

July 28, 2011

Mr. Darin Lowther
Alberta Utilities Commission
Fifth Avenue Place, #400
425 - 1 Street SW
Calgary, Alberta
T2P 3LB

Delivered by Email

Dear Sir:

Re: AUC Bulletin 2011-16 - Stakeholder Consultation Regarding Reliability Standards

AltaLink Management Ltd. (“AltaLink”) is pleased to provide comments to the Alberta Utilities Commission (the “AUC” or “Commission”) on the issues identified in AUC Bulletin 2011-16, dated June 30, 2011, in the context of the discussion paper authored by Professor David Mullen, dated June 6, 2011 (the “Discussion Paper”). The Discussion Paper addresses whether the Commission may refuse to entertain objections by a Market Participant (“MP”) to the approval of rules and reliability standards developed by the Independent System Operator (“ISO”) when that MP has not taken part in consultations conducted by the ISO.¹

With respect to reliability standards, the Discussion Paper concludes: (i) the Commission has no authority to refuse to entertain objections to ISO reliability standards on the basis that an objecting MP has not taken part in the ISO consultations on those reliability standards; (ii) the relevant Acts, Regulations and rules do not permit such an action on the part of the Commission; and (iii) it is unlikely that a court would see this power as implicit in the AUC’s powers under section 76(1)(e) or section 77 of the *Alberta Utilities Commission Act, S.A. 2007, c. A-37.2* (the “AUCA”), to make rules of practice and develop codes of practice with respect to the conduct of its hearings.² AltaLink agrees with Professor Mullen’s conclusions and offers the following additional comments.

1. Does Section 19(6) of the *Transmission Regulation* offer an interested person procedural rights or standing when a reliability standard is forwarded to the Commission?

Upon satisfying the Commission that it is an “interested person” in relation to a proposed reliability standard, that person has procedural rights and standing under section 19(6) of the *Transmission Regulation*, Alberta Regulation 86/2007 (the “*Transmission Regulation*”). Upon

¹ Discussion Paper, page 1.

² Discussion Paper, page 1.

making a submission to the Commission pursuant to section 19(6)(a) or (b) of the *Transmission Regulation*, the interested person has standing to satisfy the Commission that a reliability standard is either technically deficient or not in the public interest.³

Section 9(2) of the *AUCA* also applies to an objection by a person to a reliability standard. A person will have standing under section 9(2) of the *AUCA*, in addition to section 19(6) of the *Transmission Regulation*, where the Commission's decision approving or rejecting the proposed reliability standard may directly and adversely affect the rights of that person. AltaLink's position regarding the applicability of section 9(2) of the *AUCA* is consistent with the position taken by Professor Mullen in his Discussion Paper.⁴

2. Should an interested person's standing or consideration of their submission regarding a reliability standard be conditional on their participation in the AESO's consultation prior to the forwarding of a reliability standard to the Commission?

AltaLink supports participation by stakeholders in consultation conducted by the ISO on proposed reliability standards. However, non-participation should in no way impact that person's ability to later assert its rights under section 19(6) of the *Transmission Regulation* or 9(2) of the *AUCA* to object to a proposed reliability standard. Each of section 19(6) of the *Transmission Regulation* and section 9(2) of the *AUCA* provide substantive rights. There is no legislative authority for the Commission to withdraw those rights on the basis of a lack of participation in a prior consultation. Neither is there any basis to suggest that the Commission has implied powers to do so.

Consistent with Professor Mullen's conclusions in the Discussion Paper, AltaLink has also "...not been able to find any authority supporting the proposition that a tribunal can sometimes have the power to withhold access to its hearing processes on the basis of misconduct or failure to participate in other sanctioned preliminary processes."⁵ There is, however, jurisprudence to the contrary. One example is *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236 ("*Milner Power*"). The facts of *Milner Power* involve the Alberta Energy and Utilities Board (the "AEUB") denying a complaint regarding an existing ISO rule to proceed to a hearing, in part because the AESO had already engaged in a consultative process prior to issuing the rule.⁶ The Alberta Court of Appeal in *Milner Power* found that this was an error and allowed an appeal from the AEUB.

In *Milner Power*, under the governing legislation, the AEUB had the authority to decline to hold a hearing or other proceeding if, in its opinion, a complaint was "frivolous, vexatious, trivial or otherwise does not warrant a hearing or other proceeding". The Alberta Court of Appeal held that this provision only authorized the AEUB to refuse to entertain complaints that were, in and of themselves, "without arguable merit". The fact that the ISO had engaged in a consultative

³ AUC Bulletin 2011-10, page 9.

⁴ Discussion Paper, page 5.

⁵ Discussion Paper, page 6.

⁶ *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236, para. 54.

process in respect of highly technical matters was held to not be relevant to the question of whether the rule was in breach of the regulations.

The Alberta Court of Appeal in *Milner Power* rejected the AEUB's jurisdiction to take the consultative practices of the ISO into account under a provision giving it specific authority to decline to entertain a complaint. Accordingly, it is highly unlikely that the court would do so in respect of an objection process under section 19(6) of the *Transmission Regulation*, to which no such explicit power attaches.

AltaLink does, however, take issue with some of the comments made by Professor Mullen in his Discussion Paper respecting jurisdiction. At page 7, paragraph 9, in the context of whether the AUC's statutory powers extend to authorizing rules that withdraw participatory rights, Professor Mullen states that:

...it may be possible to assert that the ISO is not so much a third party proponent in matters that it takes to the AUC but rather has a relationship with the AUC that is more in the nature of shared responsibility for regulation of the matters coming within their joint purview.

With respect, the Commission acts independently of the ISO. There is no "shared responsibility", nor is there anything "coming within their joint purview", either under legislation or pursuant to existing practice. The ISO is as much an MP as AltaLink.

3. Should participation or lack of participation in the AESO's consultation process be taken into consideration by the Commission as it evaluates the submissions of interested persons?

Please refer to AltaLink's comments under Issue #2 above, which apply equally to Issue #3.

4. Is a departure from the objection process for ISO rules justified based on the statutory or regulatory provisions governing ISO rules and reliability standards?

There is no basis for departing from the objection process for ISO rules. Maintaining the same process for objections to both ISO Rules and reliability standards will aid in transparency and consistency in the rule making process.⁷

In respect of AUC Bulletin 2011-02, issued January 20, 2011, the ISO previously submitted that the legislative scheme for reliability standards is separate and distinct from ISO rules and, accordingly, different processes for the two are justified. It further submitted that all reliability standards proposed to the Commission by the ISO are based on those of the North American Electric Reliability Corporation.

⁷ This is consistent with the position taken by Capital Power Corporation in response to AUC Bulletin 2011-02, as set out in AUC Bulletin 2011-10.

In response to the ISO, AltaLink submits that under section 19(4) of the *Transmission Regulation*, the ISO is required to consult and forward the reliability standard to the Commission for review. The ability of an interested person to object under section 19(6) is in no way hindered by the source of the reliability standard.⁸

The AESO further submitted that section 19 of the *Transmission Regulation* does not include the ability of a market participant to complain about a reliability standard (as is the case for an ISO rule pursuant to section 25 of the *Electric Utilities Act*, S.A. 2003, c. E-5.1). In response, AltaLink submits that the absence of a provision that would allow for an interested person to complain about a reliability standard highlights the importance of an opportunity to submit an initial objection pursuant to 19(6)(a) or (b) of the *Transmission Regulation*, and not making the right to object conditional on that party's participation in prior consultation.⁹

Under the *AUCA*, the administrative penalties under section 63 are the same for a breach of an ISO Rule as they are for a breach of a reliability standard. The same is true for the offence provisions under section 64 of the *AUCA*. A party's procedural rights, including the right to object, should be no less under section 19(6) of the *Transmission Regulation* in respect of reliability standards than for objections to ISO rules.

In the Discussion Paper, Professor Mullen identifies nothing which would justify a departure from the objection process for ISO rules based on the statutory or regulatory provisions governing ISO rules and reliability standards. In short, there is no basis for a departure, and very strong bases against doing so.

- 5. Is there a need for a pre-hearing meeting in each case to discuss:**
- (a) the issues regarding a reliability standard;**
 - (b) whether parties would benefit from a settlement meeting; and**
 - (c) whether any aspects of a reliability standard not at issue may be approved by the Commission in advance of the completion of any Commission proceeding.**

AltaLink generally supports pre-hearing meetings so that issues may potentially be resolved or narrowed. While AltaLink supports the ability of parties to bring an application to request access to a pre-hearing meeting, a pre-hearing meeting should not be required in every case.

AltaLink generally supports the ability of the Commission to approve aspects of a reliability standard not at issue in advance of the completion of any Commission proceeding, provided that consent of the interested parties is obtained. There may be circumstances where advance approval is inappropriate, such as where aspects currently not in dispute may become at issue, depending on the outcome of the other issues in dispute.

⁸ AUC Bulletin 2011-10, page 9.

⁹ AUC Bulletin 2011-10, page 9.



AltaLink looks forward to its continued participation in stakeholder consultation on the Alberta reliability standards development process. Should you have any questions or concerns, please do not hesitate to contact the undersigned at 403.267-3450.

Yours truly,

(original signed by)

Zora Lazic
Senior Vice President, Regulatory and Client Services