriateness of the penalty but also for whether a contravention has actually occurred. They are 1) justice to the party accused of the contravention, 2) guidance for all market participants who in the future may find themselves accused of a similar contravention, and 3) the

overall protection of the market integrity which ultimately benefits customers and producers alike.

82. In the situation of the settlement agreement, the easy path is to accept it. Indeed, when it comes to criminal plea-bargains, consent decrees, or negotiated settlements, the tendency of decision-makers, judicial or regulatory, is to scrutinize the harshness of the penalty lest it be too lenient. Seldom does one hear of a decision-maker rejecting a settlement on the grounds that the penalty is too harsh, and in even more rare circumstances does one hear of a settlement being rejected on the grounds that no offense was committed. After all, a party that willingly agrees to a settlement must have done something wrong, otherwise why would they have agreed to settle? This question parallels the question in criminal law of why would an innocent person plead guilty to a crime they did not commit? The answer, it turns out, is not so simple. Many innocents may choose to plead guilty in exchange for a lower penalty rather than risk asserting their innocence in court only to lose and receive a harsher sentence. This calculus has led some commentators to proclaim that "[t]ruth is the plea bargaining process's greatest casualty."[58] Corporations are no different when it comes to making such cost-benefit decisions. Indeed, it is possible that TransAlta could have contested the allegations of contraventions on various grounds, but chose to avoid a lengthy proceeding for the sake of expediency.

83. On the other hand, settlement agreements have efficiency attributes that the *Electric Utilities Act* encourages, something the Chief Justice of Alberta pointed out many years ago.[59] The MSA has long maintained that settlements are an important toolkit to enforce its legislative mandates. True this is, but this means that the Commission must scrutinize each settlement even more carefully for the public interest.

84. The second of my concerns relates to the impact of the settlement on other market participants' future conduct. Accepting this settlement, while not creating a strict legal precedent, does create a 'soft' precedent. By this, I mean that if another market participant were to be accused of contravening the *Electric Utilities Act* and its regulations for similar conduct, this participant would be hard-pressed to fight the charges. After all, they would reason, why would the Commission accept their pleas of innocence when the last party (TransAlta) had accepted a settlement which was blessed by the Commission? Even if such a party felt that they had done nothing wrong, they would have to engage in the calculus described above and evaluate whether to try to prove their innocence or accept culpability. Hence, when a charge of contravention is presented for the very first time, the Commission must engage in a heightened analysis of whether the conduct outlined in the settlement agreement actually constitutes a contravention of the *Electric Utilities Act* and its regulations.

85. The Commission has made it clear that, in contested proceedings, it will "allow the alleged contravener to bring a defence of due diligence."[60] This defence is intricately tied with the criminal law doctrine of *mens rea*. This ancient doctrine, simply speaking, requires that the state prove that the alleged offender knew that they were committing an offence. In the case of regulatory crimes, while the *mens rea* requirement is weakened somewhat, the law still requires

[58] Paul C. Roberts and Lawrence M. Stratton, *The Tyranny of Good Intentions: How Prosecutors and Law Enforcement Are Trampling the Constitution in the Name of Justice*, page 82 (Three Rivers Press, 2008). Roberts and Stratton cite the eminent legal historian John Langbein for the proposition that there exist many chilling parallels between the modern plea bargaining system and the ancient system of judicial torture. *Id*.

[59] *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215.

[60] Bulletin 2010-017 at page 5, paragraph 36.

that the alleged offender be given a chance to prove that they did the best they could to avoid committing the offence. While not a formal requirement for administrative prosecutions, such as this proceeding, the Commission has extended these criminal law requirements to its proceedings.[61]

86. Allowing a party to prove due diligence necessitates that the party know in advance that there is actually a set of acts the sum of which will create an offence. This means that when looking at the proposed settlement, the facts presented must articulate an actual offence. Otherwise, wholly innocent conduct may be avoided for fear of future prosecution.

87. This leads me to my third point. Given that the goal of the MSA is to protect the integrity of the market, conduct that is truly detrimental to the market must be judged by an objective standard. One such standard could be overall economic efficiency, a standard that in the long-run benefits producers and customers alike. The corollary of this, however, is that if such conduct is not inefficient, economically speaking, then prohibiting it, either explicitly or through the chilling effect of settlements, could be detrimental to the market.

88. All of this leads to the central question of this proceeding, namely whether the set of facts recited in the settlement agreement give rise to an offence against the market. In the present proceeding, the gravamen of the MSA's charge against TransAlta is that is impeded access to the market in order to extend its market power. If one were to use the language of antitrust, it would be akin to a charge of predatory pricing using an essential facility.

89. Predatory pricing usually requires market power, uneconomic pricing, and the ability to recoup the lost profits in the future.[62] Generally speaking, in order to prove these elements, one must establish the following. First, a market must be defined. Second, the market power of the party whose conduct is impugned must be defined and measured. Third, the potential harm to the market must be defined. Finally, the ability of the party to recoup the lost profits must be established.

90. With respect to the market, the MSA has defined it as the electricity market in Alberta. The MSA has also explained the large potential for harm resulting from even the smallest restraint in supply. While the MSA did not explicitly define TransAlta's market power, it suggested, by citing the work of Severin Borenstein,[63] that traditional measures of market power might not be appropriate for the electricity market. That may be true, but it would therefore behove the MSA to develop the proper measures of market power for future proceedings. In the present proceeding, it seems to be implied that TransAlta possesses sufficient market power to affect the market. Again, this is probably true, but a level of rigor needs to be developed to guide those market participants, that may not be obviously possessing market power, that their conduct could have an adverse impact on the market.

91. With respect to the harm to the market, the MSA has calculated the impact of the activity on the price level overall. This is a transfer of consumer surplus to producer surplus. Of course, antitrust analysis and jurisprudence treats these wealth transfers with some controversy. Missing

[61] See also the discussion in Del Bianco v. Alberta (Securities Commission) 2004 ABCA 344 at paragraph 12.

[62] The Competition Bureau's *Predatory Pricing Enforcement Guidelines* provide much more detail on the subject. http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Predatory_Pricing_Guidelines-e.pdf/$file/Predatory_Pricing_Guidelines-e.pdf

[63] Ex. 0047.02, Final Argument of the MSA, March 28, 2012, page 17, footnote 20.

from their formula is the dead-weight loss caused by their activity. In this case, the shutdown by ADC's members would represent that. In the future, those quantities should be factored into the analysis.

92. It is the recoupment aspect of the charge that the MSA has not established. TransAlta is alleged to have sold electricity in an uneconomical manner and not for legitimate business purposes. The MSA's focus on uneconomical sales is a bit troubling. It transforms the MSA and the Commission into both a mind reader and computer of optimal pricing behaviour. In the long-run, this would essentially return us to a world of regulated market prices. Hence, the proper focus of the analysis has to be on an objective set of economic facts that can be established in a Commission proceeding.[64]

93. The proper and objective way to get at what the MSA is stating is not to get into the motives of the party exporting at the last minute, but rather something like the recoupment test in predatory pricing jurisprudence. In this proceeding, the MSA would have had to establish that TransAlta would gain more in the higher Alberta electricity prices than what it lost by exporting to the cheaper markets on a sustainable fashion. Indeed, there was some evidence that TransAlta lost money on some of these impugned transactions. The answer, therefore, is the need for more economic analysis. What would be needed is to show that the quantity exported was such that the withholding of that amount from the Alberta market would raise prices in Alberta by an amount to offset the losses from the export.

94. For example, if p_{A1} is the price prior to the export, p_{A2} is the price after the export, and p_C is price outside Alberta, then it would have that $Q_C\, p_C + Q_A\, p_{A2} > (Q_C + Q_A)\, p_{A1}$, where Q_C is the amount exported and Q_A is the amount sold inside Alberta.[65] The jump in price is a function of the amount withheld or exported, Q_C. The company may also have bid Q_C at a much higher price than p_{A1}, in which case it would not have run, and hence only Q_A is sold. Needless to say, the analysis is more complicated, which points out the need for the MSA to develop a more sophisticated model.

95. With respect to the essential facility aspect of this proceeding, the MSA is arguing that by exporting at the last minute, TransAlta is impeding the flow of electricity into Alberta on the only route that could be used. Although no formal guidance on this doctrine exists in Canada, the doctrine has been discussed mostly by the Canadian Radio-television and Telecommunications Commission (CRTC). In the United States, the courts have required a monopolist with control over an essential facility to share the facility with others.[66] Of note, however, is that the Supreme

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[64] When I asked counsel for the MSA on what one would have to do to avoid being charged by the MSA in the future, he answered:

> 3 MR. WILSON: Well, to pick up on what the
> 4 MSA panel was trying to address this morning, I would suggest
> 5 … that intent will matter. Secondly, but
> 6 related: Is there a legitimate business purpose for the
> 7 timing that you chose?

Transcript, March 14, 2012, Volume 3, at 00580. Similar assertions were made by the MSA's witness panel during the oral portion of the proceeding.

[65] Of course, $p_C < p_{A2}$ and $p_C < p_{A1}$.

[66] The typical requirements to establish that a party is liable under the essential facilities doctrine is that:

1. The monopolist controls access to an essential facility;
2. The facility cannot be reasonably duplicated by a competitor;
3. The monopolist denies access to a competitor; and
4. It was feasible for the monopolist to grant access.

Court of United States constrained the doctrine by stating that where a regulatory scheme exists that regulates access, the application of the essential facilities doctrines becomes less relevant.[67]

96. In the present situation, we are dealing with a situation where the MSA is legislatively mandated to uphold the integrity of the market for electricity (and gas), so one could argue that that constraint on the doctrine is not needed here. That may or not be the case. What it does point out, however, is that there could be another solution to the situation at hand. The solution could be that the MSA work with the AESO to change the rule regarding the last minute exports (or imports) to be a more robust rule that avoids these last minute strategizations.

97. At the end of the day, despite some of the holes in the MSA's theory of the case, I do conclude the MSA acted in good faith to preserve the integrity of the market and was guided by sound economic principles, even if they were not fully articulated. TransAlta, I am satisfied, has consensually come to the settlement agreement. As such, I join the Commission in accepting the MSA's settlement agreement.

98. In the future, as more of these cases are presented to the Commission either as settlements for approval or disputes for adjudication, I would urge the parties and the MSA to keep on developing the theories by which market participants are alleged to have contravened the *Electric Utilities Act* and its regulations. Granted, there are unique features in our electricity market, and it is precisely because of these unique features that the theory must be developed properly over time. In the long-run, getting the theory right will better serve all producers and customers alike.

(original signed by)

Moin A. Yahya
Commission Member

[67] Brett Frischmann and Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 Antitrust L.J. 1, 6-7 (2008). Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 410-12 (2004).

Appendix 1 – Proceeding participants

Name of Organization (Abbreviation) Counsel or Representative	Witnesses
Alberta Direct Connect Consumers Association (ADC) R. Secord – Ackroyd LLP K. De Champlain – Ackroyd LLP	
ATCO Power Ltd. (ATCO Power) M. Buchinski – Bennett Jones LLP S. Assie – Bennett Jones LLP	
Capital Power Corporation (Capital Power) D. Crowther – Fraser Milner Casgrain LLP	
Independent Power Producers Society of Alberta (IPPSA) S. Shawa – Jensen Shawa Solomon Duguid Hawkes LLP	
Industrial Power Consumers Association of Alberta (IPCAA) M. Forster	
Market Surveillance Administrator (MSA) D. Wilson	Dr. M. Ayres – Chief Economist Dr. M. Nozdryn-Plotnicki – Senior Advisor
TransAlta Corporation (TransAlta) T. Dalgleish, QC – Davis LLP L. Berg	M. Cochlan – Director, Market Regulation J. Frayer – Consultant R. Schaefer – Executive Vice-President, Corporate Development
TransCanada Energy Ltd. (TransCanada) N. Berge	
Office of the Utilities Consumer Advocate (UCA) T. Shipley – Reynolds Mirth Richards & Farmer	

Alberta Utilities Commission

Commission Panel
T. Beattie, QC, Panel Chair
B. Lyttle, Commission Member
M. Yahya, Commission Member

Commission Staff
J. Petch, QC, Commission Counsel
D. Lowther, Director, Markets
K. Wyllie, Research Analyst

Appendix 2 – Abbreviations

Abbreviation	Name in Full
ADC	Alberta Direct Connect Consumer Association
AESO	Alberta Electric System Operator
AIES	Alberta Interconnected Electric System
ATCO Power	ATCO Power Ltd.
AUC or the Commission	Alberta Utilities Commission
BC	British Columbia
Capital Power	Capital Power Corporation
CRTC	Canadian Radio-television and Telecommunications Commission
EUA	Alberta *Electric Utilities Act*
FEOC Regulation	*Fair, Efficient and Open Competition Regulation*
IPCAA	Industrial Power Consumers Association of Alberta
IPPSA	Independent Power Producers Society of Alberta
ISO	Independent System Operator
Mid-C	Mid-Columbia
MSA	Market Surveillance Administrator
OASIS	Open Access Same-Time Information System
OBEG	Offer Behaviour Enforcement Guidelines
PSE	Purchasing Selling Entity
TP	Transmission Provider
TransAlta	TransAlta Energy Marketing Corp.
TransCanada	TransCanada Energy Ltd.
UCA	Utilities Consumer Advocate
WECC	Western Electricity Coordinating Council