

Electronic Notification

February 7, 2012

Market Surveillance Administrator
Application for approval of a settlement agreement between the
Market Surveillance Administrator and TransAlta Energy
Marketing Corp.
Application No. 1607868
Proceeding ID No. 1553

COMMISSION RULING ON STANDING AND CONFIDENTIALITY**1 INTRODUCTION AND BACKGROUND**

1. On November 22, 2011, the Alberta Utilities Commission (AUC or the Commission) issued a Notice of Application regarding Proceeding ID No. 1553 (Proceeding 1553) with respect to an application made by the Market Surveillance Administrator (MSA) for approval of the terms of a settlement agreement dated November 4, 2011 between the MSA and TransAlta Energy Marketing Corp (TransAlta) pursuant to sections 44 and 51 of the *Alberta Utilities Commission Act* (settlement approval application).
2. On November 22, 2011, the Commission granted standing to the MSA and TransAlta to participate in this proceeding, and at the same time, requested any other parties wishing to request standing to submit a written statement showing:
 - (a) how the party may be directly and adversely affected by the decision resulting from the settlement approval application, and
 - (b) how the MSA does not adequately represent the party's interests.
3. On December 12, 2011, the Commission received requests for standing from the Alberta Direct Connect Consumers Association (ADC), ATCO Power Ltd. (ATCO Power), the Industrial Power Consumers Association of Alberta (IPCAA) and the Office of the Utilities Consumer Advocate (UCA).
4. On December 15, 2011, the Commission invited the parties requesting standing as well as TransAlta and the MSA to file further submissions regarding the requests for standing. On December 20, 2011, ATCO Power advised the Commission that it was withdrawing its request for standing. The remaining parties made further submissions on December 21, 22 and 23, 2011.

5. On January 5, 2012, the Commission issued a letter to advise parties that it wanted to further canvass the views of parties on the issue of standing and the request for confidentiality made by the MSA and TransAlta in the settlement approval application at an oral hearing commencing on January 19, 2012.

6. On January 19, 2012, in addition to the parties noted above, ATCO Power, Capital Power Corporation (Capital Power), the Industrial Power Producers Society of Alberta (IPPSA) and TransCanada Energy Ltd. (TransCanada) appeared at the hearing and indicated a wish to be heard and to make submissions regarding the issues of participation in the settlement approval application and the request for confidentiality.

7. The Commission heard submissions from the MSA, TransAlta, ADC, IPPCA, the UCA, ATCO Power, Capital Power, IPPSA and TransCanada.

8. The Commission has now considered all of the submissions made, the authorities referred to by counsel and the record filed in this proceeding on each of the issues argued before it on January 19 and 20, 2012. In issuing this ruling, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this ruling to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning related 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 PARTICIPATION AT THE HEARING

9. In this proceeding the Commission will be deciding whether or not to approve the proposed settlement, notwithstanding a larger number of other issues canvassed in its January 5, 2012 correspondence in order to better inform this ruling. If the settlement agreement is approved, a number of results including imposition of an administrative penalty on TransAlta will follow.

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.

11. The Commission considers that it is master of its own procedures and finds that the Commission has inherent authority and power to permit interventions on terms and conditions that it believes are appropriate in the circumstances.¹

12. As noted in ATCO Power's December 12, 2011 submission,² the settlement approval application is one of the first oral proceedings heard by the Commission under sections 44(2)

¹ *American Airlines, Inc. v. Canada (Competition Tribunal)* [1989] 1 SCR 236, affirming [1989] 2 FC 88, *Knight v. Indian Head School Division* [1990] 1 SCR 653 at paragraph 49, *BP Canada Energy Company v. Alberta (Energy and Utilities Board)* 2004 ABCA 75 at paragraph 25 and the *Alberta Utilities Commission Act* s. 8(2).

² Exhibit 0009.01, Request for Standing of ATCO Power Ltd. dated December 12, 2011, pp. 1-2.

and 51(1)(b) of the *Alberta Utilities Commission Act*. Also, there have not been enforcement proceedings taken under Section 51(1)(a) to lend guidance. Accordingly, approval or refusal of approval of a settlement with potential implications or ramifications to the fair, efficient and openly competitive operation of the electricity market is very much a case of first impression. This ruling is not meant to serve as precedent to determine third party participation in future settlement approval proceedings. Such participation will remain to be decided based upon the particular circumstances of each case. Likewise it is not intended to serve as precedent to determine third party participation in a future Section 51(1)(a) enforcement proceeding. There are different concerns regarding procedural fairness, prosecutorial disclosure and so forth not present in considering settlement approval under Section 51(1)(b) which will require consideration and may dictate different conclusions in different cases.

13. The Commission finds in this proceeding that each of the UCA, ADC and IPCAA has 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 and that it is reasonable for the Commission to hear and consider this evidence when deciding whether the proposed settlement should be approved. However, the specific decision which the Commission will be making is whether or not to approve the proposed settlement. Consequently, the participation permitted which the Commission considers will be relevant and of assistance to it shall be restricted to each of the UCA, ADC and IPCAA addressing only in what respects each contends that the proposed settlement agreement does not adequately address the harm and loss to their members or the consumers it represents occasioned by the alleged misconduct and may not provide an adequate deterrence to prevent similar future market misconduct.

14. In accordance with the following process schedule, each of the UCA, ADC and IPCAA may file written evidence on the record to prove the harm done to its respective members or the consumers it represents as a result of the misconduct described in the settlement approval application. The Commission will allow each of the UCA, ADC and IPCAA to also make written submissions following the oral hearing regarding its perspective on the reasonableness of the proposed settlement agreement.

15. Accordingly, the following further process schedule is directed:

Deadline for evidence and submissions by the UCA, ADC and IPCAA regarding harm and reasonableness of settlement	February 27, 2012 at 4:00 pm
Deadline for rebuttal evidence and submissions by the MSA and TransAlta regarding harm and reasonableness of settlement	March 5, 2012 at 4:00 pm
Oral hearing	March 14, 2012 at 9:00 am

3 REQUEST FOR CONFIDENTIALITY

16. The November 4, 2011 settlement approval application requested confidentiality on behalf of the MSA and TransAlta respecting the “Net Position (MW)” and “Adjusted Net Position (MW)” figures and related information in columns 4, 5, 7 and 8 in Table 1 to Appendix 2 of the settlement agreement attached as Appendix A to the settlement approval application. This request was made pursuant to AUC Rule 001: *Rules of Practice* and AUC Rule 014: *Rules Respecting the Public Disclosure of Market Surveillance Administrator Records in a Hearing or Other Proceeding* (AUC Rule 014). The request for confidentiality application was argued during the oral hearing on January 20, 2012.

17. The privacy and confidentiality concerns of TransAlta and the MSA relate to the risk that publication of the information in Table 1 as noted above might, even at this time, assist other market participants to derive TransAlta’s market positions and trading patterns in the market to TransAlta’s detriment and the possible detriment of the market’s operation. The Commission is satisfied that the applicants have a genuine concern in this regard.

18. The record indicates that sufficient details of TransAlta’s impugned trading activity during the 31 hours in November, 2010 under consideration in the settlement approval application are already disclosed in the settlement agreement. The submissions made at the hearing clarified that such trading information is not data that goes to the fundamental question of whether a breach of FEOC³ occurred. TransAlta submitted that the data for which confidentiality is sought is second-order data used by the MSA to calculate disgorgement of the benefit gained by a breach of FEOC. The applicants further point out that the data for which confidentiality is requested does not need to be considered by the Commission for it to understand and assess TransAlta’s impugned trading activities disclosed elsewhere in the settlement approval application. The Commission accepts the representations and submissions made to it to this effect.

19. The Commission finds that in accordance with Section 5 of AUC Rule 014, disclosure of this data could reasonably be expected to result in undue financial loss to TransAlta or harm to its competitive position, the information is personal, financial and commercial, this information has been consistently been treated as confidential by TransAlta, and TransAlta’s interest in confidentiality outweighs the need and public interest in its disclosure as part of the public record of the hearing of the settlement approval application.⁴

³ FEOC is an acronym that refers to the fair, efficient and openly competitive operation of the market.

⁴ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522.

20. Accordingly the request made in the settlement approval application for confidentiality is granted.

The Alberta Utilities Commission

Tudor Beattie, QC
Panel Chair

Bill Lyttle
Commission Member

Moin A. Yahya
Commission Member