



**TransAlta Corporation, TransAlta Energy
Marketing Corp., TransAlta Generation Partnership,
Mr. Nathan Kaiser and Mr. Scott Connelly**

**Complaints about the conduct of the Market Surveillance
Administrator**

May 15, 2014

The Alberta Utilities Commission

Decision 2014-135: TransAlta Corporation, TransAlta Energy Marketing Corp.,
TransAlta Generation Partnership, Mr. Nathan Kaiser and Mr. Scott Connelly
Complaints about the conduct of the Market Surveillance Administrator
Application Nos. 1610340, 1610342, 1610343
Proceeding No. 3109

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1 Introduction

1. In this decision, the Alberta Utilities Commission (AUC or the Commission) must decide whether complaints about the conduct of the Market Surveillance Administrator (MSA) filed by TransAlta Corporation, TransAlta Energy Marketing Corp. and TransAlta Generation Partnership (collectively, TransAlta), Mr. Nathan Kaiser (Kaiser) and Mr. Scott Connelly (Connelly) must be dismissed in accordance with subsection 58(2)(a) of the *Alberta Utilities Commission Act*. Subsection 58(2)(a) states, in part, that the Commission shall dismiss a complaint if it is satisfied the complaint relates to a matter the substance of which is before it.

2. It is the MSA's position that the complaints relate to matters the substance of which are before the Commission by way of a notice it filed on February 25, 2014, and an application it filed on March 21, 2014. The MSA submits that the Commission must therefore dismiss the complaints in accordance with subsection 58(2)(a).

3. TransAlta, Kaiser and Connelly submit that the subject matters of their complaints are discrete from the matters raised in the MSA's notice. They also submit that subsection 58(2)(a) does not apply because their complaints were filed before the MSA initiated its proceeding by filing its notice. The complainants asked the Commission not to dismiss their complaints or, in the alternative, to consolidate Proceeding No. 3109 and Proceeding No. 3110 so that they may be heard together, provided that recourse to the remedies under Section 58(3) are maintained.

4. In this decision, the Commission does not assess the merits of the complaints or the MSA's application. Rather, at this point, the Commission's inquiry is limited to interpreting Section 58 of the *Alberta Utilities Commission Act* and deciding if it is obliged by subsection 58(2)(a) to dismiss the complaints made by TransAlta, Kaiser and Connelly.

5. The Commission considers that the record for Proceeding No. 3109 closed on April 14, 2014.

6. A glossary of abbreviations used in this decision is included in Appendix 2.

7. 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 Background

2.1 The MSA's Offer Behavior Enforcement Guidelines

8. In February 2010, the MSA initiated stakeholder consultation on new Offer Behavior Enforcement Guidelines (OBEGs). The MSA's consultation included the circulation of discussion papers with illustrative examples of offer behavior, an industry workshop, meetings with market participants, including TransAlta, and the circulation of draft OBEGs. The MSA issued its final OBEGs on January 14, 2011.

9. Electrical generating units are required to be shut down periodically to repair damage from an unexpected event. Depending upon the nature of the damage, the owner may have some flexibility in scheduling the outage for repairs. Such outages are referred to as discretionary outages. The draft OBEGs and the final OBEGs addressed, amongst other things, the timing of these discretionary outages.

10. Power Purchase Arrangements (PPAs) are statutory instruments that established terms and conditions between the owner of a generating unit (PPA owner) and the purchaser of the output from that generating unit (PPA buyer). TransAlta Corporation is the PPA owner of the Keephills and the Sundance coal-fired generating units. Under its PPAs, TransAlta Corporation is required to make the committed capacity of these units available to certain PPA buyers.

11. The MSA published illustrative examples related to offer behavior on September 10, 2010, as part of its OBEGs consultation. The MSA met with stakeholders on September 17, 2010, to discuss the illustrative examples. A notice accompanying the illustrative examples stated:

As drafts to stimulate discussion in a stakeholder workshop they [the illustrative examples] should not be held as a binding statement of MSA enforcement policy. We are hopeful that the workshop and stakeholder comments will lead to further refinement to be reflected in a final document providing guidance to market participants.¹

12. The MSA met with TransAlta on October 8, 2010 to discuss additional illustrative examples prepared by TransAlta, which included examples based on discretionary outages. On October 29, 2010, the MSA issued a second notice to market participants in which it set out the additional illustrative examples provided by TransAlta and the MSA's response to those examples.² No reference was made to PPA units in the additional illustrative examples or the MSA's response to those examples.

13. The draft OBEGs were issued on November 26, 2010, with an accompanying notice that stated "...we draw stakeholders' attention particularly to Section 4.7 and ask for input whether the proposed approach to discretionary outages should equally apply to units subject to Power Purchase Arrangements."³ Section 4.7.2 of the draft OBEGs states in part:

¹ Proceeding No. 3110, exhibit 14.14, tab 40, Notice to Markets Participants and Stakeholders: Market Participant Offer Behaviour, Illustrative Examples, September 10, 2010, pdf page 2.

² Proceeding No. 3110, exhibit 14.14, tab 41, Notice to Market Participants and Stakeholders: Offer Behaviour, Illustrative Examples #2, October 29, 2010, pdf pages 5 to 18.

³ Proceeding No. 3110, exhibit 14.14, tab 42, Notice to Market Participants and Stakeholders: Market Participant Offer Behaviour Draft Guidelines, November 26, 2010, pdf page 20.

The MSA recognizes that additional considerations under the fair efficient and openly competitive standard may apply in Fact Patterns A and B if Participant A is a PPA Owner and it is subject to a PPA. The MSA is still considering the application of these examples to units subject to a PPA. The MSA seeks market participants' input on this issue.⁴

14. As noted above, on January 14, 2011, the MSA released the final OBEGs. In relation to discretionary outages, the OBEGs state:

The MSA recognizes that additional considerations under the fair, efficient and openly competitive standard may apply in the above Fact Patterns A and B if Participant A is a PPA owner and the unit is subject to a PPA. The MSA is still considering the application of these examples to units subject to a PPA and at this time offers no guidance on outage timing at PPA units.⁵

15. In a notice accompanying the final OBEGs, the MSA stated that stakeholders "should expect to see a paper outlining the MSA's views in the area of discretionary outages at PPA Units in the next few weeks" and that an "opportunity will be provided for further stakeholder comment at that time."⁶

16. On March 10, 2011, the MSA advised market participants that it had suspended plans for stakeholder consultation relating to the timing of outages for units subject to PPAs. The MSA further stated:

The MSA has received a complaint on a substantively similar matter and has made the decision to commence an investigation under section 42(1)(b) of the *Alberta Utilities Commission Act* (AUCA). Parties directly relevant to the investigation have been notified in accordance with the *MSA Investigation Procedures*. In the view of the MSA the investigation and the stakeholder consultation are best handled sequentially, in that order.

Following completion of the investigation the MSA will reassess the need for stakeholder consultation on this matter and will provide an update accordingly. However, please feel free to contact the writer at any time with any questions regarding the status of the stakeholder consultation.⁷

⁴ Proceeding No. 3110, exhibit 14.14, tab 42, Offer Behaviour Enforcement Guidelines, Draft, November 26, 2010, page 28.

⁵ Proceeding No. 3110, exhibit 14.14, tab 46, Offer Behaviour Enforcement Guidelines, January 14, 2011, page 28.

⁶ Proceeding No. 3109, exhibit 20, Notice to Market Participants: Final Offer Behaviour Enforcement Guidelines and stakeholder comments on the draft, January 14, 2011, pdf page 2.

⁷ At Proceeding No. 3109, exhibit 3, Complaint by TransAlta, page 9, paragraph 35, TransAlta cites a MSA notice dated March 10, 2011. The notice can be found at <http://albertamsa.ca/uploads/pdf/Archive/2011/Notice%20PPA%20outages.pdf>.

2.2 The MSA's investigation

17. TransAlta scheduled the following discretionary outages at coal fired generating units subject to PPAs between November 2010 and February 2011:

Generating Unit	Date
Sundance 5	November 19, 2010
Sundance 2	November 23, 2010
Sundance 2, Keephills 1	December 13-16, 2010
Keephills 2	February 16, 2011

18. On February 25, 2011, a market participant⁸ made a complaint to the MSA about the conduct of TransAlta. The complaint related to the timing of outages at TransAlta's coal fired generating units that are subject to a PPA.

19. On March 8, 2011, the MSA issued a Notice of Investigation to TransAlta relating to the timing of outages at generating units for which TransAlta was a PPA owner. On December 19, 2011, the MSA advised TransAlta by letter that it was revising the scope of its investigation to include outages between November 2010 and December 2011 and to address trading associated with those outages.

20. Over the course of its investigation, the MSA requested TransAlta to provide it with information and records related to its investigation. The MSA's first request was made on December 19, 2011 and its last such request was made on November 20, 2013.⁹

21. TransAlta claimed privilege with respect to some documents in its possession, and the MSA disputed this claim. The matter was considered by the Court of Queen's Bench on October 4, 2013. On February 24, 2014, the Court ordered TransAlta to produce a number of documents in its possession. TransAlta appealed that decision to the Alberta Court of Appeal. The Court of Appeal granted an interim stay of the document release order pending the appeal, which was heard on April 2, 2014.¹⁰

22. On November 27, 2013, the MSA provided TransAlta with its facts and findings regarding the timing of discretionary outages. The MSA provided TransAlta with its facts and findings regarding the trading activity associated with non-public outage records on November 29, 2013, and asked TransAlta to provide these documents to Kaiser and Connelly.

23. TransAlta provided its response to the facts and findings to the MSA on January 10, 2014. Kaiser and Connelly provided their responses to the facts and findings to the MSA on January 24, 2014.

⁸ The phrase "market participant" is defined in subsection 1(1)(ee) of the *Electric Utilities Act* as (i) "any person that supplies, generates, transmits, distributes, trades, exchanges, purchases or sells electricity, electric energy, electricity services or ancillary services, or (ii) any broker, brokerage or forward exchange that trades or facilitates the trading of electricity, electric energy, electricity services or ancillary services."

⁹ Proceeding No. 3110, exhibit 14.02, Application of the Market Surveillance Administrator, page 13, paragraph 48.

¹⁰ As of the date of this decision the Alberta Court of Appeal has not issued its decision in this matter.

2.3 The Complaints and the MSA's Notice and Application

24. On February 21, 2014, TransAlta, Kaiser and Connelly sought to file with the Commission, on a confidential basis, complaints about the conduct of the MSA pursuant to Section 58 of the *Alberta Utilities Commission Act*. The Commission wrote back to TransAlta, Kaiser and Connelly on the same day and advised that it would not accept submissions on a confidential basis absent a motion pursuant to AUC Rule 001: *Rules of Practice*. Later that same day, TransAlta and Kaiser filed their complaints publicly. Connelly filed his complaint about the MSA's conduct under Section 58 on February 24, 2014. The TransAlta, Kaiser and Connelly complaints were consolidated by the Commission to be heard as Proceeding No. 3109.

25. The MSA filed its notice of request to initiate a proceeding against TransAlta, Kaiser and Connelly (Proceeding No. 3110) on February 25, 2014, in accordance with Section 51 of the *Alberta Utilities Commission Act*. The MSA stated in its notice that it would file an application and supporting records in relation to its notice when it received process and scheduling instructions from the Commission.

26. The MSA filed its application and supporting documents on March 21, 2014. On March 25, 2014, the Commission set a process schedule to consider the application of subsection 58(2)(a) to the complaints filed by TransAlta, Kaiser and Connelly.

3 Interpretation of subsection 58(2)(a)

3.1 Principles of statutory interpretation

27. All of the parties to Proceeding No. 3109 and Proceeding No. 3110 agreed that the starting point for interpreting Section 58 of the *Alberta Utilities Commission Act* is Driedger's modern principle. As explained by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd v. Alberta (Energy and Utilities Board)*, that principle requires that "the words of an act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."¹¹ The court explained that its approach was to look first at the grammatical and ordinary meaning of a provision and then examine the entire statutory context and legislative intent. The Court emphasized that "the ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme."¹²

28. In addition to supporting the modern approach, TransAlta and Kaiser stressed the importance of Section 10 of the *Interpretation Act* which states: "an enactment shall be construed as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects." Another principle endorsed by the parties was that the ordinary meaning of words in legislation can be modified to avoid absurdity or inconsistency.

29. The Commission agrees with the parties that the above principles apply to its interpretation of Section 58 of the *Alberta Utilities Commission Act*. In the sections that follow, the Commission reviews the grammatical and ordinary meaning of the section, the overall statutory scheme and the intent or purpose of the legislation.

¹¹ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4, at paragraph 37 ["ATCO"].

¹² *Ibid.*, at paragraph 49.

3.2 Grammatical and ordinary meaning

30. Sections 58 of the *Alberta Utilities Commission Act* reads as follows:

58(1) Any person may make a written complaint to the Commission about the conduct of the Market Surveillance Administrator.

(2) The Commission

- (a) shall dismiss the complaint if the Commission is satisfied that it relates to a matter the substance of which is before or has been dealt with by the Commission or any other body, or
- (b) may dismiss the complaint if the Commission is satisfied that the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation or a hearing.

(3) The Commission may, in considering a complaint, do one or more of the following:

- (a) dismiss all or part of the complaint;
- (b) direct the Market Surveillance Administrator to change its conduct in relation to a matter that is the subject of the complaint;
- (c) direct the Market Surveillance Administrator to refrain from the conduct that is the subject of the complaint.

(4) A decision of the Commission under subsection (2) or (3) is final and may not be appealed under section 29.

31. The parties did not agree on the grammatical and ordinary meaning of subsection 58(2)(a). The disagreement was twofold. First, they disagreed about how broadly the Commission should interpret the words "...related to a matter the substance of which is..." Second, they disagreed on whether the words "is before ...the Commission" preclude the application of subsection 58(2)(a) if there is no other matter before the Commission when the complaint is filed.

32. The MSA argued that the plain and ordinary meaning of subsection 58(2)(a) is clear; if a complaint relates to a matter the substance of which is before the Commission it shall be dismissed. The MSA asserted that Canadian courts have consistently interpreted the word "related" to have broad a meaning.

33. The MSA further argued that the determination of whether a matter is before the Commission or any other body must be made at the time when the Commission is considering a motion or application to dismiss under subsection 58(2)(a). It submitted that subsection 58(2)(a) does not contemplate a filing race between the MSA and potential complainants. The MSA observed that it is its practice to share its facts and findings with the subject of an investigation before filing a notice with the Commission. It argued that subsection 58(2)(a) would have little meaning if the filing of a complaint under Section 58 before the MSA files its notice commencing a proceeding would prevent the operation of subsection 58(2)(a).

34. TransAlta, Kaiser and Connolly all argued that the MSA placed too much emphasis on the words “relates to” and failed to have regard for the other words of the provision when interpreting subsection 58(2)(a).

35. TransAlta argued that the phrase “the substance of which” circumscribes the broad scope of the word “relates.” It stated that *Black’s Law Dictionary* defines “substance” as “the essence of something; the essential quality of something as opposed to its real form.”¹³ TransAlta concluded that, having regard for this definition, the grammatical and ordinary meaning of subsection 58(2)(a) is that a complaint can be dismissed only if it relates, in its substance – i.e., in an essential way – to a matter that is before the Commission.

36. TransAlta, Kaiser and Connelly submitted that the phrase “is before or has been dealt with by the Commission” should be interpreted to mean that subsection 58(2)(a) does not apply when a complaint is filed before the MSA submits its notice of request for a hearing. They argued that a literal reading of that subsection supports this interpretation and observed that each of the complaints were filed before the MSA filed its notice to request a hearing. These parties all argued that if the Commission were to dismiss a complaint on the basis of a subsequently filed notice by the MSA, the dismissal would eliminate the only statutory check on the MSA’s conduct, undermine confidence in the regulatory framework and have a chilling effect on future complainants.

3.2.1 Commission findings

37. A plain reading of subsection 58(2)(a) suggests that it establishes two related criteria for dismissal. First, there must be a degree of commonality between the complaint and another matter (“...relates to a matter the substance of which is ...”). Second, the other matter has been or is being considered by the Commission or another body (“...is before... the Commission...”). The Commission examines these two criteria in greater detail in the paragraphs that follow.

“[R]elates to a matter the substance of which is ...”

38. The MSA, TransAlta and Kaiser all referenced *Haskett v. Insurance Corp of British Columbia*¹⁴ with respect to the interpretation of the phrase “relates to.” The MSA submitted that *Haskett* supports an interpretation of the word “related” as having a broad meaning. Both TransAlta and Kaiser submitted that the phrasing interpreted in *Haskett* was broader than the phrasing in subsection 58(2)(a). They also submitted that the outcome in *Haskett* did not support the MSA’s expansive interpretation of “relates to.”

39. In *Haskett*, a person insured by the Insurance Corporation of British Columbia (ICBC) fled the scene of an accident for which he admitted responsibility. He was later charged and convicted of failing to remain at the scene. The ICBC argued that the insured had breached a term of his insurance policy which, in turn, allowed the ICBC to deny indemnification when a “claim arises out of or is related to circumstances that result[ed] in his conviction for a motor vehicle related criminal code offence” (emphasis added).

40. The B.C. Court of Appeal ruled that the ICBC was required to indemnify the insured under the policy because the criminal conduct he was convicted of did not cause the accident for

¹³ Proceeding No. 3109, exhibit 108.02, Reply submission of TransAlta, page 8, paragraph 29.

¹⁴ *Haskett v. Insurance Corp. of British Columbia*, 1990 CanLII 335 (BC CA) [“**Haskett**”].

which the claim was made. The Court endorsed the following passage from the trial judge's decision.

Counsel also referred me to definitions of the word 'relate' from Black's Law Dictionary and Webster's Dictionary. One of the definitions reads as follows: 'To show or establish a logical or causal connection between.' In my view, those definitions and the cases referred to by counsel illustrate the fact that the word 'relate' must be interpreted within the context of the particular phrase or clause in question. With respect to the Regulation at hand, I consider that the words 'is related to' must refer to a causal connection between the plaintiff's claim for indemnity and the conduct that gave rise to his criminal liability.¹⁵

41. The Court of Appeal then referenced the definition of "relate" from *Black's Law Dictionary* which was: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; with 'to'." The Court concluded that the definition "without any doubt imports some logical, reasonable connection."¹⁶

42. Another case addressed by the MSA, TransAlta and Kaiser was the Supreme Court of Canada's decision in *Slattery (Trustee of) v. Slattery*.¹⁷ In that decision, the Supreme Court interpreted Section 241(3) of the *Income Tax Act* which included the phrase "in respect of proceedings relating to..." (emphasis added). The Court found that the words "relating to" were words of the widest possible scope and were intended to convey some connection between two related subject matters.¹⁸

43. The Commission finds that the interpretations of the phrases "relate to" and "relating to" in *Slatterly* and *Haskett* are consistent and sound, and reflect the ordinary meaning of those words. Accordingly, the Commission is satisfied that a similar interpretation can be reasonably applied to its interpretation of the phrase "relates to" in subsection 58(2)(a). The Commission, therefore, finds that the words "relates to," as used in subsection 58(2)(a), are words of considerable scope. However, the Commission recognizes that those words cannot be read in isolation and must be interpreted within the context of the remaining words of the provision, particularly the words "a matter the substance of which is." In this regard, the Commission finds the definition of "substance" that was provided by TransAlta from *Black's Law Dictionary* to be helpful. "Substance" was there defined as being "the essence or essential quality of something." This definition of "substance" was not disputed by the MSA and is, in the Commission's opinion, reflective of its ordinary meaning.

44. Having regard to the foregoing, the Commission finds that the plain and ordinary meaning of the first part of subsection 58(2)(a) is that a complaint will relate to a matter the substance of which is or has been before the Commission if there is a logical or reasonable connection between the substance or essence of the complaint and the substance or essence of the other matter.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Slattery (Trustee of) v. Slattery*, 1993 CanLII 73 (SCC), [1993] 3 SCR 430 ["**Slatterly**"].

¹⁸ *Ibid.*

“[I]s before ... the Commission”

45. The Commission finds that there is more than one plain and ordinary meaning to this part of the provision. It could be read to mean either a) a complaint may be dismissed only if it relates to a matter that was before the Commission prior to the complaint being filed, or b) that a complaint must be dismissed if it relates to a matter that is before the Commission when it is making a decision on a motion or application to dismiss a complaint under subsection 58(2)(1).

46. Having regard for the Supreme Court of Canada’s directions on statutory interpretation, and given the apparent ambiguity in the phrase “is before... the Commission...,” the Commission must proceed to the next phase in the interpretive analysis and examine the greater statutory context and the legislative intent.

3.3 The statutory scheme

47. The MSA, TransAlta, Kaiser and Connelly all discussed, to some extent, the greater statutory scheme in which Section 58 of the *Alberta Utilities Commission Act* operates. All of these parties recognized that the MSA has a broad mandate to investigate and take enforcement measures with respect to the activities and conduct of market participants that does not support the fair efficient and openly competitive operation of the electricity market. The parties also agreed that the statutory scheme places the Commission in a supervisory role over the MSA.

3.3.1 Commission findings

48. The Commission finds that two acts administered by it are of particular importance when considering the statutory context in which Section 58 was enacted: The *Electric Utilities Act* and the *Alberta Utilities Commission Act*. In addition, two regulations, the *Fair, Efficient and Open Competition Regulation* and the *Market Surveillance Regulation* also provide context.

49. The *Electric Utilities Act* sets out the regulatory framework for the operation of Alberta’s wholesale electricity market. Section 5 of the Act sets out its purposes. Subsections 5(b) and (c) emphasize the fundamental importance of establishing and maintaining an electricity market based upon fair and open competition. Subsection 5(h) provides that another purpose of the Act is 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.”

50. Section 6 of the *Electric Utilities Act* further emphasizes the importance of the fair, efficient and openly competitive electricity market. It states “[m]arket participants are to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market.”

51. The *Fair, Efficient and Open Competition Regulation* is a regulation made under the *Electric Utilities Act*. Section 2 of that regulation provides a comprehensive list of market participant conduct that does not support the fair, efficient and openly competitive operations of the market. The prohibited conduct includes:

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

- (i) a market participant directly or indirectly colluding, conspiring, combining, agreeing or arranging with another market participant to restrict or prevent competition, and
 - (ii) a market participant engaging in predatory pricing or any other form of predatory conduct; and
- ...
- (j) manipulating market prices, including any price index, away from a competitive market outcome;

52. Section 4 of the *Fair, Efficient and Open Competition Regulation* also sets restrictions on trading using outage records that are not publicly available.

53. Part 5 of the *Alberta Utilities Commission Act* addresses the continuation of the MSA as an independent agency and sets out its mandate and duties. The MSA's statutory duties include surveillance, investigation and enforcement of matters and activities related to the fair, efficient and openly competitive gas and electricity markets of Alberta. The MSA has been described by the Alberta Courts as the "watchdog" of Alberta's electric and gas markets.¹⁹

54. Section 39 of the *Alberta Utilities Commission Act* provides that the MSA's mandate includes, amongst other things, the investigation of conduct that does not support the fair, efficient and openly competitive operation of the electricity market. The MSA may initiate such an investigation on its own or in response to a complaint from a market participant or a referral from the independent system operator (ISO).²⁰ Subsection 39(4) of the *Alberta Utilities Commission Act* states that the MSA may "establish guidelines to support the fair, efficient and openly competitive operation of the electricity market." The MSA is required to make any such guidelines available to the public.

55. The Alberta Court of Queen's Bench described the MSA's mandate as follows:

...the mandate of the MSA is extremely broad and in undertaking any investigation, the MSA is compelled by statute to consider the activity under investigation in light of the *Act*, the regulations, the ISO rules, the market rules and arrangements. In addition, it must consider whether the activity is consistent with the fair, efficient, and openly competitive operation of the market and whether new rules are desirable. In my view, the Market Participants or their employees can have little or no expectation of privacy insofar as their activities as market participants under the *Act* are being investigated.²¹

56. Section 33 of the *Alberta Utilities Commission Act* requires the person appointed as Market Surveillance Administrator to act honestly, in good faith, and in the public interest and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Section 40 of the *Alberta Utilities Commission Act* requires the MSA to carry out its mandate in a fair and responsible manner.

¹⁹ *TransAlta Corporation v. Market Surveillance Administrator*, 2014 ABQB 143, paragraph 15.

²⁰ The ISO is an agency established under Section 7 of the *Electric Utilities Act* with a broad mandate to plan and operate Alberta's integrated electric system. The organization that carries out the functions of the ISO is called the Alberta Electric System Operator (AESO).

²¹ *Alberta Market Surveillance Administrator v. Enmax Energy Corporation*, 2008 ABQB 54, paragraph 8.

57. The MSA has considerable investigatory powers under the *Alberta Utilities Commission Act*. Pursuant to Section 46 of that act the MSA can enter the premises of a market participant, make inquiries of a market participant's current and former employees, including contract employees, request the production of documents, and request access to a market participant's computer system.

58. If the MSA is satisfied that a person has contravened an act or another regulatory instrument or has engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market, it can provide notice to the Commission of the need for a hearing into the matter or to approve a settlement with respect to the matter. When the Commission receives such a notice, it must set the matter down for a hearing pursuant to Section 53 of the *Alberta Utilities Commission Act*. When such a notice is received, the Commission must hold a hearing.

59. Section 61 of the *Alberta Utilities Commission Act* provides that the MSA is immune from liability for "market surveillance acts" that include acts and omissions carried out in the exercise of the MSA's mandate, unless the acts were not carried out in good faith.

60. The *Market Surveillance Regulation* is a regulation made under the *Alberta Utilities Commission Act*. This regulation sets out in greater detail a market participant's obligation to provide records requested by the MSA. It also makes it clear that the MSA is entitled to use such records for the purposes of its mandate.

61. Sections 7 and 8 of the *Market Surveillance Regulation* are also relevant in terms of understanding the statutory scheme. Section 7 requires the MSA to make public the procedures it will use when interacting with market participants during investigations. Under this section, the MSA is required to consult with market participants before making any material changes to its investigation procedures. Section 8 of the regulation sets out the process that the MSA must follow when making guidelines in support of the fair, efficient and openly competitive operation of the electricity market. This section provides that the MSA must consult with market participants when developing new guidelines or when changing existing guidelines.

62. The *Alberta Utilities Commission Act* also sets out the AUC's role and duties with respect to the MSA and its activities. The act places the Commission in a supervisory and decision-making role with respect to the activities of the MSA.

63. As noted above, if the MSA brings a matter to the Commission by way of a notice under Section 51, the Commission must hold a hearing in accordance with Section 53. Section 56 sets out the Commission's authority when making a decision on a matter brought to it by the MSA. Subsection 56(2) provides that the Commission may take into account any guidelines made by the MSA. Subsection 56(3) states that, if the Commission finds that a person has engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market, it may:

- impose an administrative penalty on the person
- impose any terms or conditions on the person relating to the person's future conduct in the electricity market, and

- prohibit the person from engaging in conduct or direct the person to take action

64. Section 58 authorizes the Commission to rule on complaints about the conduct of the MSA. After deciding whether a complaint meets the thresholds for consideration described in Section 58(2), the Commission may:

- dismiss all or part of the complaint
- direct the MSA to change its conduct in relation to a matter that is the subject of the complaint, or
- direct the Market Surveillance Administrator to refrain from the conduct that is the subject of the complaint

65. A decision of the Commission on a complaint may not be appealed under Section 29 of the act.

66. When read as a whole, the Commission finds that the statutory scheme makes clear the fundamental importance of establishing and maintaining an electricity market that is fair, efficient and openly competitive. The scheme establishes the MSA as the market watchdog with one of its primary goals being the protection of the fair, efficient and openly competitive operation of the electricity market. The MSA is given broad powers to carry out this role. The Commission considers that those broad powers reflect the fundamental importance of preserving or maintaining a fair, efficient and openly competitive market.

67. The Commission notes that the MSA's exercise of its authority over market participants is not unlimited and is subject to a number of checks. First, it has a statutory duty to act fairly, responsibly and in the public interest. Second, it is required to consult with market participants with respect to its investigation procedures and any guidelines it makes under Section 39(4) of the *Alberta Utilities Commission Act*. It cannot change existing procedures or guidelines without consultation. Third, the MSA concerns about the conduct of market participants are subject to the Commission's oversight. Fourth, a person who has a concern about the conduct of the MSA may make a complaint about that conduct.

68. The statutory scheme places the Commission in a supervisory role over the activities and conduct of the MSA. The Commission not only rules on matters brought before it by the MSA but also rules on complaints relating to the conduct of the MSA. Importantly, neither the MSA nor a complainant is entitled to appeal a decision of the Commission on a complaint.

3.4 The purpose of subsection 58(2)(a)

69. TransAlta stated that the Legislature's intent when it enacted the *Alberta Utilities Commission Act* was to create a regulatory process that is focused, diligent and fair. It noted that complaint procedures under that act were included to ensure oversight of the MSA, to ensure that someone was watching the market "watchdog." TransAlta submitted that this underlying principle was reflected in comments made by Mr. Mel Knight (former Minister of Energy), with respect to similar complaint provisions in the *Electric Utilities Act* regarding the conduct of the Independent System Operator.²² Mr. Mel Knight stated that "[I]f the ISO is felt to be heavy

²² Proceeding No. 3109, exhibit 102.02, Submission of TransAlta, paragraph 23.

handed or leaning too hard on some individual or some person or a corporation, they can make complaints...” and “[S]o the ISO itself, although it is an independent body, very important with respect to what we’re doing in the province, also has someone to answer to.”²³

70. TransAlta and Kaiser referred the Commission to [AUC Decision 2010-104, Lavesta Area Group, Written Complaint about the Conduct of the Independent System Operator](#).²⁴ That decision addressed a complaint against the conduct of the ISO under Section 26 of the *Electric Utilities Act*. That wording of that section is similar to the wording in Section 58 of the *Alberta Utilities Commission Act*. Having regard to the statutory scheme and the intent of the legislature, the Commission found that a complaint under Section 26 was intended to include the following:

- complaints about the AESO’s compliance with Commission rules
- complaints about the AESO’s consultation with interested parties, and
- complaints about the AESO relating to procedural rights in the AESO’s processes that do not relate to the making of rules or setting of fees²⁵

71. TransAlta and Kaiser submitted that a similar interpretation was appropriate with respect to a complaint about the conduct of the MSA.

72. Kaiser and TransAlta also argued that the Alberta Court of Appeal’s decision in [Milner Power Inc. v. Alberta \(Energy and Utilities Board\)](#)²⁶ was helpful to the Commission because it interpreted a similar provision in the *Electric Utilities Act* (Section 25) that addressed complaints about ISO rules. Kaiser and TransAlta each referred to the following passage from *Milner*:

The Act repeatedly describes its purposes in terms of fairness, openness, non-discrimination, efficiency and a competitive market. To remain consistent with the purpose of the Act, we are satisfied that the Legislature intended that the Board could not use its gatekeeping discretion granted under section 25(4) to refuse to hear arguably meritorious complaints. A complaint that prima facie has arguable merit and is not, or has not been, before another authority should warrant further investigation or a hearing.²⁷

73. TransAlta, Kaiser and Connelly submitted that the purpose of subsection 58(2)(a) is to avoid duplication of proceedings. TransAlta and Kaiser also asserted that the subsection essentially codifies the common law principles of abuse of process, issue estoppel, collateral attack, *res judicata*, and *lis pendens*.

74. TransAlta argued that subsection 58(2)(a) should only be relied upon when an identical issue between the parties has been, or is being, considered in parallel proceedings. It stated that this is a requirement in almost all of the common law doctrines that embodied in subsection 58(2)(a). Specifically, it noted that the criteria for a successful application for dismissal based on the principle of *lis pendens* are the identity of parties, object and cause.

²³ *Alberta Hansard*, Legislative Assembly of Alberta, March 19, 2003.

²⁴ AUC Decision 2010-104, Lavesta Area Group, Written Complaint about the Conduct of the Independent System Operator, March 10, 2010 [“Lavesta”].

²⁵ *Ibid.*, at paragraph 91.

²⁶ *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236 (CanLII) [“Milner”].

²⁷ *Ibid.*, at paragraph 46.

75. TransAlta and Kaiser both referred to the Supreme Court’s decision in *British Columbia (Workers’ Compensation Board) v. Figliola*²⁸ in their submissions on this issue. In *Figliola*, the question before the Court was whether a Human Rights Tribunal should hear a matter that had already been adjudicated by the Workers’ Compensation Board. The provision in dispute allowed the tribunal to dismiss all or part of a complaint if “the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.”

76. The Court found that the provision was the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack or abuse of process. It concluded that these doctrines function to deliver “finality, the avoidance of multiplicity of proceedings and protection for the integrity of the administration of justice, all in the name of fairness.”²⁹ The Court stated that all of these doctrines exist to prevent unfairness by preventing “abuse of the decision making process.”³⁰

77. The Court stated that the provision:

...does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them.³¹

78. The MSA submitted that one of the purposes of the *Alberta Utilities Commission Act* is to protect the public and the integrity of the electricity market. It stated that Section 58 should not be interpreted to enable a person or company to block or impair monitoring, investigations or enforcement proceedings. It stated that the scheme of that Act is to allow the Commission to consider alleged transgressions expeditiously and in an open manner.

79. The MSA argued that the Court of Appeal’s interpretation of Section 25 of the *Electric Utilities Act* in *Milner* does not apply in this case. It observed that *Milner* addressed a complaint about an ISO rule that was dismissed by the Energy and Utilities Board on the grounds that the complaint was frivolous, vexatious or otherwise did not warrant a hearing. The MSA pointed out that those are identical to the grounds for dismissal set out in subsection 58(2)(b) of the *Alberta Utilities Commission Act* and that they concerned the merits of the complaint. The MSA submitted that a dismissal under subsection 58(2)(a) requires no analysis of the merits of a complaint, and is predicated solely upon a finding that a complaint relates to a matter before the Commission.

80. The MSA submitted that the purpose of subsection 58(2)(a) was to ensure that “the complaints procedure would not react to, duplicate, impair or delay matters already dealt with or being dealt with by the Commission.”³² It contended that issues raised in complaints that are

²⁸ *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 [“**Figliola**”].

²⁹ *Ibid.*, at paragraph 25.

³⁰ *Ibid.*, at paragraph 34.

³¹ *Ibid.*, at paragraph 36.

³² Proceeding No. 3110, exhibit 18.02, Submission of the Market Surveillance Administrator, page 16, paragraph 59.

dismissed under subsection 58(2)(a), if relevant, are addressed within the context of the proceeding initiated by the MSA.

3.4.1 Commission findings

81. The Commission agrees with the parties that the purpose of Section 58 is to provide a mechanism by which a person may have his or her concerns about the conduct of the MSA considered by the Commission. This finding is consistent with the comments of Mr. Mel Knight, cited in paragraph 69 above and with the Court of Appeal's decision in *Milner* in which it stated that the "... Board has full powers of review over the AESO and the [MSA]."³³

82. The Commission does not agree with Kaiser that the *Milner* decision stands for the proposition that the AUC must not dismiss a complaint about the conduct of the MSA under subsection 58(2)(a) if the complaint is prima facie meritorious. In *Milner*, the Court of Appeal was considering the dismissal of a complaint on the basis that the complaint was frivolous, vexatious, trivial or otherwise did not warrant hearing. The Court explained that two criteria must be met to determine if a complaint warrants further investigation or a hearing: a) the complaint must have prima facie merit, and b) the complaint "is not, or has not been, before another authority"³⁴ (emphasis added). In the Commission's view, the Court of Appeal recognized in this passage that a complaint may not warrant further investigation or a hearing if subject matter of the complaint is, or has been before the Commission or another body.

83. TransAlta raised a similar argument in asserting that subsection 58(2)(a) is akin to a motion to strike a party's pleadings in a civil proceeding. TransAlta noted that the test used by the Courts for striking a pleading is whether it is 'plain and obvious' that a statement of claim discloses no reasonable cause of action. TransAlta stated that one of the policy rationales behind this test is that a party should not be able to prevent a meritorious claim against it from being heard.

84. In the Commission's view, the policy rationale underlying the ability to strike a claim for disclosing no reasonable cause of action is similar to the policy rationale that allows the Commission to dismiss a complaint on the basis that it is frivolous, vexatious, trivial or otherwise does not warrant hearing. In both cases, the dismissal is based on the merits, or rather the lack thereof, of the pleading or the complaint in question.

85. As the Commission stated previously, and as the parties themselves asserted in their submissions, a decision to dismiss a complaint pursuant to subsection 58(2)(a) does not involve an assessment of the merits of the complaint. Rather, subsection 58(2)(a) requires the Commission to assess the substance of a complaint and compare it to the substance of a matter before it and determine the relationship or connection between the two.

86. In the Commission's opinion, the purpose of subsection 58(2)(a) is to address the conflicts that could arise in circumstances where a complaint and a matter brought forward by the MSA are premised on common issues. Specifically, the Commission finds that subsection 58(2)(a) embodies a number of common law doctrines designed to ensure the integrity, fairness and finality of the decision making process. Those doctrines include: abuse of process, collateral attack, issue estoppel, *res judicata* and *lis pendens*.

³³ *Milner, Supra*, note 26, paragraph 30.

³⁴ *Milner, Supra*, note 26, paragraph 46.

87. TransAlta urged the Commission to interpret subsection 58(2)(a) as allowing dismissal of a complaint only when the issues raised in the complaint are identical to those raised in the matter brought forward by the MSA. It submitted that this is an underlying requirement for many of the common law doctrines that underlie the provision, especially the doctrine of *lis pendens*.

88. The Commission finds that applying the criteria for *lis pendens* to its interpretation of subsection 58(2)(a) would be contrary to the Supreme Court of Canada's direction in *Figliola*. In that case, the Court cautioned against the strict application of the "doctrinal catechisms" associated with the individual common law doctrines described. The Court emphasized that the focus when interpreting provisions directed at "establishing territorial respect among neighboring tribunals"³⁵ should be on the principles underlying those doctrines. The Court then explained that the application of the principles underlying these common law doctrines promotes finality, fairness, and the integrity of the decision making process and prevents multiple proceedings, inconsistent decisions, administrative inefficiency and delay.

89. The importance of similar principles was emphasized by the Alberta Court of Appeal in *Maxim Power Corp. v. Alberta (Utilities Commission)*.³⁶ In *Maxim*, the Court considered whether the AUC was required to rule on certain issues regarding the approval of a municipally owned electrical generating unit notwithstanding that Section 95 of the *Electric Utilities Act* specifically delegated decision making authority for those issues to the Minister of Energy. The Court found as follows:

...the idea that it [the AUC] could reconsider the very matter assigned by section 95(12) to the Minister is contrary to the purpose of the Electric Utilities Act, that is, to provide "... a framework so that the Alberta electric industry can ... be effectively regulated in a manner that minimizes the cost of regulation ...": section 5(h). Considering the same issue twice does not minimize costs or make for effective regulation. Nor does the possibility of conflicting decisions.³⁷ (Emphasis added)

90. With these principles in mind, the Commission finds that subsection 58(2)(a) requires it to consider issues common to a complaint and a matter advanced by the MSA within the context of the MSA-initiated proceeding. This avoids the potential for multiple proceedings on the same issues, as well as the possibility of inconsistent or conflicting results. Further, it provides an important safeguard against the use of the complaint process to delay or otherwise interfere with the consideration of a matter brought forward by the MSA. Given the emphasis in the statutory scheme on preserving a fair, efficient and openly competitive electricity market, such a safeguard is reasonable and justified.

91. Interpreting the purpose of the provision in this way does not, as suggested by TransAlta, Kaiser and Connelly, erode or defeat the statutory check on the MSA's authority created by subsection 58(1). That check is preserved because the dismissal of a complaint under subsection 58(2)(a) is premised upon common issues and not on the merits of the complaint. Accordingly, dismissal of a complaint does not preclude the complainant from pursuing his or her concerns about the conduct of the MSA in the MSA-initiated proceeding, to the extent that those issues amount to defences or mitigating factors. In other words, dismissal of a complaint pursuant to subsection 58(2)(a) does not mean that the complainant is denied a "day in court." However, in

³⁵ *Figliola*, *Supra*, note 28, paragraph 38.

³⁶ *Maxim Power Corp. v. Alberta (Utilities Commission)*, 2010 ABCA 213 (CanLII) ["**Maxim**"].

³⁷ *Ibid.*, paragraph 41.

the Commission's view, it does mean that the complainant's "day in court" occurs within the context of the MSA initiated proceeding.

92. The Commission recognizes that the remedies available in a complaint-initiated hearing under subsection 58(3) do not match those available in a MSA-initiated hearing under Section 53. However, in the Commission's view, there may be little practical difference between the range of potential outcomes arising from a proceeding under subsection 58(3) and the range of potential outcomes in a proceeding under Section 53 because of the common issues at the heart of both proceedings. For example, in its complaint, TransAlta seeks further consultation about the disputed OBEGs and their application to PPA units. If the Commission finds in the MSA-initiated proceeding that TransAlta has not breached the *Fair, Efficient and Open Competition Regulation* or engaged in anti-competitive conduct, it will likely mean that the MSA must amend its current OBEGs, through consultation, to reflect this outcome. If there is a finding that TransAlta has acted in an anti-competitive manner with respect to its PPA units, consultation will also likely ensue as the MSA amends its OBEGs to reflect the Commission decision.

93. The Commission also considers that, in the event that a matter raised in a complaint dismissed under subsection 58(2)(e) is ultimately not considered in the context of the associated MSA proceeding, a complainant may not be precluded from re-filing the complaint as it relates to the unaddressed matter.

94. Because the purpose of subsection 58(2)(a) is to safeguard the electricity market while promoting a timely, fair, efficient, and final decision-making process, the Commission finds that an overly technical or literal reading of that subsection that precludes its operation when a complaint is made before the MSA initiates proceedings against the complainant would be contrary to Section 10 of the *Interpretation Act* and produce an absurd result. This is especially so given the MSA's practice of providing its facts and findings to a market participant prior to filing its notice commencing a proceeding against that market participant. As stated by the Court of Appeal in *Wawanesa Mutual Insurance Co. v. Lindblom*:³⁸

If two interpretations of a statute are possible, that should be chosen which achieves the general scheme of the legislation, and still more, that which avoids an absurdity. That law is so well settled that I need only cite Alberta's *Interpretation Act*, s. 10.³⁹

95. Accordingly, the Commission finds that to achieve the purposes described above it may dismiss a complaint under subsection 58(2)(a), even if the complaint is filed before the MSA files a notice under Section 51 of the *Alberta Utilities Commission Act*. The Commission must, therefore, consider the specific circumstances of each case when it is asked to apply subsection 58(2)(a).

96. Having regard to the grammatical and ordinary meaning of the provision, the statutory context and legislature's intent, the Commission finds that subsection 58(2)(a) requires it to dismiss a complaint about the conduct of the MSA if it is satisfied that there is a logical or reasonable connection between the complaint and a matter the essence or essential quality of which is, or has been before the Commission.

³⁸ *Wawanesa Mutual Insurance Co. v. Lindblom*, 2001 ABCA 102 (CanLII), ["Wawanesa"].

³⁹ *Ibid.*, paragraph 39.

4 The substance of the matters before the Commission

4.1 The MSA's application

97. The MSA stated that the substance or essence of the matters raised in its notice and application is twofold. First, the MSA alleges that TransAlta undermined the integrity of the Alberta wholesale electric energy market by engaging in anticompetitive conduct in 2010 and 2011. Specifically, the MSA alleges that TransAlta manipulated the price of electric energy in Alberta by removing the committed capacity of its competitors at its coal fired generating units subject to PPAs during tight supply periods. Second, the MSA alleges that TransAlta, Kaiser and Connelly undermined the integrity of the Alberta electricity market by directly or indirectly using non-public outage records to trade for the benefit of TransAlta.

98. The backdrop to these allegations is considerable and includes the MSA's consultation activities on the OBEGs that preceded the events in question and the investigation that followed.

4.2 The complaints of TransAlta, Kaiser and Connelly

99. TransAlta stated in the first sentence of its complaint that it concerned "the conduct of the MSA in relation to its current investigation of TransAlta and more generally to its failure to properly consult with market participants..."⁴⁰

100. TransAlta characterized the substance of its complaint as follows:

- (a) The MSA breached its statutory duty to act fairly and responsibly:
 - (i) by promising, and then renegeing upon the process of industry consultation on the issue of timed outages at PPA units;
 - (ii) by applying conclusions as to conduct relating to the timing of outages in PPA units in a targeted investigation of TransAlta, without having issued guidance to market participants on the conduct in question; and
 - (iii) by conducting its investigation so as to apply conclusions reached regarding the unlawfulness of conduct relating to timing of outages in PPA units in a retroactive fashion to prior time periods in which TransAlta was induced to conduct its operations in accordance with previous MSA pronouncements on the subject.
- (b) The MSA breached the common law duty of fairness, including breaches of TransAlta's (and the market's) legitimate expectations and the rule against retroactive application of new laws and policies.
- (c) The MSA breached its statutory duty to conduct consultation with market participants (including TransAlta) prior to developing new guidelines or materially changing existing guidelines.

⁴⁰ Proceeding No. 3109, exhibit 3, Complaint Re: Conduct of the Market Surveillance Administrator, page 2, paragraph 1.

- (d) The MSA acted inconsistently with its mandate as a market ‘watchdog’ and exceeded its jurisdiction by engaging in market design.
- (e) The MSA acted unreasonably by failing to take into account the PPA terms and entitlements when drafting the OBEGs and by failing to abide by its commitment to do so through a formal stakeholder process.⁴¹

101. TransAlta framed its complaint as one that addresses the conduct of the MSA in consulting on and setting the OBEGs, including the issue of timed outages for PPA units. The facts relied upon by TransAlta in its complaint relate specifically to the events that led up to and followed the events that were the subject of the MSA’s investigation.

102. TransAlta submitted that the substance of its complaint and the substance of the MSA’s application are different. It noted that its complaint was premised upon different issues than the MSA’s proceeding and that its complaint relies on different evidence. TransAlta proposed that should the Commission find that procedural efficiencies are to be gained by hearing the two matters within a single proceeding, it would not oppose the consolidation of its complaint with the MSA proceeding and the matters be heard together in a manner that preserved the remedies available to it under Section 58.

103. Kaiser explained that the basis of his complaint was twofold. First, he asserted that the MSA has no jurisdiction to prosecute him personally. Second, he asserted that the MSA’s conduct during its investigation breached:

- (a) its investigation procedures,
- (b) its statutory duties, and
- (c) the requirements of procedural fairness.

104. Kaiser submitted that the issues raised in his complaint were different from those arising in the MSA proceeding. He also proposed that his complaint and the MSA’s proceeding be consolidated and heard together in a manner that preserved his remedies under Section 58.

105. The grounds for Connelly’s complaint mirror the grounds asserted by Kaiser. Specifically, he asserted that the MSA has no jurisdiction to personally prosecute him or that it lost jurisdiction to prosecute him as a result of the process it employed when investigating him.

106. Connelly submitted that his complaint must be maintained because the issues raised therein are distinct from the issues raised in the MSA’s application. Connelly also did not object to the consolidation of his complaint with the MSA’s proceeding while preserving his complaint remedies.

4.3 Commission findings

107. The Commission finds that the MSA’s application relates to four discretionary outages initiated by TransAlta in November and December 2010 and February 2011 and instances of forward trading on behalf of TransAlta in December 2010 and February 2011.

⁴¹ Proceeding No. 3109, exhibit 102.02, Submission of TransAlta, page 16, paragraph 58.

108. The Commission finds that the essence or substance of the matter that the MSA has brought before the Commission is the allegation that the discretionary outages and forward trading described in its application amounted to anticompetitive conduct that undermined the integrity of the Alberta wholesale electricity market.

109. The Commission finds that TransAlta's complaint relates to: the OBEGs and the MSA's consultation process for the OBEGs, the propriety of the discretionary outages, the MSA's subsequent investigation into the discretionary outages, and the MSA's decision not to proceed with further OBEGs consultation regarding discretionary outages at generating units subject to PPAs while its investigation was ongoing.

110. The Commission finds that the substance or essence of TransAlta's complaint is as follows:

- (a) The MSA's consultation on the OBEGs was flawed and inconsistent with its statutory requirements because it failed to adequately consult on the issue of discretionary outages at PPA units or take into account the terms of the PPA.
- (b) The MSA induced TransAlta to initiate the discretionary outages during its consultation on the draft OBEGs.
- (c) The MSA's investigation of TransAlta was improper and its findings are flawed because they are premised upon the retroactive application of new laws or policies.
- (d) The MSA improperly engaged in market design through the issuance of the OBEGs and in the conduct of its subsequent investigation because it lacked the jurisdiction to do so.
- (e) The MSA's investigation was improper because it breached its statutory duties and obligations, including its duty to act in a fair and responsible manner.
- (f) The MSA's investigation was improper because it breached the duties of procedural fairness and natural justice.

111. The complaints of Kaiser and Connelly relate to the forward trading discussed in the application, and the MSA's investigation into the trading.

112. The Commission finds that the substance or essence of the Kaiser and Connelly complaints is as follows:

- (a) The MSA had no jurisdiction to investigate or name Kaiser or Connelly because they are individuals.
- (b) The MSA's investigation was improper because it breached its own investigation procedures.
- (c) The MSA's investigation was improper because it breached its statutory duties and obligations, including its duty to act in a fair and responsible manner.

(d) The MSA's investigation was improper because it breached the duties of procedural fairness and natural justice.

113. The Commission is satisfied that there is a logical and rational connection between the complaints filed by TransAlta, Kaiser and Connelly and the substance of the MSA's application which is before it. The MSA's application explains the process it used to develop the OBEGs, the rationale for its investigation into the conduct of the complainants and the results of its investigation. The complaints address the validity of the MSA process for developing and consulting on the OBEGs and their implementation, the MSA's jurisdiction to investigate the complainants, the validity and propriety of the investigation itself and the MSA's conclusions based on its investigation.

114. The Commission recognizes that the evidence relied upon by the MSA and the complainants may differ in some respects. It also recognizes that the complaints focus on events that occurred before and after the discretionary outages and forward trading whereas the MSA's application concerns itself more specifically with the events more immediately surrounding the discretionary outages and forward trading. However, having carefully reviewed the MSA's application, the complaints and the submissions of the parties, the Commission is satisfied that the complaints and the MSA's application ultimately concern the same circumstances; i.e., the discretionary outages and the forward trading. In the Commission's view, the MSA's application and the complaints are, in effect, "two sides of the same coin." Accordingly, the Commission finds that it must dismiss the complaints pursuant to subsection 58(2)(a). In making this decision, the Commission makes no findings on the merits of the MSA's application or the TransAlta, Connelly and Kaiser complaints.

115. The Commission finds that dismissing the complaints is consistent with the purpose of subsection 58(2)(a) described above because it will prevent the consideration of the issues common to the complaints and the MSA's application twice and eliminate the potential for inconsistent or conflicting decisions on those common issues.

116. In the Commission's view, a proceeding under Section 53 of the *Alberta Utilities Commission Act* will provide a fair and efficient process to address the common issues that underlie the MSA's application and the complaints by TransAlta, Kaiser and Connelly. Importantly, the Commission finds that dismissal of the complaints will not deprive the complainants of a fair opportunity to pursue with the Commission the issues raised in their complaints with respect to the conduct of the MSA, to the extent that those issues amount to defences or mitigating factors.

5 Decision

117. The Commission is satisfied that there is a logical and rational connection between the complaints filed by TransAlta, Kaiser and Connelly and the substance of the Market Surveillance Administrator's application which is before it. In accordance with subsection 58(2)(a) of the *Alberta Utilities Commission Act*, the Commission finds that those complaints must, therefore, be dismissed.

Dated on May 15, 2014.

The Alberta Utilities Commission

(original signed by)

Tudor Beattie, QC
Panel Chair

(original signed by)

Henry van Egteren
Commission Member

(original signed by)

Moin Yahya
Acting Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) counsel or representative
TransAlta Corporation Martin Ignasiak - Osler, Hoskin & Harcourt LLP
Mr. Nathan Kaiser Steven H. Leitzl - Norton Rose Fulbright Canada LLP
Mr. Scott Connelly Eric R. Hoaken - Lax O'sullivan Scott Lisus LLP Lauren Epstein - Lax O'sullivan Scott Lisus LLP
Market Surveillance Administrator (MSA) Randall W. Block, QC – Borden, Ladner Gervais LLP John D. Blair, QC – Borden Ladner Gervais LLP

Alberta Utilities Commission
Commission Panel Tudor Beattie, QC, Panel Chair Henry van Egteren, Commission Member Moin Yahya, Acting Commission Member
Commission Staff Doug Larder, QC (General Counsel) JP Mousseau (Commission Counsel) Darin Lowther (Director, Markets) Andrew Davison (Senior Market Analyst)

Appendix 2 – Abbreviations

Abbreviation	Name in Full
AESO	Alberta Electric System Operator
AUC or the Commission	Alberta Utilities Commission
Connelly	Mr. Scott Connelly
ICBC	Insurance Corporation of British Columbia
ISO	Independent System Operator
Kaiser	Mr. Nathan Kaiser
MSA	Market Surveillance Administrator
OBEG	Offer Behavior Enforcement Guidelines
PPA	Power Purchase Arrangements
PPA buyer	Purchasers of the output from PPA generating units
PPA owner	Owners of the PPA generating units
TransAlta	TransAlta Corporation, TransAlta Energy Marketing Corp., and TransAlta Generation Partnership