

Bulletin 2016-10

March 29, 2016

Practices regarding enforcement proceedings and amendments to AUC Rule 001: Rules of Practice

1. The Alberta Utilities Commission previously announced its enforcement policy and supporting principles in Bulletin 2014-05. This current bulletin further outlines the Commission's enforcement policy including the investigation and enforcement stages as well as some aspects of enforcement proceedings commenced by the Market Surveillance Administrator (MSA). The first part of the bulletin deals with Commission-initiated investigation and enforcement actions in paragraphs 2-16. The second part of this bulletin discusses proposed amendments to AUC Rule 001: *Rules of Practice* to better address enforcement proceedings brought by either the MSA or the Commission.

Introduction

2. An important responsibility in the exercise of the Commission's authority is to assess whether persons are in compliance with the provisions of applicable legislative and regulatory requirements, including Commission decisions, orders and rules.
3. In this context, compliance means conducting activities in accordance with regulatory requirements. Persons subject to the regulatory requirements of the Commission are responsible to implement policies and programs to prevent contraventions, and to take steps to mitigate them if they occur.
4. The Commission's enforcement practices will address matters related to alleged non-compliance with regulatory requirements. Information about a person's conduct will be gathered through an investigation conducted by Commission staff. Depending on the circumstances, investigations may lead to corrective action without the need for a contested hearing before the Commission.

Commission's jurisdiction to enforce

5. The Commission's general authority to enforce contraventions of matters under its jurisdiction is found in Section 23 of the *Alberta Utilities Commission Act*. Section 23 provides:

23(1) The Commission may order any person

- (a) to do any act, matter or thing, forthwith or within or at a specified time and in any manner directed by the Commission, that the person is or may be required to do under this Act or any other enactment or pursuant to any decision, order or rule of the Commission,

- (b) to cease doing any act, matter or thing, forthwith or within or at a specified time, that is contravention of this Act or any other enactment or any decision, order or rule of the Commission, and
- (c) to comply with a provision of an ALSA regional plan.

6. In addition to the Commission's general enforcement jurisdiction under Section 23 of the *Alberta Utilities Commission Act*, the Commission also has the ability to commence issue-specific enforcement actions under various statutes, regulations and Commission rules, including:

- Load settlement rules: Section 24.1(5) of the *Electric Utilities Act*.
- Service Quality Standards: Section 129(3) of the *Electric Utilities Act*.
- Service standards for gas distributor or default supply provider: Section 28.3(3) of the *Gas Utilities Act*.
- Failure to comply with the *Hydro and Electric Energy Act*, the regulations thereunder or the terms and conditions of an approval, permit or licence: Section 41(1) of the *Hydro and Electric Energy Act*.
- Failure to comply with the *Pipeline Act*, the regulations thereunder or the terms and conditions of an approval or licence: Section 29(1) of the *Pipeline Act*.

7. Under Section 63 of the *Alberta Utilities Commission Act*, the Commission may impose administrative penalties or terms and conditions it considers appropriate after making a finding of contravention or non-compliance with a Commission order, rule, decision, ruling or applicable legislation.

Commission's approach to enforcement

8. The primary goal of enforcement is to promote compliance with Alberta utility laws and to prevent harm to any person, public or private property or to the integrity of the AUC's regulatory processes and to ensure that the public and regulated entities understand that there are serious consequences for contraventions.

9. Compliance will be promoted by using a variety of means including, but not limited to, mandatory and voluntary reporting by utilities, complaint investigation¹ and resolution, and inspection activities including financial and operational audits. The objective of these activities is to deter future contraventions.

Investigations

10. When compliance issues arise enforcement staff will review the circumstances and evaluate the seriousness of the identified conduct. Staff may examine available sources of information, seek input from operational staff and may contact the regulated entity involved for an explanation of its alleged conduct. Further investigation if warranted, will be conducted by the enforcement staff.

¹ See also AUC policy for third-party complaints: http://www.auc.ab.ca/about-the-auc/auc-information/Documents/AUC_Information/ThirdPartyComplaintsPolicy.pdf

11. Staff intends to provide the party subject of the investigation an opportunity to respond to the allegations prior to the conclusion of the investigation.

12. Staff may close the investigation if it appears that no contravention can be proven, the information is insufficient to warrant further investigation, or the regulated entity voluntarily returned into compliance.

Enforcement Proceedings

13. When considering whether to commence an enforcement action, the AUC will have regard for the following: (1) if, based on the information obtained in the investigation, the occurrence of an alleged contravention appears reasonably likely to be proven on a balance of probabilities, and (2) if the enforcement action is in the public interest. Potential outcomes may include the issuance of a warning, concurrence with corrective action proposed by the target of the investigation or the commencement of a formal enforcement proceeding under the Commission's Rule 001: *Rules of Practice*.²

14. If a formal enforcement proceeding is initiated, the AUC will issue a notice to the alleged contraveners, setting out the particulars of the suspected contravention and the nature of the sanctions being sought.

15. A division of the Commission will conduct a proceeding to determine the merits of the allegations set out in the notice and decide what, if any, sanctions are warranted.

16. The assigned enforcement staff will have no contact regarding the investigation and the proceeding with the Commission division considering the proceeding or the staff assisting the division except through the public record.

Amendment of AUC Rule 001 to reflect Commission and MSA procedural matters

17. In 2010, the Commission considered the need for specific rules for enforcement proceedings initiated by the MSA. The Commission sought feedback from interested stakeholders but ultimately determined in Bulletin 2010-17 that there was no need to enact specific rules for enforcement proceedings at that time.³ The Commission noted at that point that it had only conducted a limited number of MSA initiated proceedings and emphasized that a case-by-case approach would provide greater flexibility than a rule-based approach.

18. Since then the Commission has considered several MSA enforcement matters. Further, the Commission has also conducted several investigations, although these have not progressed from the investigation stage to the hearing stage. Based on this experience some limited amendments to AUC Rule 001 are proposed.

² In some cases, the subject matter of the investigation or formal enforcement proceeding may also have relevance to non-enforcement applications filed with the Commission.

³ Bulletin 2010-17, *Consultation on Market Surveillance Administrator Proceedings before the Alberta Utilities Commission*, paragraphs 12-24.

19. While AUC Rule 001 was broadly drafted to facilitate the variety of proceedings conducted by the Commission, some amendments are required so that it may better apply to enforcement proceedings initiated by the Commission and the MSA. The purpose of these amendments is not to strictly prescribe a process for enforcement proceedings. Rather, these amendments are intended to recognize some unique features of enforcement proceedings and provide means by which the process for such proceedings can be efficiently varied to address particular enforcement issues.

20. Three amendments to AUC Rule 001 are proposed. First, the definition of “party” has been expanded to include a person named by the MSA in a notice issued under sections 51 and 52 of the *Alberta Utilities Commission Act* and a person named in a notice issued by the Commission to initiate an enforcement proceeding against that person.

21. Second, new notice requirements will be added to AUC Rule 001 setting out what information must be included in a notice issued by the AUC to initiate an enforcement proceeding against a person. The amendment proposes that a notice commencing an AUC-initiated enforcement proceeding must include the following information: (1) the names of the persons alleged contraveners, (2) reasonable particulars of the alleged contravention or failure to comply to be considered by the Commission, (3) a statement of the order or other relief that is being requested, and (4) any other information that the Commission may, by order, direct. This is essentially the same information that must be included in a notice issued by the MSA under Section 51 of the *Alberta Utilities Commission Act*.

22. The third proposed amendment addresses information requests in enforcement proceedings. Specifically the amendment provides that, in an enforcement proceeding initiated by the MSA or the AUC, an information request process will only be available in the discretion and on the direction of the Commission. This is a departure from the current rule which allows for information requests in all proceedings. The proposed amendment puts the onus on the person seeking the process to persuade the enforcement hearing panel that information requests are warranted.

23. No other amendments are proposed because of the broad discretion built into AUC Rule 001. For example, the process for the filing and giving of evidence in enforcement proceedings will likely diverge from the process used in other proceedings. However, because the applicable sections of AUC Rule 001 give the Commission the discretion not to apply them should circumstances warrant, amendments to those sections are unnecessary. Further no amendments are required to address matters such as standing, disclosure or the manner in which the MSA or AUC staff must present their case.

24. The proposed amendments will not preclude the need for a pre-hearing meeting for more complex enforcement proceedings to set the process and schedule for the proceeding and to determine questions of standing, case disclosure, the pre-hearing filing of evidence and other relevant issues.

Standing and participation

25. The Commission does not intend to amend AUC Rule 001 to address standing issues in enforcement proceedings. The right to standing before the Commission is set out by statute and, as the examples below show, standing and participation are best addressed on a case-by-case basis.

26. The Commission addressed the issue of standing in MSA enforcement proceedings in Bulletin 2010-17 as follows:

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

27. The Commission previously considered standing issues once in Proceeding 1553 and twice in Proceeding 3110. In Proceeding 1553, the Commission granted limited participation rights to certain parties because each 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." The Commission limited their participation to filing evidence and argument; they were not allowed to sit their own witnesses or cross-examine the witnesses of other parties.

28. In Proceeding 3110, the Commission considered standing requests for the first and second phases of the proceeding from persons not named in the MSA's notice. The Commission decided on both occasions that only the respondents could be potentially affected by its decisions and denied the standing and participation requests of all others.

Disclosure

29. The Commission reviewed the disclosure standards that may be applicable in a proceeding brought by the MSA in Bulletin 2010-17. The Commission did not specify a standard of disclosure for these types of proceedings. Rather it confirmed that it would determine the appropriate level of disclosure on a case-by-case basis, having regard to the balance of interests in each case keeping in mind that the proceedings are administrative in nature.

30. In Proceeding 3110, the Commission decided to require disclosure based on relevance rather than reliance. A factor in its decision was that the MSA was seeking sanctions against the two individual respondents. However, the Commission acknowledged in its decision that precedents exist that suggest that disclosure based on reliance may be appropriate when the respondent in an enforcement proceeding is a corporation.

31. The Commission does not intend to change AUC Rule 001 to prescribe the level of disclosure required in enforcement proceedings, both MSA and Commission initiated. Such decisions should continue to be made on a case-by-case basis.

The filing and giving of evidence

32. Section 20 of AUC Rule 001 sets out the information requirements for applications and sections 17, 41 and 42 address the filing and giving of evidence. Taken together they provide that, unless the Commission directs otherwise, participants must advise the Commission of their respective positions, pre-file their documentary evidence and restrict their oral evidence to those pre-filed materials or matters arising from cross-examination.

33. AUC Rule 001 currently provides the Commission with sufficient discretion to adjust the process for the filing and giving of evidence. For example, in Proceeding 3110, the Commission took a hybrid approach to the application of these provisions. In that case, the MSA chose to pre-file all of its evidence in its application. The Commission directed all parties to pre-file their expert reports but did not require the respondents to pre-file any other documentary evidence. Instead, the respondents were allowed to introduce their other documentary evidence without advance disclosure through witnesses at the hearing. Another approach is to have each party introduce its case through its witnesses following disclosure from the MSA or enforcement staff.

34. The Commission will likely have to address as a preliminary matter whether or to what degree these requirements will be observed in each enforcement proceeding.

Further steps

35. The Commission anticipates holding a stakeholder consultation later this spring. Details will be forthcoming. Any questions about this bulletin can be directed to Greg Andrews at greg.andrews@auc.ab.ca or 403-592-4529.

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